21

MICHIGAN REPORTS 21

CASES DECIDED

IN THE

SUPREME COURT

OF

MICHIGAN

FROM

FEBRUARY 11 TO JUNE 11 1880

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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. Oct. 11, 1881

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SUPREME COURT OF MICHIGAN

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ISAAC MARSTON

ASSOCIATE JUSTICES

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JAMES V. CAMPBELL

ATTORNEY GENERAL

OTTO KIRCHNER

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3. FITZ W. H. CHAMBERS.
4. GEORGE M. HUNTINGTON.
5. FRANK A. HOOKER.
6. AUGUSTUS C. BALDWIN.[1] / SILAS B. GASKILL.[2]
7. JOSIAH TURNER.
8. LOUIS S. LOVELL.
9. JOSIAH L. HAWES.
10. WILLIAM S. TENNANT.[3] / DE WITT C. GAGE.[4]
11. DANIEL GOODWIN.
12. WILLIAM D. WILLIAMS.
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14. MICHAEL BROWN.
15. JOHN B. SHIPMAN.
16. EDWARD W. HARRIS.
17. BIRNEY HOYT.
18. SANFORD M. GREEN.
19. SAMUEL D. HAIGHT.[5] / JAMES B. JUDKINS.[6]
20. DAN J. ARNOLD.
21. HENRY HART.
22. GOUVERNEUR MORRIS.
23. JONATHAN B. TUTTLE.
24. LEVI L. WIXSON.

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SUPERIOR COURT OF GRAND RAPIDS, . JOHN T. HOLMES.
RECORDER'S COURT OF DETROIT, . . . GEORGE S. SWIFT.

[1] Resigned April 15, 1880.
[2] Appointed April 17, 1880.
[3] Resigned March 1, 1880.
[4] Appointed March 10, 1880.
[5] Died February 25, 1880.
[6] Appointed March 10, 1880.

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GEORGE MORELL

CHIEF JUSTICE OF THE SUPREME COURT, 1842-3.

At a session of the Supreme Court held Thursday, June 10, 1880

Mr. GEORGE MORELL CHESTER of Detroit was present with his mother, Mrs. CATHERINE M. CHESTER, a daughter of the late Chief Justice GEORGE MORELL, and addressed the Court:

YOUR HONORS:—It is my privilege, as the representative of my uncle, Gen. George W. Morell, who at one time was himself a member of the bar of Michigan, to present to you the portrait of his father, Hon. George Morell, who was one of the original members of this Court and the second to preside over its deliberations as Chief Justice. The portrait is sent with the following letter:

BEECHWOOD, SCARBOROUGH P. O.,
Westchester Co. N. Y., April 26, 1880.

DEAR SIR:—Some time ago I was informed that the authorities of Michigan desired to have the portraits of its State officers, including the Judges of the Supreme Court, to place them in the Capitol at Lansing.

My father, the Hon. George Morell, was one of the Judges of the first Supreme Court of the State, and also of the District Court of the United States for the Territory of Michigan. I take great pleasure in presenting to you, as the head of the judiciary, his portrait, which I beg you to accept for the purpose above mentioned.

I am very respectfully your obedient servant,
GEORGE W. MORELL.

To the Hon. Isaac Marston, Chief Justice of the Supreme Court, Lansing, Mich.

Chief Justice MARSTON received the portrait in behalf of the Court and said that it was eminently proper that the portraits of the early Judges should be placed in the court room. He referred to Chief Justice Morell as one of the ablest of the Judges of Michigan. The court and bar, he continued, should remember with gratitude the

early Judges, because of the ability and learning with which they had built up on the foundation of the common law the system of jurisprudence which exists in this State.

Mr. Justice CAMPBELL also replied for the Court, the substance of his remarks being herewith presented:

It is a great gratification to all of us to have this memorial of Judge Morell where it will be constantly in view, and it is the more desirable because by a somewhat singular chance he has been deprived of the means of remembrance which are usually found in the reports of decisions. During the early years of his judicial work it was not as customary as it is now to have the decisions of the Supreme Court written out, and there was no short-hand writer in attendance and no other person to preserve the language of the opinions delivered. For several years the Court had no official Reporter, and when one was appointed, he found that most of the decisions had been either delivered orally, or lost. Judge Morell always wrote out in full his important opinions, and a full series of his manuscripts was found, but they could not well be published without the rest. The Reporter therefore, although his friend and admirer, was reluctantly compelled to begin his work at a time when the materials were more complete; and our series, for this reason, contains but a few of his opinions, and these all belong to the later years of his judicial career.

As there are probably not more than one or two persons present who ever knew Judge Morell, it may be proper for me to give some account of a man who was a very eminent and useful magistrate. It was my good fortune to know him from my boyhood. I passed my studentship during his continuance on the bench, and came to the bar shortly after he left it. He was very kind in making suggestions to young lawyers, and I received from him some useful hints in practice after his retirement. As any one can see from his portrait, which is a very good and natural likeness of him, he was an

amiable and courteous gentleman of great dignity and firmness. He was a very thorough and learned lawyer, and nothing but his personal and professional qualities could have secured him almost at once on his arrival here the respect and confidence of the community. He came to Michigan under circumstances not calculated to win these unless he had deserved them. He and the late Judge Wilkins—one residing in New York and the other in Pennsylvania—were appointed in 1832 to succeed two old residents of the Territory, William Woodbridge and Henry Chipman, who were dropped for political reasons, Judge Sibley being re-appointed. The Territory was then expecting the time when it should be received into the Union as a State, and the people were more than usually jealous of outside appointments. It was an old territory, and had an extremely able bar, from among whom it would have been easy to find suitable incumbents. But from the first, Judge Morell became identified in feeling with the people, and his judicial ability and personal qualities secured confidence and regard. In the subsequent course of events his sympathies were throughout with the inhabitants of the Territory and were shown in various ways. When the Territory adopted a Constitution and organized a State government in 1835 (although not fully admitted to representation in Congress until 1837) he from the first respected the local action. There are some amusing stories told of his intercourse with Governor Horner, who was sent out in 1835 as Territorial Secretary and Acting Governor, and who had a mistaken idea that the people of the young State could be made to recognize his authority. Judge Morell gave him some plain hints as to consequences if any attempt were made—as he desired—to enforce it by any active means.

The State Legislature met and the State history began in the fall of 1835. But it was provided by the Constitution that the Territorial Courts should retain jurisdic-

tion of all judicial business until July, 1836. There was no difficulty about this, because the Territory of Michigan was larger than the State, and included, in addition to what became the State, what is now Wisconsin and the country westward of it. The Territory of Wisconsin was not organized till July 4, 1836.

Judge Morell was re-appointed Territorial Judge in 1836. He was also appointed a Judge of the State Supreme Court in July, 1836, and thereafter acted, not as Territorial but as State Judge continuously. The last act of the Territorial Judges in Michigan was in the beginning of July, before the Territory of Wisconsin was set off. A board consisting of the Governor and Judges of the Territory of Michigan had immediately after the destruction of the old town of Detroit in 1805 been vested with authority to settle titles and dispose of lots in the city. A corporation known as the Detroit Young Men's Society, which filled for many years an important place in the literary advancement of the community, was incorporated by the State Legislature, and to this State corporation the Territorial Judges granted a lot of land in Detroit. This was the last occasion on which they met officially.

The State Supreme Court, appointed in July, 1836, was made up of William A. Fletcher as Chief Justice, and George Morell and Epaphroditus Ransom as Associate Justices. The Judges then performed circuit duties, and Judge Morell's circuit included the eastern counties. The amount of business was very great. The country was full of speculative undertakings, and corporations were created in great numbers. When the crash came, and until the Bankrupt Law, passed in 1841, took effect, the courts were crowded with litigation, involving all sorts of questions. The work of Judge Morell's circuit, which was much the largest, was done promptly and thoroughly. He was a completely trained and ready lawyer, prepared to deal correctly and at once with the

questions arising on trials, and the business of his court was disposed of to the general satisfaction.

Although not a native of New York, he received his legal training there, where his cotemporaries and immediate associates included William L. Marcy, Judge Nelson and Chancellor Walworth. The New York Revised Statutes were passed, and the practice under them became to a considerable degree settled during his professional career in that State. He had always a peculiar aptitude for methodical proceedings, and became thoroughly familiar with pleading and practice under the new system then perfected. The extent of his influence may be estimated somewhat from the fact that although a majority of the Territorial and early State Judges obtained their legal training in other States and under different systems, the practice here became very closely allied to that of New York, and borrowed a large share of the New York statutory and common law changes. It is the more remarkable because some of his colleagues had a decided preference for a different system, and our first Revised Statutes favored to some extent the Massachusetts rules.

On the resignation of Chief Justice Fletcher in 1842, Judge Morell succeeded him in his office, which he held until he left the bench in 1843, after which he took no very active part in practice. He was justly regarded as an upright and eminent jurist of great acquirements and adequate knowledge of men, and a sincere lover of justice.

THE COURT directed the entry of the following order upon the journal of the Court:

WHEREAS, Gen. George W. Morell has presented to this Court a portrait of his father, Hon. George Morell, one of the Chief Justices of the Supreme Court of the State of Michigan; therefore it is

Ordered that such portrait be accepted and placed in a proper and conspicuous place in the Supreme Court room.

And this court desires to express its thanks to the donor for his valuable gift, and its gratification in having

its court room adorned by the likeness of a gentleman whose character and eminence will always make his memory honored and venerated in this State.

Judge Morell was of Huguenot descent, his ancestors having fled from France to Germany on the revocation of the Edict of Nantes, and afterwards come to America. The name was formerly spelled Morele. George Morell was born at Lenox, Mass., March 22, 1786; was educated at Lenox Academy, and at Williams College from which he graduated in 1807; studied law at Troy, N. Y., with Walworth and Marcy in the office of John Russel who was said to be the best common law practitioner in the State; and was admitted to practice as an attorney Feb. 14, 1811, and as a counselor Oct. 31, 1818. He lived in Cooperstown, N. Y., from 1811 to 1832, during which period also he was in the State militia, rising from the rank of sergeant to that of Major General. He was clerk of the Court of Common Pleas of Otsego county in 1815, and was appointed first judge of that court Aug. 20, 1827, and re-appointed to that position in 1832. He became master in chancery in 1819 and solicitor and counselor in chancery in 1823. In Nov., 1828, he was elected a member of the Assembly for Otsego. He was appointed by President Jackson, Feb. 26, 1832, Judge of the United States Court for the Territory of Michigan. He died at Detroit March 8, 1845.

JANUARY TERM 1880.*

43	1
98	120
43	1
100	192
43	1
102	368
43	1
126	675
43	1
s4NW	427
s38AR	159n
129	4642
43	1
147	11247
f148	6529

HIRAM ALLEN v. JOHN S. DUFFIE, LEVI MORRILL ET AL., TRUSTEES, ETC.

Works of necessity and charity—Subscriptions taken in church on Sunday to pay church expenses.

The choice of trustees to hold property, at a meeting of the members of a religious society, is not enough to effect a statutory incorporation in Michigan.

An objection cannot be raised in the Supreme Court if it was not brought to the notice of the trial judge.

Where suit is brought in the name of certain persons as trustees of a certain religious society, and there is no averment or recital of incorporation, it must be assumed that none exists or is relied on.

The trustees of any unincorporated society organized for a lawful purpose, may receive gifts and promises on its behalf; and a mutual subscription for its benefit may be supported even though no payee is named, if the object is made definite and certain. The mutual promise of the subscribers is a sufficient consideration.

A declaration upon a promise to pay presently is consistent with the defendant's having been at liberty to take a year's time or more on giving his note, if he did not do so.

Whether work done on Sunday is within the exception to the Sunday law as a work of necessity or charity is purely a question of law and statutory construction, and depends in all cases upon the intent of the statute.

Where a rule of law is in accord with the finding of a jury the verdict may be allowed to stand even though the question was improperly left to them.

Mere convenience of time and opportunity cannot be the test as to whether work done on Sunday is work of necessity.

All the necessary and usual work connected with religious worship

* Continued from Vol. 42.

is work of charity. Religious societies are formed to do good to mankind, and charity is active goodness.

Raising subscriptions from a congregation on Sunday to pay off a church debt, or purchase a house of worship is a work of charity within the exception to Comp. L. § 1984, which prohibits Sunday business.

The support of public worship is a work of charity that may properly be done on Sunday, and subscriptions taken for that purpose from a congregation assembled for religious exercises on the Sabbath may be sustained.

A point that is not contested and is assumed without consideration in deciding a case, is not itself decided.

Error to St. Clair. Submitted Jan. 21. Decided Feb. 11.

ASSUMPSIT. Defendant brings error.

O'Brien J. Atkinson and *Elliott G. Stevenson* for plaintiff in error. The statute prohibiting business on Sunday applies to anything that can be done on week-days, *State v. Conger* 14 Ind. 396; *Adams v. Himmel* 2 Doug. (Mich.) 76; a Sunday contract cannot be ratified, *Tucker v. Mowrey* 12 Mich. 378.

Wm. T. Mitchell and *Wm. Potter* for defendant in error.

COOLEY, J. This is an action brought upon a subscription made for the purchase of a house of worship for a religious society. From the evidence it appears that Levi Morrill, who was one of the trustees of the society, had constructed the building on his own land and at his own expense, expecting, but having no assurance, that the society would take it off his hands and reimburse the cost. At one of the regular services of the society, held on a Sunday in August, 1876, the officiating clergyman stated the facts to the congregation, and a proposition was made that the amount needed to purchase the building from Mr. Morrill be then raised by subscription. Many persons then offered sums which they specified. There was a subscription paper with a heading, whereby the several persons promised to pay the sums set opposite their names respectively. This paper was lost or destroyed, and was not produced on the

trial, and none of the witnesses could say with confidence that it named any payee or any object, but the people well understood the object, and that the purchase was to be for the society then assembled. The several donors did not subscribe their own names, but a Mr. Mills subscribed for them as they announced their proposed gifts. By the terms of the subscriptions as given by the witnesses they would be payable presently, but it seems to have been understood that the subscribers were to have a year to pay in, or longer if they desired, on giving their notes. Among the persons promising to give was the plaintiff in error, who agreed to pay twenty-five dollars. The subscription paper was afterwards turned over to Mr. Morrill, and he deeded the church property to the society. When plaintiff in error was afterwards called upon for his note, he refused to give it, saying his word was as good as his note, and intimating that as the promise was made on Sunday, he could not be compelled to pay unless he chose to do so. Not having made payment or given his note previous to August, 1878, this suit was then instituted.

The suit was brought in the name of John S. Duffie, Levi Morrill and Peleg Soules, trustees of the Methodist Protestant church of Brockway circuit. The declaration does not allege that they sue as a corporation, nor was there in the case any sufficient evidence that the society was ever incorporated. The record of the society was given in evidence, from which it appeared that at a meeting held in December, 1868, three persons, of whom Levi Morrill was one, were chosen trustees of the church; "the said trustees to hold the property of the Methodist church, Brockway Center, Michigan district, in trust for said church." Whether this was intended as an act of incorporation we do not know: it was in itself ambiguous, and it was also incomplete to effect a statutory incorporation. *Trustees etc. v. Clark* 41 Mich. 730. There was no evidence of corporate action afterwards, previous to the subscription on which the suit was brought.

I. It was assumed on the part of the defense that the suit purported to be brought by a corporation, and that it must fail because the fact of corporate existence was not made out. But as has already been said, the suit does not purport to be brought by a corporation, and the declaration does not allege that a corporation exists. The suit is brought by certain persons describing themselves as trustees for a certain religious society. Now, if the society is actually incorporated, the name they sue by may possibly be the corporate name; but in the absence of any averment or recital of incorporation, we must assume that none exists or is relied upon. The attention of the circuit judge does not seem to have been called to the want of proof to show that the plaintiffs were trustees in fact, and therefore the defect, if it was one, is not available in this court. There is no doubt that the trustees of any unincorporated society which is organized for a lawful purpose may receive gifts or promises on its behalf, and a mutual subscription may be supported even though no payee be named, provided the object is made definite and certain, as it unquestionably was in this case. *Comstock v. Howd* 15 Mich. 237. The mutual promises of the subscribers are all the consideration the case requires. *Underwood v. Waldron* 12 Mich. 73.

II. It is further objected that there was no evidence tending to support the contract declared upon; that the promise actually proved was not to be performed within a year, and consequently was void under the statute of frauds because not in writing and subscribed by the party himself.

The only special count in the declaration was a count upon a promise to pay twenty-five dollars presently; but we think the evidence tended to support this. The parties were at liberty to take one year's time or more on giving notes, but the defendant did not avail himself of this privilege. It is true that the evidence on

this point was fairly open to another construction, but it is not pretended that the court erred in any ruling respecting it, provided there was any evidence of a promise to pay presently which could properly have been left to the jury. But if the witnesses who undertook to give the terms of the subscription paper remembered them correctly, the promise was set out in the special count of the declaration according to its legal effect.

III. The principal question in the case is whether the contract was void because made on Sunday. The plaintiff in error contends that the business of raising subscriptions on Sunday to pay off a church debt or to purchase a house of worship is within the prohibition of the statute, and that any contract made in the course of it is therefore void. The defendants in error dispute this, and insist that the case is one within the exceptions of the statute. The statute is as follows: "No person shall keep open his shop, warehouse, or workhouse, or shall do any manner of labor, business, or work, except only works of necessity and charity, or be present at any dancing, or at any public diversion, show, or entertainment, or take part in any sport, game, or play, on the first day of the week; and every person so offending shall be punished by a fine not exceeding ten dollars for each offense." Comp. L., § 1984. Whatever labor, business or work is prohibited by this statute is confessedly illegal, and promises made in the course of it can support no action. So much is conceded.

Is the raising of money for the purchase of a house of worship a work of necessity or charity? That is the question made; or perhaps it is a little narrower than this, namely: Is the solicitation of contributions from a congregation assembled on Sunday for religious worship, in order to pay for a house of worship which has been erected for their occupation for religious purposes, a work of necessity or charity? The circuit judge was of opinion that the question involved an element of fact as well as of law, and he submitted it to the jury in that view. "If the agreement or contract," he instructed

them, "was made on Sunday, it is void unless it is a work of necessity or charity for which it was made. Our statute prohibits the performance of business or labor on Sunday except as to work of necessity or charity, and the Supreme Court has decided that all contracts made on that day are void except for a work of necessity or charity. As to whether this subscription comes within this exception I shall leave it for you to determine. There may be honest differences of opinion on this subject, and therefore I leave it to you as a question of fact. And you are not to be controlled in considering this by the practice of churches. It is not what churches have done in this respect, but what they ought to have done in view of the statute. This law may be intended to prevent this business in churches. The raising of money to build churches may have been one of the objects contemplated by the statute. If you find that this subscription was not for a work of necessity or charity, it is void and cannot be ratified. If you find it to be a work of necessity or charity, it need not be ratified."

The judge was in error in supposing that the question was either wholly or partially a question of fact. It is a question of law purely, and cannot be left to depend upon the opinions of jurors as to what is a work of charity or necessity and what is not. If it could, there would be and could be no settled rule whatever, for jurors will never agree upon it. The question is purely one of statutory construction, and when we find what the statute intends, that intent must be the law for all cases. Nevertheless if the rule of law is found to be in accord with the finding of the jury, namely, that the promise in question is within the exception of the statute, the instruction will thus appear to have been harmless, and the verdict may be allowed to stand.

We shall waste no time upon the question whether the business done in taking the subscriptions was a work of necessity. No doubt the time chosen was the most convenient time for taking up subscriptions, because the persons concerned would be likely to be generally present, but it might for the same reason have been the most convenient time for doing other business, such as the trading of horses, the hiring of laborers, and the

general settlement of accounts, had the persons present been disposed to engage in such transactions. If mere convenience is to be the test of necessity, any work on Sunday may be shown to be necessary under some circumstances. *Jones v. Andover* 10 Allen 18; *Sparhawk v. Union Passenger Railway Co.* 54 Penn. St. 401; *Johnston v. Commonwealth* 22 Penn. St. 102. The defendants in error do not pretend to sustain such a doctrine, but rely upon the exception in favor of works of charity.

What then are works of charity? What works are exempted from the prohibition of the statute as fit and proper to be done upon a day which is generally observed as a day of rest and of worship? This is the inquiry to which our attention is limited.

Charity is active goodness. It is doing good to our fellow men. It is fostering those institutions that are established to relieve pain, to prevent suffering, and to do good to mankind in general or to any class or portion of mankind. As the term "charity" is made use of in our law, it no doubt takes on shades of meaning from the Christian religion, which has largely affected the great body of our laws, and to which we must trace the laws which punish what the Christian regards as the desecration of the first day of the week. It was never doubted, so far as we know, that all the necessary or usual work connected with religious worship was work of charity. If it were not so, the minister who preaches, the organist and precentor who furnish the music, and the sexton who cares for the building on Sunday, would be violating the law every day they performed service for their religious society, and not only would be precluded from recovering compensation, but might be punished for services which are proper in themselves, and for which the day is specially set apart. But their work is not illegal, because it is in a true sense, and indeed in the very highest sense, charitable. Religious societies are formed to do good to mankind.

The Statute of Charitable Uses, 43 Eliz., c. 4, enu-

merates the repair of churches among the charitable objects which it specifies. It would be unsafe to take that statute as the test of what might be done on Sunday, for it enumerates many objects which are only charitable in the sense that private provision for them tends to relieve the general public of a burden. A schoolhouse or a town hall may be the subject of a charitable use, under the statute of Elizabeth, because when provided for by a private donor, the community which must otherwise have borne the burden is relieved and benefited. But as the public is not taxed for the support of churches and other religious societies, a private donation in their aid is not charity in the same sense in which a donation which relieves a public burden is a charity. The charity in such case consists in giving aid to an institution whose purpose is to do good in other ways than by making pecuniary burdens lighter, and this, as is said above, is charity in a higher sense than is the mere relief from a pecuniary burden.

It has been said that "to save life, or prevent or relieve suffering, and this in the case of animals as well as men; to prepare needful food for man and beast; to save property, as in the case of fire, flood, or tempest, or other unusual peril, would unquestionably be acts which fall within the exception" of the statute. *Commonwealth v. Sampson* 97 Mass. 407 409. By another authority it is asserted of the Sabbath as its observance is protected in Pennsylvania, "that rest, and the public worship of Almighty God, were the primary objects of the institution, both as a divine and civil appointment; and it seems to me to follow, as a necessary consequence, that no means reasonably necessary to these ends can be regarded as prohibited." *Johnston v. Commonwealth* 22 Penn. St. 102 111. In a series of decisions in Massachusetts the exception of the statute is held to cover everything which is morally fit and proper to be done upon Sunday, under the particular circumstances of the case. *Commonwealth v. Knox* 6 Mass. 76; *Flagg v. Millbury* 4 Cush. 243;

Bennett v. Brooks 9 Allen 118; *Doyle v. Lynn etc. R. R. Co.* 118 Mass. 195. In other States a similar doctrine is held, and its origin is traced to the very Founder of the Christian religion. Where Sunday travel is prohibited, it is nevertheless lawful to go reasonable distances to visit near relatives (*McClary v. Lowell* 44 Vt. 116; *Pearce v. Atwood* 13 Mass. 324; *Gorman v. Lowell* 117 Mass. 65) or even intimate friends. *Commonwealth v. Sampson* 97 Mass., 407. On the general subject the following cases throw more or less light, and are all in the same direction: *Logan v. Mathews* 6 Penn. St. 417; *Johnston v. People* 31 Ill. 469; *Stanton v. Metropolitan Railroad Co.* 14 Allen, 485; *Feital v. Middlesex Railroad Co.* 109 Mass. 398.

The support of religious societies being in itself a charity, the general custom of such societies as to the methods by which the means of support may be collected may throw much light on the question what is admissible? The general sense of a Christian people has demanded and secured the law, and their method of observing the day must be some evidence of the sense in which the law is enacted. Now it is matter of common observation that religious societies solicit moneys for their needs and take subscriptions at their regular meetings on the first day of the week. The custom is from time immemorial. The regular Sabbath offerings, as they are called, are limited sometimes to gifts for the poor, or for sacramental purposes, or missions, but quite as often they embrace gifts for the general needs of the society, including the repairs of the church, the lighting and heating, the payment of the taxes, and the numerous other needs which do not differ at all from the needs of ordinary business associations. Nobody has ever asserted, so far as we are aware, that the taking up of these Sabbath offerings was illegal and punishable under the statute. On the contrary the custom is considered fitting and proper to the occasion, and the congregation gives

no doubt with a devotional spirit that is fully in harmony with the purpose for which they are assembled.

And if small sums may be gathered on Sunday for the support of public worship and for providing buildings for the purpose, and keeping them in repair, why not large sums? Does the amount of the several gifts make any difference when the general object is the same? Is it legal for deacons, vestrymen or other officers to pass a box for the reception of contributions in small change, and illegal for the officiating minister, as he stands in his pulpit, to solicit contributions in dollars?

In whatever consideration we give to this subject we are to keep in mind that the promise, if void at all, is void because the transaction in the course of which it is made is prohibited and made punishable by statute. If it is, then all business similar in its nature connected with church work and pertaining to what may be called the secular side of religious organizations, must be illegal and punishable also. The clerk of the society could not make his annual report on Sunday; the treasurer could not report the accounts between the society and its several members; the clergyman might be fined for appealing to his parishioners to be more liberal in their donations, and a warden or moderator might be fined for taking on Sunday a vote of the congregation that the salary of the officiating clergyman should be increased. None of these acts pertain to the religious worship, but they are nevertheless means by which religious worship is supported. And the taking up of subscriptions is only one method by which the cost of sustaining churches is apportioned among those who feel disposed to aid in so doing.

There may be and no doubt are differences of opinion as to whether it is wise or even decorous to pursue in aid of church building the course that was taken in this case. With those differences we have nothing to do. The questions which arise upon them are addressed to

the congregations themselves, and must be settled by them. We have no doubt whatever that the support of public worship is a work of charity within the meaning of the statute, and that promises like the one now in question may be sustained on that ground.

We have not overlooked the fact that in *Catlett v. The Trustees etc.* 62 Ind. 365 it was assumed by the Supreme Court of Indiana that such a promise was illegal. The report of the case does not show that the illegality was contested, and the case seems to have turned on a question of ratification. A point thus assumed without consideration is of course not decided.

We are of opinion that the judgment should be affirmed with costs.

The other Justices concurred.

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DAVID T. BALDWIN V. CHARLES R. TALBOT.

Defendant's name in declaration—Selection of exempt property.

Judgment in replevin was given by a justice in a suit brought against a defendant designated as D. T. Baldwin instead of David T. Baldwin, but no misnomer was pleaded, and the judgment was appealed by Baldwin under his full name after pleading to the merits. *Held* that the informality, if any, could be amended by reference to the records and was no longer material.

An execution debtor's right to make his own selection of property exempt from execution, is not affected by his having given a fraudulent mortgage on other property; he is entitled to the exemption of property of the full statutory value, and cannot be compelled to select mortgaged property. If the levy is insufficient, the creditor can levy an *alias* execution on other property not encumbered or covered by a mortgage supposed to be fraudulent, or not mortgaged.

An execution debtor is not precluded from claiming property as exempt from levy, by the fact that he has property in another county that is not levied on, unless, perhaps, he should claim exemption on a second levy that would be excessive when taken with his first claim.

An execution creditor is not concerned in the fact that the debtor does not select mortgaged property as exempt from execution, or does not claim all he has a right to.

Error to Cass. Submitted Jan. 21. Decided Feb. 11.

REPLEVIN. Plaintiff brings error.

M. A. Thompson for plaintiff in error. At common law suit must be brought in plaintiff's full name, though changes have been made by statute; Stat. 3 and 4, Wm. IV., ch. 42, § 12; but this does not extend beyond the express terms of the statute, *Rust v. Kennedy* 4 M. & W. 586; fraudulent disposition of property deprives an execution debtor of his right to exemption, *Herschfeldt v. George* 6 Mich. 456; *Brackett v. Watkins* 21 Wend. 68; *Grimes v. Bryne* 2 Minn. 89; levy can be made on mortgaged chattels at any time before foreclosure, *Cary v. Hewitt* 26 Mich. 229; *Macomber v. Saxton* 28 Mich. 516; but they must be sold in an undivided lot, *Worthington v. Hanna* 23 Mich. 530; *Harvey v. McAdams* 32 Mich. 477.

L. B. Des Voignes for defendant in error.

CAMPBELL, J. Talbot sued Baldwin in replevin to recover a horse which Baldwin had seized on execution. Talbot claimed the horse as exempt, and there was testimony showing him entitled to the exemption. Baldwin levied on this horse and upon some mortgaged property besides, including another horse and a buggy. When he made the levy he was instructed to disregard Talbot's claim of exemption, and he intentionally omitted to take any steps to enable Talbot to select, and refused to give up the animal in question. This levy was made in Cass county. There was some evidence that Talbot had some property in another county which would have been within the right of exemption had it been seized on execution.

An objection was made and overruled below, that the replevin was void because brought against D. T. Bald-

win, instead of David T. Baldwin. No misnomer was pleaded, and the original judgment, which was rendered before a justice, was appealed by Baldwin to the circuit under his full name, after pleading on the merits below. Under these circumstances, if there was any informality, it was one which the record furnished means of amending and is no longer material.

An offer was made in the circuit court to show that Talbot had given a chattel mortgage on his other property, and to show fraud in that mortgage, which it is claimed was excluded by the court. It is somewhat difficult to tell just what was objected to, for the admission was distinctly made that such a mortgage had been given. But we have no doubt the court held correctly that such a mortgage was of no importance unless covering this horse. The right of exemption of this property could not depend on the condition of any other property; and it was held in *Bayne v. Patterson* 40 Mich. 658, that a debtor was entitled to exemption of property of the full statutory value, and that he could not be compelled to select mortgaged property, as that would defeat the beneficial purpose of the law, and give him no such amount as the law designed to secure him. It is no fraud to claim that clear amount. Neither is there anything in the statute to prevent an execution debtor from claiming property as exempt against levy in one county, because he may happen to have property somewhere else which is not levied on. Such a question might arise if on a second levy he should claim exemptions which with his first claim would be excessive. It cannot arise until then. If there was other property covered by a mortgage claimed to be fraudulent, or not covered by any encumbrance, the judgment creditor might have issued an *alias* execution and levied on it, if the first levy failed to pay his debt. But in neither case could the first claim of exemption be destroyed.

A remaining point which is perhaps difficult to connect in any legitimate way with the record, is aimed

at maintaining the doctrine that where property is levied upon which is mortgaged, there can be no claim of exemption for any specific articles, as the mortgage interest is an entirety. In the present case there was no such claim of exemption, and no evidence given or offered which had any tendency to show that this horse was mortgaged. It does not concern the plaintiff in error in this suit that the execution debtor did not see fit to claim any property which was mortgaged, or that he did not claim all he might have claimed.

There is no error in the record, and the judgment must be affirmed with costs.

The other Justices concurred.

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FREDERICK PFISTNER v. JAMES BIRD AND THOMAS BIRD.

Trespass for cutting timber—Passage of title.

Under a contract transferring all the pine trees the vendee "may choose to take," the latter agreeing to pay a certain sum "for the said pine, so cut," etc., title did not pass until the pine was cut, and until then the vendee had neither actual nor constructive possession, and could not bring trespass for damages against a grantee of the vendor who had cut timber on the land.

Error to Kent. Submitted Jan. 21. Decided Feb. 11.

TRESPASS. Defendant brings error.

Champlin & More for plaintiff in error. Title cannot pass until there is some specific identification of the property bargained for, *Golder v. Ogden* 15 Penn. St. 528; *Hutchinson v. Hunter* 7 id. 140; *Waldo v. Belcher* 11 Ired. 609; *Merrill v. Hunnewell* 13 Pick. 213; *Scudder v. Worster* 11 Cush. 573; *Wilkinson v. Holiday* 33 Mich. 386; *Hahn v. Fredericks* 30 Mich. 223; *First Nat. Bank v. Crowley* 24 Mich. 492; *Lingham v. Eggleston* 27 Mich.

324; *Kingsley v. Holbrook* 45 N. H. 313; *Drake v. Wells* 11 Allen 141; Benj. Sales § 352; it passes at once where the property is in a specified place or is of a specified kind, and when it is part of a greater quantity of the same kind so that it can be identified, *Whitcomb v. Whitney* 24 Mich. 486; *Adams Mining Co. v. Senter* 26 Mich. 73; *Johnson v. Moore* 28 Mich. 3; *Colwell v. Keystone Iron Co.* 36 Mich. 51.

L. E. Carroll and *Taylor & Eddy* for defendant in error.

MARSTON, C. J. On September 7, 1868, William Bradley, claiming to be the owner of certain lands in this State, sold to defendants Bird by written contract "all of the pine trees they * * * may choose to take off from the following described lands * * * within three years from the date of this agreement; * * * And the said parties [Birds] do hereby agree to pay the said party of the first part [Bradley] the sum of one dollar per thousand feet for said pine so cut, hauled and scaled. * * * the measures of said logs are to be taken at the proper measure so delivered by the man or person who is appointed to scale said logs."

In 1870 Bradley conveyed to one Fisher, through whom Pfistner derives his title, the lands upon which the pine in question was standing, reserving the pine timber covered by the Bird contract.

Pfistner cut and carried away the pine in the winter of 1871-2, and the Birds bring this action of trespass to recover damages on occasion thereof. On the trial it was claimed that Bradley had extended the time within which the Birds might cut and take the pine under their contract. Under the contract between Bradley and the Birds no title to any of the pine timber passed to the latter until the same was cut by them. They did not purchase all the pine, nor all of a particular quality, but such only as "they may choose to take off," and they were to pay a certain price per thousand feet for the pine so cut. Until cut they had no title to any of

the pine. The destruction of it by fire or otherwise while standing would not have fallen upon them, as until cut by them there was no possible way of identifying any of the timber as theirs, or of ascertaining what portion thereof they would afterwards choose to take under their contract. Until the timber was cut, therefore, they were neither in the actual or constructive possession of any part or lot thereof, and could not maintain an action in the present form against this defendant. The authorities cited by counsel for the defendant, plaintiff in error, fully sustain this view.

The other errors we need not consider. The judgment must be reversed with costs of both courts.

The other Justices concurred.

HENRY G. STONE ET AL. v. SARAH NICHOLS ET AL.

Pleading—Common counts.

Assumpsit on the common counts will lie for the price of articles sold, on the vendee's refusal to give an order which the plaintiff had agreed to take in payment, and which was to be drawn on a third person and be payable in labor.

Error to Kent. Submitted Jan. 21. Decided Feb. 11.

ASSUMPSIT. Defendants bring error.

Geo. H. White for plaintiffs in error. Recovery cannot be had under the common counts for work and materials furnished under a special contract, unless the defendant has so far fulfilled its terms that his liability is solely to pay money, and in other cases recovery must be had on a special count for damages for breach of contract, *Begole v. McKenzie* 26 Mich. 470; *Crane v.*

Grassman 27 Mich. 444; *Butterfield v. Seligman* 17 Mich. 98; Chitty's Pl. 340; Selw. N. P. 73; where the plaintiff in assumpsit on a special contract has fulfilled his obligations, and the defendant has omitted some duty other than the payment of money, the declaration must be special, *Spratt v. M'Kinney* 1 Bibb 595; *Cochran v. Tatum* 3 T. B. Mon. 405; *Bradley v. Levy* 5 Wis. 400; *Weart v. Hoagland* 2 Zab. 517; *Nesbitt v. Ware* 30 Ala. 68; *Brooks v. Scott* 2 Munf. 344; *Carson v. Allen* 6 Dana 395; *Snedicor v. Leachman* 10 Ala. 330; *Baldwin v. Lessner* 8 Ga. 71; *Haynes v. Woods* 1 Stew. (Ala.) 12; *Bernard v. Dickins* 22 Ark. 351; *Duncan v. Littell* 2 Bibb 425; *Talver v. West* 1 Holt N. P. 178.

Grove & Harris for defendant in error. *Indebitatus assumpsit* may be maintained wherever there is a legal liability to pay money for work and labor or for goods sold and delivered, whether under an executed contract or not; and a case where an agreement performed by one party was to be performed by the other by payment in specific articles, and payment has been demanded according to the terms of the contract and refused, is no exception, *Way v. Wakefield* 7 Vt. 223; *Clark v. Fairchild* 22 Wend. 576; *Smith v. Smith* 2 Johns. 235; *Childs v. Fischer* 52 Ill., 205; *Jackson County v. Hall* 53 Ill. 440; this rule applies where a payment by bill, note, order or other obligation has been refused and the credit or time for which the paper was to be current, has expired, 1 Chitty Pl. 347; *Hunneman v. Grafton* 10 Met. 454; *Hanna v. Mills* 21 Wend. 90; *Yale v. Coddington* id. 175.

GRAVES, J. This is a very plain case. It originated in a justice's court, and the defendants in error, who were the plaintiffs, carried it by appeal to the circuit court where they recovered before a jury. The action was on the common counts for the price of manufactured articles which Stone used in a building he was putting up, and the items were explained in a bill of particulars.

It was not disputed that the articles charged for were provided by defendants in error and used in the building. Neither were the prices questioned. The subject of controversy was who was the real debtor to defendants in error. The evidence for the plaintiffs was that the materials were bargained to Stone, and that they agreed to take his order on one Scofield, payable in labor in the place of money, and that Stone refused to give the order. And on the part of the defense the showing was that although the articles were for Stone's use, they were yet furnished on Scofield's exclusive credit, he being Stone's debtor and it being mutually understood that Scofield should pay in labor to the plaintiffs and receive from Stone a credit on account for the amount so paid.

The case was distinctly and fairly submitted to the jury to find the truth between these conflicting claims, and they determined that the version by the plaintiffs was true and as a consequence, that the other was not so. There was no question of accomplished novation and, taking the case to be as contended by the plaintiffs and found by the jury, the action was maintainable on the common counts. *Gibbs v. Blanchard* 15 Mich. 292. There are some features which resemble points in several late cases. *Ingersoll v. Baker* 41 Mich. 48; *Lyon v. Chamberlain* id. 119; *Bonine v. Denniston* id. 292. The notice of special matter had no effect before the jury. The charge was explicit on the subject. There is no error.

The judgment is affirmed with costs.

The other Justices concurred.

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PAUL FISH FOR THE USE OF HENRY E. SMITH v. THERON BARBOUR, IMPLEADED WITH SAMUEL N. BROWNSON.

Proceedings by capias—Liability of special bail.

The grounds of arrest by *capias* and the proceedings to bind the bail must conform strictly to the statutes.

The renewal of jurisdiction by waiving the right to a discontinuance given by plaintiffs' neglect to follow the statutory procedure in suits by *capias*, cannot at common law bind the sureties on the defendants' recognizance of special bail.

Special bail to a *capias* are not held to a case not made by the affidavit for the writ, unless, perhaps, where the record shows that the recovery was limited to the matters in the affidavit.

Where a declaration for obtaining money on false pretenses is so amended as to describe the fraudulent representations differently, and add to them, as by differently stating localities and amounts of payments made by the plaintiffs, the variance is material.

The special bail for defendant in a suit by *capias* are not bound to indemnify against charges in the declaration that are materially different from those in the affidavit on which the writ issued.

Whether an affidavit that does not state that plaintiff has suffered damage, will warrant holding defendant to bail on a *capias*—*Q.*

Error to Mecosta. Submitted Jan. 21. Decided Feb. 11.

ACTION ON BAIL BOND. Plaintiff brings error.

A. L. Millard for plaintiff in error. An execution is not invalidated by immaterial errors whereby it varies from the judgment, *Sanders v. Kentucky Ins. Co.* 4 Bibb 471; *McMahan v. Colclough* 2 Ala. 68; *Lewis v. Avery* 8 Vt. 289; *Avery v. Lewis* 10 Vt. 332; *Doak v. Duncan* Litt. Sel. Cas. 177; *Bank of Whitehall v. Pettes* 13 Vt. 395; *Barnes v. Hayes* 1 Swan 304; *Brace v. Shaw* 16 B. Mon. 43; *Sprott v. Reid* 3 Ia. 489; *Jordan v. Porterfield* 19 Ga. 139; *Martin v. Rice* 16 Tex. 157; *Corbin v. Pearce* 81 Ill. 461; *Jones v. Cook* 1 Cow. 309; *Jackson v. Robins* 16 Johns. 574; *Hayes v. Bernard* 38 Ill. 297; *Franklin v. Merida* 50 Cal. 289; contra, *Williams v. Vail* 9 Mich., 162; errors are sometimes amendable and can

only be attacked by parties in direct proceedings, *Doe v. Gildart* 4 How. (Miss.) 267; *Thornton v. Lane* 11 Ga. 459; *Stevenson v. McLean* 5 Humph. 332; irregularities in the issuance of a *ca. sa.* cannot be used as a defense by the bail, *Kenan v. Carr* 10 Ala. 867; common bail cannot be discharged on the ground that the plaintiff did not file his declaration seasonably, *Branson v. Shinn* 4 Halst. (N. J. L.) 1; *Livingston v. Bartles* 4 Johns. 478; delay in suing out a *ca. sa.* is no defense to a *sci. fa.*, *Bell v. Bullitt* 3 Mon. 200; where a plaintiff omits to declare within the time prescribed, or where the declaration varies from the writ or affidavit to hold to bail, a motion to exonerate the bail must be made in the original suit and as soon as possible (2 Burrill's Pr. 292; *Knight v. Dorsey* 1 Brod. & Bing. 48), since they might have surrendered their principal even after the beginning of suit against them (2 Burr. Pr. 229; 1 Tidd's Pr. 237) or might have been relieved without a surrender, on showing that they could not make one, *Warner v. Hayden* 2 Wend., 252; bail cannot question the sufficiency of the affidavit or legality of the order for bail (*Lewis v. Brackenridge* 1 Blackf. 112; *Stewart v. Howard* 15 Barb. 26; *Morton v. Herault* Hardin 203; *Toulmin v. Bennett* 3 Stew. & Port. 220), and are estopped from denying that their principal was liable to arrest, *Stever v. Sornberger* 24 Wend. 275; it is no defense to a suit against special bail that the proceedings against their principal are incorrect, *Cutshaw v. Birge* 4 Blackf. 511; nor are they discharged even by an amendment to the declaration by which a new demand is added, as they would still be liable to the extent of the original demand and the plaintiff could show on the trial that no new demand had been proved (*Seeley v. Brown* 14 Pick. 177; *New Haven Bank v. Miles* 5 Conn. 588; *Ball v. Claflin* 5 Pick. 303), technical variances are no defense to an action on a bail bond, *Rosenberg v. McKain* 3 Rich. 145; if the bail wish to take advantage of the fact that a *ca. sa.* has not been issued or that the writ is void, they must plead it, *Brother-*

line v. Mallory 8 Watts 132; *Cockran v. Drake* 3 Har. (N. J.) 9; *Bolles v. Haines* 7 Blackf. 398; *Gray v. Hoover* 4 Dev. (N. C.) 475; *Philpot v. Manuel* 5 Dowl. & Ry. 615; 1 Chitty Pl. 484.

Champlin & More for defendant in error. Special bail are discharged by anything that would increase their liability, *Campau v. Seeley* 30 Mich. 62; the obligation of bail arises from contract and the law together, the statute extending their privileges beyond the express condition of the bond, *Edwards v. Gunn* 3 Conn. 318; *Beebe v. Gardner* 11 Conn. 108; when bail are sued on the bond they can object that the affidavit for the *capias* did not show a right to arrest, *Stafford v. Low* 20 Ill. 152; *Wilcox v. Ismon* 34 Mich. 268; *Stephenson's Case* 32 Mich. 60; *Hackett, relator v. Judge* 36 Mich. 334; an amendment to a declaration, introducing a new demand, is a material variance which discharges the bail, *Smith, relator v. Wayne Circ. Judge* 27 Mich. 87; *Seeley v. Brown* 14 Pick. 180.

CAMPBELL, J. In March, 1877, plaintiff sued defendants on a recognizance of special bail which was given on the 18th of December, 1868, on behalf of John J. Barbour, whom Fish had sued by *capias* in the circuit court for Lenawee county. That original suit was begun and affidavit to hold to bail made August 1, 1868. Declaration was filed November 28, 1870. An amended declaration was filed March 1, 1871. The original defendant pleaded the general issue to the original declaration, but did not plead to the amended declaration. On the 14th of April, 1871, a trial was had, resulting in a verdict for $1,164.60, on which judgment was entered the same day, and execution issued the next day, returnable July 4, 1871. A return of *nulla bona* on this execution is dated July 5, 1871, but was not filed until January 4, 1873.

What purports to be an assignment of the judgment from Paul Fish to Smith was filed March 12, 1872. On the 5th of May, 1876, an execution against the body was

issued, not by Mr. Millard, plaintiff's attorney, but by Shumway & Salsbury, purporting to be attorneys for Smith, returnable on Tuesday, June 6, 1876, directing the sheriff of Lenawee county to take the body of John J. Barbour to satisfy "Henry L. Smith, the assignee of Paul Fish the plaintiff," etc. This was returned *non est inventus*, June 7, 1876. The present suit was begun in Mecosta county, March 1, 1877.

On the trial various objections were raised to the sufficiency of the proceedings to charge defendant, and the circuit judge held there could be no recovery.

Under our practice no suit can be commenced by *capias* or after arrest carried to judgment except in compliance with statute. An order for bail can only be made on affidavit, and the affidavit must be annexed to the writ and returned and filed with it. Comp. L., §§ 5736-7. When the defendant has appeared, by putting in special bail or otherwise, "the plaintiff shall declare against such defendant, by the end of the next term after the return of the writ by which such suit was commenced." § 5744. "If a plaintiff fail to declare, as in the last section prescribed, judgment of discontinuance may be entered against him, according to the course and practice of the court." § 5745.

No execution against the body can issue until an execution has been returned unsatisfied against the property of the judgment debtor. § 6082.

It has been determined on various occasions in this State that these exceptional proceedings are to be construed with strictness, and that both as to defendants and their bail, the grounds of arrest, and the proceedings to bind the sureties must appear to comply with the statutes. *Proctor v. Prout* 17 Mich. 473; *People ex rel. Singer Co. v. McAllister* 19 Mich. 215; *Brown v. Kelley* 20 Mich. 27; *Matter of Stephenson* 32 Mich. 60; *Hackett relator v. Judge of Wayne Circuit* 36 Mich. 334; *Campau v. Seeley* 30 Mich. 60.

In this State the conditions and proceedings in suits by *capias* are not left to be regulated by the practice of

the courts, but are fixed by statute, and become therefore of more importance, and less subject to discretion.

It was objected that the affidavit showed no cause for allowing a *capias*. It avers that John J. Barbour and one Crandall on or about January 17, 1867, at Hudson in Lenawee county, represented themselves as owners of a patent right for mops in Allegan, Van Buren, St. Joseph "and certain other counties in the State of Michigan," which they requested plaintiff to purchase. (This ownership is not denied). That in order to cheat and defraud plaintiff they represented that the invention was very salable and met with a ready sale when offered, and that they were making rapid sales of their exclusive right for different portions of territory, and among others, they had sold the right for eight counties to one Ephraim Van Horn (an acquaintance of plaintiff), and that one could easily contract for as many as 25 mops in a day. That they showed plaintiff a book with the names of "eight persons or thereabouts" whom they represented as having given orders for one mop each, and that the names had been obtained during a part of one afternoon when plaintiff took a ride with Barbour of three or four miles in Dover, in Lenawee county. That by means of these false pretenses they then and there sold and assigned to plaintiff "the said pretended right for the said counties of Allegan, St. Joseph, Van Buren, and certain other counties in said State as aforesaid," for plaintiff's notes payable to John J. Barbour or bearer for seven hundred dollars, "bearing date the said 17th day of January, 1867, and payable respectively at a certain time after the date thereof." The fraud alleged in the conclusion is the obtaining by these promissory notes "for different sums, amounting in all to the sum of seven hundred dollars, dated and payable as last aforesaid," whereas no sale had been made of any territory to Van Horn, and no such orders obtained as named in the book, and the patented mops were not salable.

It is certainly remarkable that plaintiff does not state what county rights he bought, or what counties Van Horn was said to have purchased, or the amounts and terms of the notes which he gave, or whether he had been called on to pay them. The affidavit does not attempt to show in what way he was actually damaged or to what extent. Fixing bail at $3000, on such an affidavit, was entirely unwarranted. We do not find it necessary, however, to determine whether this affidavit does not show a cause of action to some extent, although we think, if it does so, the foundation for determining the right of holding Barbour to bail was very slender, for want of more certainty.

This affidavit was not made until more than a year and a half after the alleged fraud. Defendant was required to give bail in $3000, and special bail was perfected.

Instead of declaring within the two terms required by the statute, plaintiff did not file his original declaration for nearly two years after bail was perfected, and his amended declaration was not filed for several months after the original. Under the English practice, which is not entirely based on statute, this failure to declare put the plaintiff practically out of court. Of course the defendant could and did waive any personal objection to the continuace of the cause in court, by pleading and going to trial, but this renewal of jurisdiction could not bind the bail for whom he had no right to make such a renewal of a lapsed suit. In the King's Bench no rule to declare was required before such discontinuance became effectual, and being matter of statute and not of judicial discretion, the bail were entitled to rely upon this default. Tidd's Practice 294; *Cooper v. Nias* 3 B. & Ald. 271; 1 Sellon's Practice 220-1-2, 361; *Carmichael v. Chandler* 3 Doug. 432; *Boulcot v. Hughes* 1 Chitty 279; *Sykes v. Bauwens* 2 Bos. & P., N. R. 404; *Oldham v. Burrell* 7 Term 26; *Ariel v. Barrow* 8 Bing. 375.

No extension of time was granted to plaintiff for de-

claring, and how far that would have affected the bail is therefore not before us.

It is also well settled that the bail are not held to a case not made by the affidavit. There are some decisions holding that if it clearly appears from the record that the recovery was confined to the matters in the affidavit, and if the record shows this, the addition of new averments or counts does not prejudice. But otherwise it is not the case the bail saw fit to indemnify against. *Wheelwright v. Jutting* 7 Taunt. 304; *Caswell v. Coare* 2 Taunt. 107: *Seeley v. Brown* 14 Pick. 177; *Thompson v. Macironi* 4 Dowl. & R. 619; s. c. 3 B. & C. 1; Tidd's Pr. 294; 1 Sellon Pr. 173.

Reference has already been had to the defective allegations in the affidavit, and to the unsatisfactory way in which all the facts are described, and damages left to a very general inference. The original declaration followed the affidavit very closely and made out no stronger or different cause of grievance, except that it stated the book to have contained a large number of names, not qualified by the number of eight.

The amended declaration changed the original among other averments as follows: It included Lenawee county with Allegan, Van Buren and St. Joseph, as one of the counties in which they represented they had rights; it reduced the number of counties alleged to have been sold to Van Horn to seven instead of eight, and it brought in a new and tangible averment of fraud in a false representation that plaintiff could procure mops at two factories named, at Farmington and Pontiac, for forty-five cents each. No reference whatever was made to this representation in the affidavit.

It then proceeds to aver that by these representations the plaintiff was induced to buy a right for Lenawee county for $143, by note bearing date December 24, 1866, but time of payment not specified, and a right for a county in Ohio, not named, for $100, payable in one year

from January 17, 1867, and subsequently to purchase Allegan, St. Joseph and other counties not named, for two notes of $250 each, dated January 19, 1867, but the time of payment not specified. There was no allegation of special damages in either declaration.

It is evident that the second declaration is materially variant from the affidavit. It describes the fraudulent representations differently, and adds an important representation concerning the cost of manufacturing. It describes the purchase as a different one from that sworn to, not only making Lenawee the first purchase and distinct from all the rest, but including as a separate purchase a county in Ohio, showing these purchases for notes given on three different occasions, and not making up the sum of seven hundred dollars as a single consideration, or as the aggregate of all the notes. Other minor variances need not be specified.

The bail never agreed to indemnify plaintiff against the charges set out in the second declaration. There can be no presumption that recovery was not based on the new averments, which are not only material but descriptive. We think it is impossible to lawfully hold them liable upon the judgment.

Some more technical objections were presented, which we do not think it necessary to consider. The whole proceedings are characterized by very long delays, and the bail would have just reason to complain if the law allowed them to be held. We have preferred to dispose of the cause on matters of substance.

The court below decided correctly that they were discharged.

The judgment must be affirmed with costs.

The other Justices concurred.

CLARK J. WHITNEY ET AL. v. HIRAM B. ROSE, ISAAC P. PROSSER ET AL.

Presumption from neglect to testify.

Where a bill is filed in aid of execution and the question at issue is the good faith of a transfer of the land, and the purchaser is made a party defendant, and evidence is given tending to show that the sale was made with an evident intent to defraud creditors, his neglect to make an affirmative showing to support the sale will warrant a court in giving their full force to any legitimate inferences drawn from the evidence given against it.

Appeal from Kalamazoo. Submitted January 21. Decided February 11.

BILL IN AID OF EXECUTION. Dismissed as to defendant Prosser. Complainants appeal.

O. W. Powers and *Geo. M. Buck* for complainants, cited as to the fraudulent nature of the transfer to Prosser, *Pursel v. Armstrong* 37 Mich. 330; *Wright v. Brandis* 1 Ind. 336; *Mills v. Howeth* 19 Tex. 259; *Garahy v. Bayley* 25 Tex. (Supp.) 294; *Green v. Tantum* 19 N. J. Eq. 109; *Atwood v. Impson* 20 id. 150; *Fuller v. Sears* 5 Vt. 530; there is no inflexible rule as to the amount of evidence required to prove a fraudulent transfer, Bump Fr. Con. 583; *Reed v. Noxon* 48 Ill. 323; *Smit v. People* 15 Mich. 497.

Brown, Howard & Roos for defendants. Fraud by an execution defendant in transferring his property does not affect the transferee unless the latter is shown to have been concerned in it, Bump Fr. Con. 195; *Miller v. Kirby* 74 Ill. 242; *Hatch v. Jordon* id. 414; *Gridley v. Bingham* 51 Ill. 153; *Green v. Tanner* 8 Met. 411; *Leach v. Francis* 41 Vt. 670; *Fifield v. Gaston* 12 Ia. 218; *Ruhl v. Phillips* 48 N. Y. 125; *Waterbury v. Sturtevant* 18 Wend. 353; *Palmer v. Henderson* 20 Ind. 297; *Hamilton v. Staples* 34 Conn. 316; *Merch. Bank of Newton v. Northrup* 22 N. J.

Eq. 58; *Durkee v. Chambers* 57 Mo. 575; *Byrne v. Becker* 42 Mo. 264; *Preston v. Turner* 36 Ia. 671.

MARSTON, C. J. This was a bill filed in aid of an execution levied upon certain lands. In May, 1874, defendant Hiram B. Rose, with Alanson S. DeYoe, executed a note to complainants for a little over two thousand dollars. The debt to complainants for which this note was given was that of DeYoe. In December, 1875, a judgment was recovered upon this note, an execution was issued, and a levy made upon certain lands of defendant Rose in March, 1876. Afterwards the judgment was set aside and a new trial awarded, but the lien obtained under the levy made was permitted or ordered to stand. The case came on for trial, and in February, 1877, a judgment was recovered, an execution issued, and a levy made by virtue thereof on the 26th day of the same month.

Defendant Hiram B. Rose was the owner and in possession of 160 acres of land at the time he signed the note referred to. On the 26th day of May, 1875, he mortgaged a part of the premises to Horace M. Peck. This mortgage is not now claimed to have been given for any purpose except to have Mr. Peck assist him in settling with complainants, which not having been done, that mortgage plays no farther part in this controversy.

December 27, 1875, Rose conveyed to defendant Prosser forty acres, and about the time the suit was commenced on the note (the particular time does not clearly appear) he conveyed eighty acres to one Palmer, thus leaving but forty acres in his name, upon which he resided.

Defendant Prosser was not called as a witness. Rose testified that he made a *bona fide* sale to Prosser, receiving from him seven hundred dollars in money and a note for a portion of the balance of the agreed consideration. What he did with this money he is wholly unable to state, and the manner in which the note was paid, if

at all, is left by his testimony in a very unsatisfactory condition. In October, 1876, a son of Hiram B. Rose took from Prosser a two years lease of the forty acres in question. The consideration to be paid therefor was to clear some twelve acres of the land, thoroughly subdue it, cut ditches sufficient to carry off the water, take off all loose stumps, build forty rods of new fence, keep all fences in good repair, pay all taxes, and have the whole seeded at the expiration of the lease. Truly this would seem to have been a most liberal rent, if enuring to Mr. Prosser's benefit, and yet quite a natural agreement, if the sale to Prosser was not a *bona fide* one. That Rose about this same time made a sham sale of some of his wheat to keep it from the reach of his creditors is clear beyond dispute.

It is insisted on the part of defendant Prosser that under Comp. L., § 4717, his rights cannot be affected by the fraud of Rose, unless the evidence connects him with the fraud. Admitting this, we are not satisfied from the evidence that Prosser has paid in fact any consideration for the premises. True, the evidence of Rose, standing alone, might tend to prove a payment of seven hundred dollars in cash and some note transfer for the balance, yet his evidence does not satisfy us that such was the fact, when we consider it in connection with all the other evidence in the case. While it may be true that Prosser was not called upon to take the stand and explain the transaction until a *prima facie* case was made out against him, yet this is just that kind of a case, as it now stands, that seems to require some affirmative showing on the part of Prosser in order to sustain the conveyance. And if the transaction were an honest one on his part, he should not have permitted any doubtful matter of right to have stood in his way of making a full explanation. A person certainly is not obliged to answer vague and indefinite charges, but when made a party defendant in a litigation where the question at issue is the *bona fides* of a purchase made by him, and evidence is given tend-

ing to show that the sale was made with an evident intent to defraud creditors, silence under such circumstances may well prevent the court from presuming too much in favor of the honesty of the transaction. The inferences from the facts proved against the validity of the sale should be allowed to have their full force and effect where the party defendant was called upon to remove them, had an opportunity so to do, and did not avail himself of it.

The decree below must be reversed, and a decree rendered in favor of complainants, with costs of both courts.

The other Justices concurred.

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JOHN KOCH v. WALTER H. COOTS, SHERIFF.

Bail.

Sureties on a bail bond are presumed, for their own benefit, to have the custody of their principal; and they may surrender him to exonerate themselves.

In an action by special bail against the sheriff for having falsely returned to an execution that the defendant could not be found in his county, it cannot be said as matter of law that the sheriff's neglect to inquire of the plaintiff in the execution as to the defendant's whereabouts, tended to show negligence.

Error to the Superior Court of Detroit. Submitted January 21. Decided February 11.

TRESPASS ON THE CASE. Plaintiff brings error.

Otto Kirchner for plaintiff in error. A sheriff's liability for falsely returning a *fieri facias* may depend on his knowledge of facts which should cause him to try to find property, *Bell v. Com.* 1 J. J. Marsh. 553; it is negligence *per se* if a notary fails to ask the holder of a dishonored bill the indorser's address, *Harris v. Robinson*

4 How. 345; a sheriff could inquire of the bail for the address of his principal, Petersdorff on Bail, p. 405.

Maybury & Conely for defendant in error.

GRAVES, J. The plaintiff in error and George Kopp undertook as special bail for the appearance of one Bettinger in a suit against him by Ernest Lichfelt. The latter having recovered in the action, took steps to fix the bail. An execution against the body was sued out and placed in the hands of Coots, the sheriff, for service, and he made return in substance that the defendant Bettinger could not be found within his county. *Lichfelt v. Kopp* 38 Mich. 312. Lichfelt then sued the plaintiff in error on his undertaking as bail, and collected of him the condemnation money and costs.

This action was thereafter brought against the sheriff, charging him with having returned falsely to the execution against Bettinger, and the jury found in the sheriff's favor.

One ruling is complained of. The proceedings were in Detroit, and the plaintiff adduced evidence that Bettinger resided there, and had for more than five years, and had not been absent from the county; that he, the plaintiff, resided in the city, but defendant made no inquiry of him for the purpose of finding Bettinger. The defendant gave evidence that he inquired of Kopp, the other special bail, who informed him that Bettinger was in Macomb county; that he received the same information at the latter's boarding place, and was also told by one of the attorneys at whose instance the execution was issued, that Bettinger was in Macomb county and could not be found in the county of Wayne.

The judge charged the jury that it was the sheriff's duty to arrest Bettinger if he could find him; that he was bound to use ordinary, reasonable care and due diligence to find him; that it was a question for them whether he did exercise such care in making inquiries as

a man of fair, reasonable judgment in such office should make; that if they were satisfied he did not, it would be their duty to find for the plaintiff, but if they were satisfied he did make such inquiries, then it would be their duty to find for the defendant; that he had no right to sit in the office and make inquiries there alone; he ought to ask proper persons; and that it was for the jury to say whether he made inquiries of proper persons or not.

It subsequently became a question with the jury whether it was the sheriff's duty to inquire of the plaintiff, and the failure to do which would cause liability, and the judge gave them to understand that it was their province to find, under the circumstances, to what extent and of whom the sheriff was bound to inquire, to discharge his duty as already defined.

The plaintiff's counsel then requested him to instruct the jury that the sheriff's failure to inquire of the plaintiff tended to show negligence on his part, and the judge refused, and this ruling presents the question in the case.

The first reflection which occurs on reading the record is that there is a want of facts to show that the plaintiff was accessible to the sheriff in order to be inquired of, or that inquiry of him might have led to the arrest of Bettinger. There is nothing to make out that any better information would have been obtained from the plaintiff than was received from his associate in the recognizance, or that the failure to inquire of him was to his detriment. Waiving this consideration however, was it error in the court to refuse to lay it down as matter of law that it was the sheriff's duty to inquire of the plaintiff as to where his principal was or could be found?

It will be observed that the action is not by the original plaintiff against the sheriff for falsely returning his inability to bring in the body of the original defendant. But it is an action by the bail against the sheriff, or in

other words, an action by the defendant's keepers who bound themselves for his surrender. For the benefit of the bail the law supposes the principal to be in their custody, and they have the right to surrender him for the purpose of exonerating themselves. *Parker v. Bidwell* 3 Conn. 84; *Nicolls v. Ingersoll* 7 Johns. 145.

Formerly no attempt was ever made by the sheriff to find out the principal in order to arrest him on the *ca. sa.*; but it was left at the sheriff's office merely that the bail might understand that the plaintiff intended to proceed against the defendant's person, and it was the duty of bail to search in the sheriff's office to know whether any *ca. sa.* had been left there. *Hunt v. Coxe* 3 Burr. 1360; 2 Saunders, 68, 71, note to *Underhill v. Devereux*. The sheriff's return of not found was held to be good, though the plaintiff knew where to find the defendant. Tidd 1098, citing *Sillitoe v. Wallace and another, bail of Cawthorne*, Ms. And it was held to be good, also, where the defendant was abiding in the county, ready and willing to render his body, and did not avoid the execution. *Winchel v. Stiles* 15 Mass. 230.

But assuming that a legal duty to the bail is cast upon the sheriff to exercise some diligence to effect the arrest of the party for whose surrender they have become bound, and who for their advantage is supposed to be in their keeping (*Bradley & Bissell v. Bishop* 7 Wend. 352; *Cozine v. Walter* 55 N. Y. 304), and still I think it cannot be carried further than the charge carried it, and that the judge would not have been warranted in compelling the jury to find that the failure to inquire of the plaintiff was a breach of duty to the latter, and evidence on which to find the return to the execution false. If there was any error it was not against the plaintiff.

The judgment should be affirmed with costs.

The other Justices concurred.

STEPHEN BOODY v. THE PEOPLE.

Larceny—Horse stealing—Excessive sentence for crime.

Larceny is not classified in Michigan as grand and petty, and as "grand larceny" is not a crime known to Michigan law, and the crime known by that name at the common law might fall within the jurisdiction of a justice of the peace, it would be doubtful how far a conviction under that name would sustain a sentence for the higher grade of larceny.

Act 102 of 1877, if valid at all, cannot be made to cover a case of horse stealing unless by the clearest averments, and will not support as an information for horse stealing an information that consists of the ordinary charge of larceny and includes other property besides the horse.

Comp. L. § 7998, authorizing an excessive sentence to be affirmed so far as lawful, does not apply where there is any other reason for reversing it.

A sentence pronounced under an apparently erroneous view, cannot be maintained by the Supreme Court on a different theory, as it would then become an original sentence by the appellate tribunal.

A sentence as for the crime of horse stealing, to six years' confinement in the State prison, on conviction under an information for "grand larceny" which included other property besides the horse, is not authorized by Michigan statutes.

Error to Eaton. Submitted Jan. 22. Decided Feb. 11.

INFORMATION for "grand larceny." Respondent was convicted.

John M. Corbin for plaintiff in error. Joinder of horse-stealing and simple larceny in one count is void unless horse-stealing is made larceny by law, *State v. Nutting* 16 Vt. 261; indictments for cattle-stealing cannot be maintained as for a common law larceny, *State v. Ripley* 2 Brev. 300; a sentence to longer imprisonment than is allowed by law must be reversed and the prisoner set at liberty, *Elliott v. People* 13 Mich. 365; *Crippen v. People* 8 Mich. 117; *O'Neil v. People* 15 Mich. 275.

Attorney General *Otto Kirchner* for the People.

CAMPBELL, J. Boody was informed against in the circuit court for the county of Eaton for stealing "one dark brown mare, seven years of age, of the value of seventy-five dollars, one single harness of the value of fifteen dollars, and one double-seated one-horse buggy of the value of thirty-five dollars." When arraigned he pleaded guilty. The information and plea were both entitled as in a case of "grand larceny." The judgment recites that the respondent on his plea of guilty was duly convicted of the crime of grand larceny, and so does the commitment warrant to State prison. Upon this conviction the judge sentenced him to six years in the State prison at Jackson. Error is brought on this judgment as not authorized by law.

There has never been in this State any crime known under the name of "grand larceny." The division of punishments under our statutes would probably include within the jurisdiction of a justice of the peace, and exclude from that of the circuit court, some cases which would have been grand larceny at common law, as being of more than the value of twelve pence. With us there has been no subdivision of simple larceny into divisions of grand and petty larceny, and the measure of jurisdiction over the smaller offenses has shifted from seven dollars up to one hundred, and is now fixed at twenty-five dollars. It is certainly open to some doubt how far such a conviction would maintain a sentence for the higher grade of larceny. But the defects in the record render this unimportant.

The information cannot be maintained as one for horse stealing, under the law of 1877 (Laws 1877, p. 80), entitled "An act to provide for the prevention and punishment of horse stealing," because the count under which respondent is charged is an ordinary charge of larceny, and includes other property as well as a mare. No case can be brought within this singular statute, which places

horse stealing above homicide in its minimum punishment, by anything less than the clearest averments. Its validity we shall not discuss.

The record does not show a compliance with the statute of 1875, requiring certain precautions to be taken before giving sentence on a plea of guilty. But it is impossible to suppose the circuit judge was ignorant of the statute fixing the maximum punishment for larceny. The only reasonable inference we can draw from the sentence is that the judge supposed he was obliged to sentence the respondent to the punishment for horse stealing, which is not less than three nor more than fifteen years in the State prison, unless he should see fit to punish for a first offense in the Ionia prison. This is the ground of error chiefly urged, and we think there is enough on the record to justify that inference.

We cannot therefore in dealing with this record, apply the provisions of § 7998 of the Compiled Laws (1 Sess. L. 1867, p. 223), to uphold this sentence up to the maximum of five years for larceny. That statute authorizes this court to uphold an excessive judgment for all within the excess, if there is no other reason for reversal. This statute does not apply where any other difficulty stands in the way. See *Wilson v. People* 24 Mich. 410.

The punishment for larceny may be by fine or imprisonment in the county jail, as well as by imprisonment in the State prison. Comp. L., § 7569. As already suggested, we cannot conceive that the circuit judge could have supposed he was acting under § 7569, because there is no possible room for mistaking its limitations, and it must have been familiar to him. We have no means of knowing that he would have sentenced the prisoner at all to State prison, if he had regarded the case as one of simple larceny. It is apparently not merely an excessive but a mistaken sentence, and if we should leave it standing as one for five years, we have no assurance that it would not be practically an original sentence of our own, based on a different theory of guilt from that

of the circuit judge. We are of opinion, therefore, independently of any question arising out of the anomalous form of the judgment, that the sentence must be regarded as wholly erroneous, and must be reversed entirely, and the prisoner discharged without day.

The other Justices concurred.

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GEORGE FRANKLIN SUTFIN v. THE PEOPLE.

Bastardy—Non-residence of the bastard.

The main purpose of the Michigan Bastardy Act is to indemnify the public for the support of the child, and it does not apply to cases where the child lives out of the State, even though it was begotten within the State.

The right of the mother of a bastard child to a personal action against its father for the injury done her, is not barred by proceedings against him under the Bastardy Act.

CERTIORARI to Van Buren Circuit Court. Submitted January 22. Decided February 11.

Mills, Crane & Hilton for plaintiff in certiorari. Bastardy proceedings do not lie where the bastard lives out of the State when they are instituted, *McFadden v. Frye* 13 Allen 472.

Attorney General *Otto Kirchner* for the People.

MARSTON, C. J. This was a proceeding under the Bastardy Act, instituted on the complaint of the mother of the child. The complainant is and has been a resident of the State of Indiana; the child was born in that State, and is now there living with its mother. It is claimed that the child was begotten in the State of Michigan while the mother was here attending school. Under these

facts it is claimed the defendant cannot be held under our statute.

The proceedings under this act are purely statutory; they are partly for the benefit of the complainant, and may be instituted in her name, and partly for the purpose of indemnifying the public, and may be instituted in the name of the people. The warrant may be executed in any part of the State, and if upon the trial the defendant is found guilty he shall be adjudged to be the father of the child, and shall stand chargeable with the maintenance thereof, with the assistance of the mother, in such manner as the court shall order. The person so adjudged to be the father shall give bond to the superintendents of the poor of the county, with sufficient sureties, to the satisfaction of the court, to perform such order, and also to indemnify the county which might be chargeable with the maintenance of such child. The mother and superintendents, respectively, may recover from the defendant any sum of money which ought to have been paid them respectively in pursuance of such order of the court, and the superintendents are given power to compromise and arrange with the father relative to the support of such child, and thereupon to discharge him from all liability for the support of such bastard.

It seems very clear indeed from these several provisions that the support of the bastard child, and thereby to prevent its becoming a charge upon the public, is the primary object and purpose of the act. In so far as the putative father is required to contribute to its support, it is a benefit to the mother; but for the performance of such order a bond is given to the superintendents of the poor, and to indemnify the county which might be chargeable with the maintenance of the child. These two things go hand in hand together. Where the mother and child are actual residents of another State, or of a foreign country, it surely could not have been intended that the bond to the superintendents would be for the

indemnity of the county where the mother and child resided, nor could it have been intended to meet a contingency that might never happen, by a change of residence to the county in this State where the proceedings were instituted, or any county into which the parties might come.

The statute is designed to meet cases where the child is a resident of this State, and cannot be held applicable to cases like the present. The benefit to the mother of the child which this act contemplates, is secondary only. She may have her personal action against the father of the child for her injuries, and the proceedings under this act would be no defense in such an action.

The order of the circuit court in this case must be reversed and held for naught.

The other Justices concurred.

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William Mahoney v. The People.

Assault with intent to commit rape—New trial.

In a prosecution for an assault with intent to commit rape, a charge in which the judge explains the crime and that of rape, and directs a verdict of guilty if the jury find beyond a reasonable doubt that respondent on the occasion in question took hold of the complainant and used force to overcome her,—that she resisted, and that his intent was to overcome her resistance and gratify his passions notwithstanding, and that it was against her will, is *held* proper.

When an application for a new trial is based on matters pertaining to the discretion of the court, and not on absolute legal right, its refusal is not open to review in the appellate court.

The refusal of a new trial presents no question for review where the affidavits therefor, though given in the bill of exceptions, are not accompanied by any finding of the facts they are claimed to prove.

Error to Manistee. Submitted Jan. 22. Decided Feb. 11.

INFORMATION for assault with intent to commit rape. Respondent was convicted.

S. W. Fowler for plaintiff in error.

Attorney General *Otto Kirchner* for the People.

GRAVES, J. The plaintiff in error was found guilty of an assault with intent to commit rape, and the court sentenced him to State prison for a term of years.

Complaint is made that in stating the offense to the jury the judge was not sufficiently precise. After explaining the crime of rape, and that of an assault with intent to commit it, he added: "If you find from the evidence that the respondent did, on the occasion in question, take hold of the complainant and use force to overcome her; that she resisted; that the intent of the respondent was to overcome her resistance, and to gratify his passions upon her notwithstanding her resistance, and that it was against her will; if you find these facts to exist and beyond reasonable doubt, then your verdict should be guilty." Construing this instruction with the rest of the charge, to which no exception has been taken, and comparing it with the evidence, and we not only find it accurate (*Strang v. People* 24 Mich. 1; *Don Moran v. People* 25 Mich. 356; *People v. Lynch* 29 Mich. 274) but appropriate to the circumstances as given by witnesses. The jury could not have been misled.

The refusal of the court to grant a new trial presents no question. It is true the affidavits are incorporated in the bill of exceptions, but there is no finding upon them of the facts they may be claimed to show, or anything equivalent to such a finding. Moreover, the application for the new trial was founded on matters pertaining to the discretion of the court and not on the ground of absolute legal right. *Hill v. People* 16 Mich. 351.

There is no error and the judgment is affirmed.

The other Justices concurred.

CHARLES KOPKE v. THE PEOPLE.

Bigamy—Information.

An information for bigamy is not bad for merely omitting to allege the exceptions to the statute and negative their existence, if it avers both marriages and sets forth that the first wife was living when the second marriage took place.

In an information for bigamy the averment of the first marriage is presumed to intend a lawful marriage, which the prosecution must prove; and the averment that the second marriage was felonious is sufficient without also charging it to have been unlawful.

Foreign statutes should, when possible, be proved as provided for in the State laws and the Acts of Congress rather than by the testimony of a lawyer who has practiced within the jurisdiction where they are in force.

A civil marriage performed under a license irregularly issued, and under such circumstances that all concerned must be presumed to know that it gave no authority, cannot furnish ground for a prosecution for bigamy if not based on the voluntary consent of both parties, or followed by cohabitation or some recognition of a marriage entered into in good faith.

Positive evidence of non-assent to a marriage ceremony that had been irregularly performed weighs against the presumption of its validity.

Error to Recorder's Court of Detroit. Submitted January 22. Decided February 11.

INFORMATION FOR BIGAMY. Respondent was convicted.

Charles E. Miller for plaintiff in error. An indictment must allege all facts necessary to a conviction, *State v. Wilson* 2 Mill 135; *State v. Philbrick* 31 Me. 401; *People v. Aro* 6 Cal. 207; *Markle v. State* 3 Ind. 535; *Dillingham v. State* 5 Ohio St. 280; *State v. Henderson* 1 Rich. 179; *Tennessee v. Fields* Mart. & Y. 137; and facts not charged will not be inferred, *Mears v. Com.* 2 Grant's Cases 385; an indictment for bigamy should allege the first marriage to have been lawful, *King v. State* 40 Ga. 244; and that the second was unlawful,

State v. Palmer 18 Vt. 570; where a statute makes an act "willfully and maliciously" done, a crime, it is not enough to allege that it was done "feloniously and maliciously," *State v. Card* 34 N. H. 510; *State v. Delue* 1 Chand. (Wis.) 166; *State v. Roberts* 3 Brev. 139; where a statute creating a crime contains an exception, the indictment must negative it, *Com. v. Maxwell* 2 Pick. 139; *Com. v. Fitchburg Railroad Co.* 10 Allen 189; *State v. Barker* 18 Vt. 195; *State v. Abbey* 29 Vt. 60; all indictments on statutes must state all the circumstances necessary to the definition of the offense therein, *State v. McKenzie* 42 Me. 392; *Com. v. Macuboy* 3 Dana 70; *State v. Stiles* 5 La. Ann. 324; *State v. Porte* 9 id. 106; *State v. Read* 6 id. 227; *State v. Casey* 45 Me. 435; *Ike v. State* 23 Miss. 525; *State v. Gove* 34 N. H. 510; *People v. Allen* 5 Den. 76; *State v. Raines* 3 McCord 533; *State v. Williams* 14 Tex. 98; *Hampton's case* 3 Gratt. 590; *Anthony v. State* 29 Ala. 27.

Attorney General *Otto Kirchner* for the People.

CAMPBELL, J. Respondent Kopke was convicted in the Recorder's court of Detroit of bigamy, the first marriage being alleged to have taken place in Ohio, on the 9th of May, 1879, and the second at Detroit, on the 29th of the same month. Exceptions are alleged on several grounds.

We do not think the information is bad for failure to allege the exceptions to the statute and negative their existence. It avers both marriages, and that the first wife was living when the second marriage took place. It is in the form commonly used and approved by Mr. Archbold. Archb. Cr. Pl. 610. An averment setting out the first marriage must be presumed to intend a lawful marriage, and the prosecution must prove one. We can see no reason for requiring any greater fullness of allegation. As the second marriage is averred to have been felonious, we think it may fairly stand as charged

to have been unlawful. While the word "unlawfully" is generally inserted in conjunction with the term "feloniously," it would be overnice to hold that a felonious act needs any further qualification, or that an information is open to anything but verbal criticism for omitting the double qualification.

The chief complaint of error refers to the rulings of the court below upon the proof of the first marriage. The charge was that if the jury believed the testimony of the witness Edward W. Goddard, and that the statutes of Ohio which had been read to them were the law of Ohio at the time the first marriage was consummated, the marriage was in accordance with the laws of Ohio.

No objection seems to have been made to the proof of the Ohio laws by the testimony of an Ohio lawyer, and no exception is based upon it. While it does not affect the record as now presented, we deem it proper, nevertheless, to suggest that statutes should be proved in a more direct way, and that our laws, as well as the Acts of Congress, make distinct provision on the subject. *People v. Lambert* 5 Mich. 364.

Upon the circumstances of the first marriage there was a conflict of evidence. The defendant in his statement to the jury, which stands like other testimony for their consideration and judgment as to its force, averred circumstances of fraud and duress which would, if believed, have justified a finding against the first marriage, which was not followed by any recognition or acquiescence.

In presenting the case to the jury their attention was directed only to the testimony of the prosecutor's witness Goddard, who acted as justice on the occasion; and the effect of any fraud or other thing tending to negative an intelligent consent was disregarded. Assuming the formalities were apparently followed, the marriage was not necessarily valid.

The case, however, did not show, by Goddard's own testimony, a complete compliance with the laws of Ohio,

as sworn to. One of the conditions preliminary to any jurisdiction in a justice to solemnize marriages, is that the judge of probate, upon such investigation into the facts as satisfies him of its propriety, shall issue and sign a license, and affix the seal of his court to it; and a heavy penalty is imposed where he issues or signs a license without complying with the statutory directions. (Sec. 7 of the law as returned.)

Mr. Goddard's testimony does not touch the facts preceding the appearance of the parties before him. It is undisputed that Miss Marquardt, the person named as first wife, had caused Kopke's arrest before Goddard for bastardy. When brought before Goddard, he says he asked Kopke what he was going to do, and he said he would marry her. Kopke states that he had been told by the constable who arrested him that he would have to marry her or go to the penitentiary. Kopke claims not to understand English, and on his trial in the Recorder's court an interpreter was used. Goddard says that he went up stairs with the man and woman to the office of the judge of probate and a license was made out, and they returned to his office where he performed the marriage ceremony while Kopke was still under arrest. He states that he did not know what the constable said to Kopke, and that Kopke when the ceremony was over, left her and refused to have anything to do with her.

The license does not purport to have been issued or signed by the probate judge himself, but by an officer calling himself deputy clerk. The law as sworn to does not authorize such a signing.

Inasmuch as the justice and parties were all personally cognizant of the facts attending the issuing of the license, none of them can be regarded as having been deceived as to the conditions under which it issued. Both justice and parties were therefore presumed to know it was not such a license as gave him authority to act.

We are not disposed to question the validity of a marriage in Ohio, whether regularly solemnized or not, where

parties have acted upon it in good faith, and have treated each other as married persons subsequently. Such is we think the accepted doctrine in that State. *Carmichael v. State* 12 Ohio St. 553. But we think the rule fairly to be inferred from that case is that where there is no ceremony, or one which does not comply with the statutory conditions, there must be some independent proof of an actual and voluntary consent indicating the existence of a deliberately recognized marriage. By the ancient law there was no presumption of marriage without subsequent cohabitation as husband and wife. The rule laid down by this court in *Hutchins v. Kimmell* 31 Mich. 126, requires very clear evidence of conduct in confirmation of the relation, where not otherwise made out. The presumption from a regular ceremony, unattacked, is very cogent. But inasmuch as consent lies at the bottom of all these presumptions, positive evidence of non-assent is of weight against an irregular ceremony, and should be considered by the jury.

As the record stands, we think the court was not authorized to say the marriage was made out as effectually as the jury must have been led to believe from the charge. For this error a new trial should be granted.

The other Justices concurred.

JOSEPH NIMS v. ELI B. SHERMAN.

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Title to realty not transferable by estoppel based on oral statements.

A purchaser under a defective foreclosure is only in the position of a mortgagee, and can only recover possession by new foreclosure proceedings.

A sale of lands is void if not made in writing; and the purchaser, after making part-payment, can refuse to carry out the contract, and recover back what he has paid.

If a verbal sale of a mortgage interest in lands is to be considered a sale of chattels, and the purchaser, after paying part of the price refuses to carry out the bargain, it can be enforced only by a suit for the remainder or by foreclosure, allowing what has been paid.

A tenant in fact cannot dispute the title under which he obtained possession, even though he has since acquired a better title; but when he has surrendered the possession obtained by tenancy he may then try titles. These principles do not apply to cases where the party in possession did not enter under the other and has never made himself the other's tenant in fact.

The principle by which a mortgagee who has misled a purchaser into believing that the mortgage is no longer a lien is estopped from claiming under it, applies to personal property, since mortgages in Michigan are chattel interests and may be transferred, paid or extinguished without writing.

The doctrine of estoppel by actions, oral statements or silence can never pass a title which under the statutes can only be transferred by deed.

S bought land from W who claimed it under a defective foreclosure, and after consulting N who was in possession. N did not tell S that he owned the equity of redemption or that he held other than as a tenant of W, and on the other hand gave N to understand that he would give up possession without foreclosure. *Held* that although S purchased on this understanding N was not estopped from afterwards insisting on his legal title.

Error to Ingham. Submitted January 22. Decided February 11.

EJECTMENT. Defendant brings error.

Henry A. Shaw for plaintiff in error.

H. P. Henderson for defendant in error.

COOLEY, J. This was a special proceeding before a circuit court commissioner to recover possession of lands. It was appealed to and tried in the circuit court where Sherman, who was complainant, recovered judgment. It is now brought to this court by writ of error on exceptions.

Sherman derives his title by deed from one Wheaton bearing date June 17, 1878. At this date Nims was in

possession, and had been in possession, for a year and a half or thereabouts. It was shown on the trial and was not disputed, that Wheaton's title was derived through the foreclosure of a mortgage in chancery, which was ineffectual for the reason that the legal title to the land when the foreclosure suit was instituted was in one Graves, who was not made a party to the suit. Graves deeded to Nims in November, 1876, and Nims went into possession under his deed.

Wheaton testified on the trial that before taking the deed from Graves, Nims came to him and had a talk about buying the land; that the foreclosure was not then complete; that Nims then said he was proposing to buy of Graves, but Wheaton advised him it was not worth while, as the Graves title would be extinguished by the foreclosure; that Nims afterwards told him he had bought out Graves, and wanted to get the land, and that an agreement was finally made between them that Nims might have the land on paying the amount of the mortgage in foreclosure and another mortgage which Wheaton expected to take up, and the further sum of $200. The arrangement was oral, and Nims paid $200 upon it. Afterwards when Sherman proposed to buy the land Wheaton went to Nims and enquired of him if he wanted to keep it, and Nims replied that he did not think he could pay for it. Wheaton says Nims then told him he would give up the land on being repaid the $200, but Wheaton replied that he did not think he could get that back for him, but would if he could after realizing the amount of the two mortgages, and would pay him what he could get above the amount of those mortgages. He further says Nims then told him to go on and sell the land. Nims, on the other hand, testifies in substance that he agreed to give up the land on being repaid the $200 and not otherwise.

The principal question in the case arises on what is testified to by Sherman as having taken place between himself and Nims before his purchase from Wheaton.

He says in substance that he called upon Nims to inquire what right he claimed in the land, and that Nims made no claim under the Graves deed or in any way adverse to Wheaton. He told Nims that Wheaton had informed him that Nims would leave the land as soon as he harvested his wheat, and Nims replied that that was correct and he would do so. But after the trade with Wheaton had been perfected, and after the wheat harvest when he called on Nims again, the latter refused to leave. Nims on the other hand denies that he had any interview with Sherman until after he heard that the latter had bought, or that he ever agreed to leave on other terms than the repayment of what he had paid to Wheaton. When Sherman found Nims would not surrender possession, he caused the statutory notice provided in the case of tenants at will to be served upon him, and when this notice was not regarded, the present proceeding was instituted, and has resulted in a judgment that Sherman recover possession.

The question the record presents arises upon the charge of the court, and as the charge states concisely the facts on which the legal instructions are based, it is proper to give it in full. It is as follows:

"This case is an appeal from the circuit court commissioner, and the proceedings were commenced by Mr. Sherman against Mr. Nims for the purpose of recovering possession of certain land. The plaintiff claims, you remember, under Wheaton by a deed dated June 7th, '77, and the defendant at that time was in possession. Wheaton became the purchaser under the foreclosure proceedings which have been given in evidence; but these foreclosure proceedings were ineffectual to cut off the title or right which was at that time held by Graves. Graves was not a party to the foreclosure proceedings, and they were ineffectual for that reason to transform the mortgage which was sought to be foreclosed into a deed absolute. As to him it was still a mortgage, and he still had a right to redeem; and it is enough to say as to Wheaton, I discover nothing in the case to prevent Graves from relying upon his deed which he had at the time of the foreclosure proceedings. In other words, there is nothing in the case tending to estop him from assert-

ing his title as against Wheaton; but you remember Wheaton afterwards sold to Sherman, and Graves conveyed to the defendant Nims, and the question to be determined is whether Nims was a tenant at will or at sufferance of Sherman; or whether he has a right to hold adversely to him. The statute under which the proceedings were commenced provides, among other things, that whenever any tenant at will or sufferance shall hold over after the determination of his estate by notice to quit, as provided by law, these proceedings to recover possession may be had. So in order to recover possession as against Nims, the plaintiff must show that he is either a tenant at will or by sufferance, otherwise he cannot maintain the proceedings.

"If the defendant is not a tenant, but is holding adversely to him, then these proceedings of course cannot be maintained; so that the only difficulty about the case is to determine whether Nims does or has a right to hold adversely to Sherman, or whether he must be regarded as his tenant, and this must depend upon whether as to Sherman he is estopped for any reason from relying upon his deed,—from holding against Sherman upon the strength of his deed from Graves. Now there is such a principle in law as estoppel. It is based upon the obligation of every one to speak the truth when others are expected to act upon what they are saying, and upon the policy of the law to prevent the great mischief resulting from uncertainty, confusion and want of confidence in the intercourse of men, if they were permitted to deny that which they have deliberately and solemnly asserted or received as true.

"Now, if when Sherman was about to purchase the land of Wheaton, Nims was in possession and he was called upon by Sherman, or was seen by Sherman, and his purchase was explained so that he understood Sherman was about to purchase of Wheaton, and was asked what his right or interest in the land was, and he disclaimed any right under the deed, or withheld any information that he relied upon the deed, or stated that he was holding under Wheaton, then he would be estopped from now asserting his title under the deed from Graves; and this would be so, I state, upon the authority of the case of *Cook v. Finkler* 9 Mich. 131, although the statement was made with the impression or understanding on the part of Nims that his right under his deed from Graves had been cut off by the foreclosure proceeding. If he was laboring under that misapprehension that his right was cut off by the foreclosure proceeding, and said nothing about his deed on that account, or stated that he held under Wheaton because he supposed that

his right under the deed was cut off, when it was not, the effect of it would be same, and the principles upon which he would be estopped would be the same as if he knew what he said was untrue. Now then the question of fact for you to determine, and the only one indeed in the case, is whether before Sherman's purchase he had an interview with Nims in which he either disclaimed any title under the deed or remained silent in respect to it, claiming his whole source of right was from Wheaton. If he did, then he would be estopped and might be deemed a tenant at will or at sufferance of Sherman; so too, if he said that he would leave after harvest and saying nothing about his deed from Graves; but if on the other hand you should believe that this conversation took place after the purchase of Sherman,—after the conclusion of his purchase,—why anything that he might have said, no matter what it was, would not estop him. I think you do not misapprehend the precise question of fact you are to determine; and of course this is to be determined upon what you believe to be the fair preponderance of evidence one way or the other."

In finding a verdict for the complainant under this instruction the jury must have found that Sherman called upon Nims before his purchase; that Nims did not disclose to Sherman the fact that he owned the equity of redemption, and that he promised to surrender possession without insisting upon any repayment of the sum he had paid to Wheaton. Under these circumstances the circuit judge was of opinion that Nims was estopped from claiming otherwise than as tenant at will, or at sufferance under Sherman. It will be observed from the facts given that Nims was never tenant of any sort to Wheaton. On the contrary he was owner of the legal title, and Wheaton, as purchaser under the defective foreclosure, was in the position of mortgagee only. *Gilbert v. Cooley* Wal. Ch. 494. Wheaton could therefore only recover possession from Nims by new proceedings in foreclosure. But Wheaton had verbally sold his mortgage interests to Nims, and had received upon the sale $200, and he had such rights against Nims as this sale would give him. If the sale were to be regarded as a sale of lands, it would be void because not in writing (*Scott v. Bush* 26 Mich. 418), and Nims might have refused

to perform on his part and recovered back the sum he had paid (*Scott v. Bush* 29 Mich. 523). But assuming it to be a sale of chattels merely, with a part-payment of the purchase price, Wheaton could enforce it only by suing Nims for the remainder of the purchase money, or by foreclosure, allowing in that case what Nims had paid. There had never been any understanding, oral or otherwise, betweem Nims and Wheaton, that the latter should receive from the former a conveyance of his legal estate.

When therefore Sherman went to see Nims previous to buying of Wheaton—if he did so, as he says—Nims owned the land subject to two mortgages, which he had bargained to purchase, but found himself unable to pay for. Under these circumstances he had orally agreed to give up possession to Wheaton or to a purchaser from him, but whether without conditions or upon conditions is in dispute. Concede, as the jury must have found, that it was without conditions, and we have only the case of the owner of the legal title agreeing orally to yield up possession to the mortgagee or to his grantee, without awaiting a foreclosure. It is not claimed that such an agreement could have any legal force whatsoever.

Can the agreement receive legal vitality from the fact that Nims repeated it to Sherman without informing Sherman that he held any interest in the land otherwise than under Sherman? The circuit judge seems to have been of opinion that under such circumstances Sherman was justified in supposing Nims was merely a tenant of Wheaton, who could not dispute his landlord's title. One who is a tenant in fact, it is justly held, shall not dispute the title under which he has obtained possesion, even though he has since acquired a better title (*Falkner v. Beers* 2 Doug. (Mich.) 117; *Ryerson v. Eldred* 18 Mich. 12); but when he has surrendered the possession obtained by means of the tenancy, he may at once turn about and try titles with his late landlord. Now this principle has no application to a case in which the party in possession did not enter under the other, and has

never made himself the other's tenant in fact; as it is clear Nims had not in this case. Moreover, if the estoppel is valid to prevent Nims retaining possession as against Sherman, it must be valid to prevent his afterwards setting up his title against that of Sherman; for if Sherman has any equity whatever it is one that must operate to the complete protection of his title. Thus the estoppel in the case must go quite beyond that which precludes the tenant from disputing the tenancy, since that is temporary only. It must be an estoppel that in legal effect will absolutely preclude Nims from setting up at any time the legal title which he confessedly owns; and give to Sherman the benefit of a transfer of it.

In *Cook v. Finkler* 9 Mich. 131, a mortgagee was held estopped from claiming under his mortgage when he had by his statements induced a purchaser to believe that the mortgage was no longer a lien on the land. As mortgages are chattel interests in this State, and may be transferred without writing (*Cooper v. Ulmann* Wal. Ch. 251; *Martin v. McReynolds* 6 Mich. 70), and moreover may be paid and extinguished without making use of any writing, we need say of the case of *Cook v. Finkler* only this, that it must stand on the principles of estoppel that are applied in the case of personal property. But in *Hayes v. Livingston* 34 Mich. 384, pains were taken to show that the doctrine of estoppel by actions, oral statements or silence, could never have the effect to pass a title which the statute expressly declares shall be transferred by deed only. The facts of that case were very similar to those in question here, and we have no occasion to qualify or change anything which was there said. This case affords a good illustration of the wisdom of the statute, and of the principle it establishes. The jury found the estoppel on very unsatisfactory evidence, for even on Sherman's testimony there is much reason for believing that Nims expected what he had paid would be returned to him before he gave possession. It is true his interest was small, but this does not affect the ap-

plication of the principle. A valuable farm may as easily be taken on such doubtful testimony as may the most insignificant interest. But it suffices to say here that the statute establishes the principle, and even hard cases cannot override it.

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

The other Justices concurred.

Daniel W. Perkins and Thomas Sumner v. Philip Keller and Anthony Ancel.

Statutory foreclosure—Filing sheriff's deed—Change in name of paper pending publication of foreclosure notice.

The neglect to file the sheriff's deed on statutory foreclosure within twenty days after the sale does not of itself invalidate the foreclosure, but extends the time for redemption by the period of the delay.

A change in the place of publication does not destroy the identity of the publication.

A change of name does not necessarily destroy identity so long as that to which the name pertains remains the same.

A statutory foreclosure is not invalidated by a change in the name of the newspaper in which the foreclosure advertisement is published, and by the removal of the publication office to another place in the same county, if the paper otherwise preserved its identity.

Case made from Bay. Submitted January 22. Decided February 11.

Ejectment. Plaintiffs recovered below.

D. W. Perkins for plaintiffs.

Hatch & Cooley for defendants. Identity of name does not determine the identity of the newspaper to which it pertains. *Scammon v. Chicago* 40 Ill. 146.

CAMPBELL, J. The defendants Keller and Ancel bring up this cause on case made, alleging errors which they claim prejudiced them in the court below.

Perkins and Sumner sued in ejectment, and defendants set up title under a mortgage foreclosure by advertisement. This was objected to as irregular on two grounds: *first*, that the deed on foreclosure was not filed in the register's office until twenty days after sale; and *second*, that the publication of notice was imperfect.

Upon the first point we think the objection is not well taken. We have held in *Lilly v. Gibbs* 39 Mich. 394, that the time of redemption in such a case does not begin to run until the deed is filed. In *Doyle v. Howard* 16 Mich. 261 and *Grover v. Fox* 36 Mich. 461 the delay was such as to destroy all the purposes of the statute. But it was suggested in the case of *Doyle v. Howard* that a brief delay, while it might subject the sheriff to a mandamus requiring him to perform his duty, ought not to entirely destroy the foreclosure. It does not seem to us reasonable to regard the delay of twenty days as of itself enough to subject the purchaser to any other loss than the extension of the right of redemption for that period.

The other question is more serious and is not without difficulty.

The statute under which the foreclosure was had requires notice to be published for twelve successive weeks, at least once in each week, "in a newspaper printed in the county where the premises included in the mortgage and intended to be sold, or some part of them, are situated, if there be one; and if no newspaper be printed in such county, then such notice shall be published in a paper published nearest thereto." Comp. L., § 6914.

By section 6917 any postponement is required to be published "in the newspaper in which the original advertisement was published," etc. And by section 6926 the affidavit of publication of notice is to be made "by the printer of the newspaper in which the same was

inserted, or by some person in his employ knowing the facts."

The notice of foreclosure in the present case was published long enough, but a change was made during the publication which was held by the court below to have destroyed its legal continuity. It was begun in a newspaper published at Wenona, opposite Bay City, called the Wenona *Herald*. Before it had been published twelve weeks the proprietors of the paper removed their establishment across the river to Bay City, and changed the name of the paper to the Bay City *Herald*. There was no other change made, and the Bay City *Herald* was kept up on the same forms and with the same material, and on the same subscription list, with no more difference in subscribers than arises from the occasional dropping of one and accession of another. No change was adopted in the make-up of the paper except in the change of heading. The notices which had been set up in Wenona were continued from the same type and forms, which were not broken up or distributed.

Inasmuch as there has been no change in the county of publication, it is not claimed that either paper (supposing them to be distinct) would not have been competent to publish a lawful notice. It is not claimed, on the other hand, that the statute will permit a publication to be begun in one paper and finished in another. The only question, therefore, is whether the Bay City *Herald* is the same paper as the Wenona *Herald*. And the inquiry is narrowed down to whether change of place and change of name destroy legal identity.

Change of place certainly does not. The same newspaper or magazine is often published at different times in different towns or cities, and in different places in the same city. Some of the leading reviews both in Great Britain and America have been published at different times in cities remote from each other and in different states and countries. No doubt such changes might be such as to destroy their competency to publish

some legal notices, but no one ever supposed they were not in the general understanding, continuous enterprises. The good will of such publications is sometimes their most valuable property, and the chief value of that has consisted in the reputation derived not from locality but from management. Changes of ownership even do not always make any serious difference in the popularly recognized identity any more than in corporations. It is not easy to define in words precisely what makes the identity of the Edinburgh *Review*, or of one of our American monthlies, but very few subscribers or readers are curious to know the locality of the printing or publication office.

In *Hinchman v. Barns* 21 Mich. 556, where it was insisted a special partnership had not been legally formed because the newspapers in which notices were published had their offices in a different ward and senatorial district from the place of partnership business (the latter being in the second senatorial district and the newspapers being published in the first) it was held by this court that inasmuch as both the business of the firm and the newspaper offices were within the city of Detroit, the notices were good, and the whole city might be treated as the place of publication. It was there intimated, though not decided, that when the Legislature refers to a town, city or county as the place of publication, it does not forbid a change of place, or require publication in any particular place within any of those precincts. And reference was made to changes of location from fire or accident or other cause as not changing the rights or identity of the concern. It would be unreasonable and it could do no one any good to allow accidents or removals of business stands to destroy substantial rights. It is not desirable to render mortgage sales precarious beyond the necessary requirements of the statutes. If this paper had been called the Bay County *Herald*, it can hardly be seriously claimed that a removal of its office a few rods, from Wenona into Bay City, would have been more injurious than its removal

from one part of Bay City to another, or would have raised any suspicion of change of identity.

It seems to us that a change of name does not necessarily produce any destruction of identity, so long as there is no change in the enterprise itself. The name of a paper has the same significance as the name of a man or of a corporation. It is in each of those cases the primary legal means of identification. But men may have their names changed without prejudice to their rights or responsibilities, and so may corporations both public and private. The seat of government of this State and several of its cities and counties, as well as towns, have been changed in name and in boundaries, with no loss or change of individuality. If any difficulty is caused in determining such identity, it is a question of fact to be settled by proof. It certainly was possible in removing to Bay City, to create a substantially new journal, but we think it was equally possible to continue the old one. Had the place of publication been continued at Wenona, some change of name would have been likely, if not necessary, when Wenona ceased to be called Wenona, and became West Bay City. The continuation of the old name might have become a practical misnomer.

We think when the notice is shown to have been published continuously in the same county, by the same business firm, in the same printing establishment, from the same type and forms, and in a paper which is intended to be the same, and having the same readers, the *Herald* which was called the Wenona, and is now called the Bay City *Herald*, merely from its transfer of locality in the same vicinage, may properly be regarded as the same paper throughout. Since the argument our attention has been called to *Sage v. Central R. R. Co.* 99 U. S. 334, holding the same views.

The court below erred in ruling otherwise, and the judgment must be reversed with costs and a new trial granted.

The other Justices concurred.

43	58
68	297
43	58
108	471
43	58
112	551
43	58
120	409

MICHAEL O'ROURKE v. ALEXANDER O'ROURKE.

Sunday note—Credibility of witnesses.

A note made on Sunday is not void at common law, and in a suit on a foreign note any foreign statute invalidating it must be proved.

Rulings upon a point that has no legal foundation and is immaterial to the case do not furnish any ground of complaint to a plaintiff in error who relies on it.

An instruction that if the jury find that a party has willfully sworn falsely as to a material fact, and they should be of opinion that such willful false swearing rendered him incredible in the whole, they would have a right to disregard his entire testimony, is not erroneous.

Error to Van Buren. Submitted January 22. Decided February 11.

ASSUMPSIT. Defendant brings error.

Richards & Mills for plaintiff in error. A charge that a jury has a right to disbelieve the whole of a party's testimony if he has willfully sworn falsely in one particular, should be qualified by excepting the case of corroborative evidence, *Crabtree v. Hagenbaugh* 25 Ill. 240; *Pope v. Dodson* 58 Ill. 361; *U. S. Exp. Co. v. Hutchins* id. 44; *Meixsell v. Williamson* 35 Ill. 530; *C. & A. R. R. v. Buttolfe* 66 Ill. 347; 1 Whart. Ev. § 412.

J. G. Parkhurst and *Spafford Tryon* for defendant in error. A note made on Sunday is not invalid at common law or by the law of New York, *Adams v. Hamell* 2 Doug. (Mich.) 73; the credibility of a witness who has sworn falsely to one particular is for the jury to determine, *Emlaw v. Emlaw* 20 Mich. 11; *Fisher v. People* 20 Mich. 135; *Hamilton v. People* 29 Mich. 188.

GRAVES, J. The defendant in error sued upon the common and money counts, and appended to the decla-

ration pursuant to the statute a copy of a note reading as follows:

"ROCHESTER, N. Y., Oct. 16, 1864.

On the 16th day of October, 1877, for value received, I promise to pay to Alexander O'Rourke, or bearer, the sum of fourteen hundred dollars, with interest at seven per cent. This is army money and other money that he has. This note is stamped according to law.

MICHAEL O'ROURKE."

The plaintiff in error pleaded the general issue, and filed an affidavit in which he questioned the execution of the note. The jury gave their verdict for the defendant in error, and assessed his damages at $1264.13.

The substantial defense was twofold: *First*, that the note was not executed by plaintiff in error; and *second*, that it was made in the State of New York on Sunday, and was hence invalid.

In regard to the first question the evidence was contradictory. And as going to support the denial of execution and as tending to explain the dealings of the parties, the defense adduced evidence that in 1865 the parties went into partnership in Allegan, and that plaintiff in error on that occasion applied the funds of defendant in error in his hands to make up the latter's share of capital, and that they dissolved in 1868, at which time the plaintiff in error gave his note and mortgage for the entire sum receivable by defendant in error. The latter conceded in effect that the note was given in New York on Sunday, and he admitted the going into partnership, and that plaintiff in error put in for him out of the fund represented by the note the sum of $800, and that he received in 1868 the note and mortgage of plaintiff in error for that portion of the original demand. But he denied that the residue represented by the note in suit, had been paid or accounted for.

Whether the note was caused to be invalid on account of being made on Sunday depended on the statutes of New York. It was not void by the common law. *Mackalley's Case* 9 Co. 66*b*: Cro. Jac. 280; *Waite v. Hundred*

of Stoke Cro. Jac. 496; *The King v. Brotherton* 1 Strange 702; *Swann v. Broome* 3 Burr. 1595 1597; *Drury v. De Fontaine* 1 Taunton 131; *The King v. Whitnash* 7 B. & C. 596; *Begbie v. Levi* 1 Tyrw. 130: 1 Cr. & J. 180; *Story v. Elliot* 8 Cow. 27; *Batsford v. Every* 44 Barb. 618; *Geer v. Putnam* 10 Mass. 312; *Johnson v. Day* 17 Pick. 106; *Kepner v. Keefer* 6 Watts 231; *Fox v. Mensch* 3 W. & S. 444; *Adams v. Gay* 19 Vt. 365; *Bloom v. Richards* 2 Ohio St. 387; *Davis v. Barger* 57 Ind. 54; *Tucker v. West* 29 Ark. 386. If any laws existed in New York to impair the contract they should have been proved. *Kermott v. Ayer* 11 Mich. 181; *Ellis v. Maxson* 19 Mich. 186; *Wheeler v. Constantine* 39 Mich. 62. We cannot assume that other States have legislated as we have in regard to the observance of Sunday or the first day of the week, and the record is silent relative to the course or state of legislation in New York. If we were disposed to speculate on the subject, we should not infer that the note would be void there. *Smith v. Wilcox* 24 N. Y. 353; *Merritt v. Earle* 29 N. Y. 115; *Eberle v. Mehrbach* 55 N. Y. 682. The whole contention, therefore, arising out of the circumstance that the note was made in New York on Sunday had no legal foundation and was immaterial, and the various rulings respecting it afford the plaintiff in error no ground of complaint. If any one was prejudiced it was the defendant in error.

On the other chief branch of the case, the question of execution, as the court understands the charge, was fully submitted, and the jury appear to have found that the paper was duly executed.

The secondary question, as to whether the note and mortgage of 1868 covered the whole fund originally going to defendant in error, or merely a part of it, and if a part only, then how much, seems also to have been fully left to the jury; and the result indicates that they sustained the explanation given on the part of defendant in error, and allowed the residue of the note after deducting the note and mortgage of 1868, and then added the inter-

est. We do not see that any tenable objection is raised to the mode in which these matters were submitted, and at the same time we think the charge upon them was fair.

In respect to the subject of credibility, on which a request was made, the judge stated to the jury that if they found the defendant had sworn wilfully false with regard to the execution of the note or any other material fact, and they should be of opinion that such wilfull false swearing rendered the witness incredible in the whole, it would be their right to disregard his entire testimony.

We see no objection to this instruction of which the plaintiff in error can complain. The view explained in *Knowles v. People* 15 Mich. 408, was not disregarded. No rule of law was laid down as to what they might consider and believe and what not. But the duty of the jury to investigate and decide upon the credit and convincing force of the testimony was explicitly declared. Their province was not at all invaded.

We find nothing further in the record worthy of comment, and as no prejudicial error is made out by the complaining party, the judgment should be affirmed with costs.

The other Justices concurred

CARL EHLERT v. HENRY F. KLENGER.

Abandoning contract—Provocation—Questions of fact.

A man made an agreement with his son-in-law whereby the latter was to take care of him if he would pay over all the wages he earned. He afterwards abandoned his son-in-law's house on account of personal violence, and sued him for breach of the agreement, claiming repayment of the money he had already paid him, except a sum which he credited for his board. *Held* that the case should have gone to the jury on the extent of the

provocation for abandoning the arrangement; or, if there was no contract, on the amount of counter-claim to which defendant would be entitled for plaintiff's board.

Error to Wayne. Submitted Jan. 22. Decided Feb. 11.

ASSUMPSIT. Plaintiff brings error.

Charles E. Miller and *Edwin F. Conely* for plaintiff in error. One who agrees to pay his earnings to another in return for his maintenance can rescind the agreement for non-performance of any important condition, Bish. Cont. 667-681; 2 Pars. Cont. 679; 2 Chitty Cont. 920; *Hill v. Rewee* 11 Met. 268; *Brown v. Harris* 2 Gray 359.

Otto Kirchner for defendant in error.

CAMPBELL, J. Ehlert, who is father-in-law of Klenger, sued Klenger for the breach of an agreement whereby, in consideration that plaintiff would go to work at his trade and work while his health would permit and pay over all his wages to defendant, the latter would provide him a home, and board, clothe and maintain him. The contract was averred to have been made on the 1st day of April, 1876, and the breach alleged was on the 12th day of May, 1879, when it was claimed Klenger ill-treated plaintiff, and refused to do further as he had agreed.

The declaration contained, besides a special count, the common counts, and the bill of particulars set out money paid to Klenger, amounting as claimed, to $845.05, on which plaintiff credited board to the amount of $450.

The court below directed the jury to give a verdict for the defendant. Plaintiff brings error.

The evidence showed a contract substantially as set out, and we do not think the record bears out the objection that no agreement was made except with Klenger's wife. There was evidence showing repeated recognitions by defendant of the understanding as binding on him-

self. And although the money was paid into the hands of Mrs. Klenger, yet it also was sworn that it was done with the concurrence of Klenger, she being treated as custodian of all the family funds.

The plaintiff left the house on account of personal violence. He testified to having been roughly handled on the evening of the 11th of May, 1879, when both he and defendant were more or less intoxicated, and that the latter made threats that he would break every bone in his body. Similar language was used as sworn to by another witness, that if it were not on account of his wife he would break every bone in the old man's body.

Whatever view the court may have taken of the extent of the provocation, we think it was a question for the jury. There is a great want of probability in the idea that the old man would have left as he did unless he at least thought he had sufficient cause; and there being no evidence of any *bona fide* attempt by his son-in-law or daughter to induce him to return, the jury might very properly have drawn the inference that the cause was not imaginary. Considering the relations of the parties, the case seems to us very far from warranting the conclusion that it was unfounded, or that defendant had any right to retain the whole sum deposited.

If as defendant claims there was no contract at all, then the money belonged to plaintiff, and defendant would have no counter-claim unless possibly for board, which the plaintiff offered to allow in reduction.

We think there was a case to go to the jury on either hypothesis.

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

The other Justices concurred.

43 64
66 470

43 64
97 18

43 64
100 126

43 64
136 166
43 64
148 150

AUGUSTA TIEDKE v. THE CITY OF SAGINAW.

Separate offenses not chargeable in the same warrant.

Separate and distinct offenses, committed on different days, cannot be alleged in the same complaint and warrant. They may be charged in different counts of an information, but the prosecutor must elect on which count he will proceed.

Certiorari to the Recorder's Court of the City of Saginaw. Submitted January 22. Decided February 11.

Albert Trask for plaintiff in certiorari.

William A. Clark for defendant in certiorari, as to the joinder of distinct offenses, cited Arch. Cr. Pl. 158; 1 Chitty Pl. 201; 1 Chitty Cr. L. 253; Rosc. Cr. Ev. 232; *People v. McKinney* 10 Mich. 95; if an election between counts is not required, the decision is final, *Final v. Backus* 18 Mich. 223; *Detroit v. Jackson* 1 Doug. (Mich.) 110.

MARSTON, C. J. The plaintiff in certiorari was arrested, tried and found guilty of disorderly conduct in violation of an ordinance of the city.

The case as presented on behalf of the city seems to have been one of those convenient prosecutions which for certain purposes are deemed civil, for others criminal, and where necessary partake of the character of both.

Two separate and entirely distinct offenses, committed on separate days, were alleged in the same complaint and warrant. This was erroneous.

Separate and distinct offenses may be charged in different counts, and the prosecution may be called upon to elect upon which count he will proceed. If separate offenses could be charged in the same count, so soon as the prosecutor should introduce evidence tending to sustain either one, he would be bound thereby, and could not introduce evidence to support the other.

The course pursued in this case would prove exceedingly embarrassing on the trial. Upon the trial of either offense standing alone, the accused could prepare for trial, and the court or the jury might acquit, or be unable to agree upon a conviction; while if two or more distinct offenses are charged in the same count, the accused would have no means of knowing upon which charge the prosecutor would rely, and the jury might agree upon a verdict of guilty, while unable to agree upon any one of the charges. Other difficulties might be referred to if necessary. *People v. Jenness* 5 Mich. 327; *People v. McKinney* 10 Mich. 94; *Hamilton v. People* 29 Mich. 178.

The judgment of the Recorder must be reversed and held for naught.

The other Justices concurred.

JOHN DOWNEY v. FRANK D. ANDRUS, ADMINISTRATOR.

Finding—Delivery of money is evidence of payment—Exclusion of testimony that could be disputed only by deceased party.

A finding of facts is not merely a narration of evidence, but must determine what is proved.

Payment or delivery of money from one person to another is not of itself evidence of a loan, but rather of the payment of a debt.

The rule that a surviving party may not testify to facts known only to himself and the decedent applies to a case where it is sought to introduce such testimony to supplement that of other persons insufficient in itself to establish a case.

Error to Wayne. Submitted Jan. 23. Decided Feb. 11.

APPEAL from allowance by commissioners in probate. Claimant brings error.

Charles E. Miller and *H. A. Chaney* for plaintiff in error.

Maybury & Conely for defendant in error, as to the exclusion of testimony known equally to a deceased party and to one else, cited most of the cases reviewed in the opinion by the court.

GRAVES, J. The plaintiff in error filed a claim against the estate of his mother, Mrs. Downey, for $138, money lent to decedent. The commissioners allowed $100, and the administrator appealed. In the circuit court the case was referred, and the referee reported in favor of the estate and the claimant brought error.

No exceptions were taken to the finding of the referee and no question rests upon it. The only fact ascertained and reported is contained in the general conclusion. What precedes is a mere narration of evidence, and not determinations of the facts proved. *Trudo v. Anderson* 10 Mich. 357; *Thomas v. Sprague* 12 Mich. 120; *Danaher v. Ward's Estate* 40 Mich. 300; *Yelverton v. Steele* id. 538.

The point raised relates to a ruling by the referee excluding certain evidence, and it comes up on a bill of exceptions by him, settled pursuant to the statute. To support his claim the plaintiff in error called Mrs. Armstrong, who testified that she had seen decedent, but was not particularly acquainted with her, but was well acquainted with the claimant, who was her husband's friend; that she had known him about seven years; that some six or seven years ago, and prior to her marriage with Mr. Armstrong, that gentleman, herself and her little girl were accustomed to take long walks together, and on one of those occasions they visited claimant's house; that she could not fix the date precisely, but recollected it was in the spring, and that there was snow on the ground; that claimant then gave decedent some money; that the two were talking about some shingling and the doing of some other work on the place. Claimant said to decedent that would be a hundred dollars, and that would about settle the matter, he supposed; that in the conversation there was something

said about a barn and a fence, and some other little building; that no one else was present except the persons above named, and that Mr. Armstrong had since died; that on the occasion referred to she saw money pass, but could not tell how much there was, until subsequently informed by the claimant that the sum was one hundred dollars; that her best recollection was that claimant said, when he handed the money to decedent, that there was a hundred dollars.

The daughter referred to by the last witness was then called by the claimant. She was about nine or ten years of age at the time of the occurrence in question, and she swore she never saw decedent at any other time; that she heard some talk between claimant and decedent not exactly remembered; that decedent asked for some money and claimant gave it; that she, the witness, paid little attention, and could remember nothing further.

The claimant proved by another witness some remarks of decedent at other times, but it is not necessary to notice them. The foregoing testimony of Mrs. Armstrong and her daughter is a sufficient preliminary for the exposition of the question. There is nothing further from any one, aside from the surviving actor, to shed light upon the transaction between the claimant and decedent on the occasion described by Mrs. Armstrong, or to explain or define its true character.

The others having been examined, the claimant took the stand, and after testifying that he was decedent's son and was present at the conversation testified about by Mrs. Armstrong and her daughter, was then asked by his counsel to state what occurred on that occasion.

This was objected to as within the prohibition of the statute (Comp. L. § 5968, as amended in 1875; Pub. Acts 1875 p. 184), in regard to the right of surviving parties to testify in certain cases.

Claimant's counsel explained by saying that it was proposed to show by the claimant, as a witness in his own behalf, that on the occasion described by Mrs. Arm-

strong and her daughter he lent to decedent the one hundred dollars sought to be recovered in this case. The referee sustained the objection and excluded the offered testimony, and this ruling presents the only question in the record.

In opposition to the referee's decision it is urged that the purpose of the statute is to prevent a claimant from testifying in cases where, if he could be contradicted at all, he could be so only by the decedent, if living; and that where it appears there were others present at the transaction who might contradict the claimant, in case of his testifying falsely, the statute is not applicable, and *Wright v. Wilson* 17 Mich. 201, is cited.

It is then contended that when the claimant was offered as a witness, an assumpsit from decedent to claimant, or in other words a loan of $100 had been fully proved by Mrs. Armstrong and her daughter, as having taken place in their presence, and hence that there was no room for saying that it was necessary to exclude the claimant in order to keep him from gaining the unequal advantage which it is the purpose of the statute to guard against. There may be ground perhaps for questioning this logic.

The referee heard all the evidence of Mrs. Armstrong and her daughter, and all the evidence offered by the claimant except his own testimony, and the estate submitted no evidence, and on all this evidence for the claimant, including the testimony of Mrs. Armstrong and her daughter, the referee found against the claimant. This finding is upon this record conclusive. How then say that the evidence of this lady and her daughter proved the claim? Upon what theory may the record be so impugned?

Again, if, as contended, those witnesses did fully prove the claim, what need was there for the cumulative testimony of the claimant, the surviving party to the transaction? And how could he have been injured by being denied permission to give further testimony to a fact which was already "*fully*" proved?

The record suggests a deeper meaning for the rejected offer than is actually expressed. There is room for inferring that it was felt that whether the legal construction or necessary conclusion in point of law was to be in favor of the claimant, and to the effect that the transaction amounted to a loan, or whether, on the contrary, such construction or conclusion was to be adverse, depended on whether the description of the transaction should be confined to the vague glimpse given by Mrs. Armstrong and her daughter, or should include matters from the claimant sufficient to make out a case of loan, and which if true, were known to no one except decedent and himself.

If the supposed impression was really entertained, and it was apprehended that the testimony of Mrs. Armstrong and her daughter would not support an inference of law that the claimant on the occasion mentioned loaned one hundred dollars to his mother, it was well based.

Giving to the vague and uncertain statements of these witnesses the most force they will bear in the claimant's favor, and it is impossible to gather from them anything further than that decedent asked claimant for money and that he handed her $100. From such facts the law will not infer a loan. The payment or delivery of money by one to another, without some other circumstance to qualify the meaning of the fact, does not import a loan, but the payment of a debt. *Welch v. Seaborn* 1 Starkie 474; *Cary v. Gerrish* 4 Esp. 9; *Aubert v. Walsh et al.* 4 Taunt. 293; *Egg v. Barnett* 3 Esp. 196; *Boswell v. Smith* 6 Car. & P. 60; *Bogert v. Morse* 1 Comst. 377; *Sweet v. Barney* 24 Barb. 533; *Bowers v. Johnson* 49 N. Y. 432; 1 Greenleaf's Ev. § 38; 1 Cowen & Hill's N. 296;

The case was, therefore, one where the presence of third persons on the occasion of the fact in question, was immaterial. Mrs. Armstrong and her daughter were not cognizant of the vital matters to make out a cause of action, and not in a position to set the case right if

misstated or misinterpreted by the surviving party to the transaction, and who alone could state sufficient to support the claim. The essential facts alleged to have existed were not known to them, and if true, could only have been known to claimant and decedent, and the fact that these third persons were physically present could not put the estate on equal terms with the claimant. For the purpose of the question involved they might as well have been absent, and to have allowed the claimant to testify because of their casual presence, would have given him the same "unequal advantage" the statute was designed to prevent.

On a retrospect, we think the course of decision fully supports the ruling made by the referee, and that the effect of *Wright v. Wilson* supra, and *Chambers v. Hill* 34 Mich. 523, is in particular directly in favor. It may be expedient to take a glance at the several cases.

In *Campau v. Van Dyke* it was decided to be inadmissible for Campau to show, by his own testimony, Van Dyke's assurances to do him justice as a reason for his failure to sue during Van Dyke's lifetime; as such facts, if true, must have been equally within the knowledge of both. 15 Mich. 371 380.

Kimball v. Kimball was the case of a claim by the son against the father's estate. The circuit court held that the statute did not forbid a party from testifying to transactions within the knowledge of the deceased, provided his own knowledge respecting the transaction was superior in degree or extended to particulars the deceased may not have known. This was deemed an incorrect construction, and the view taken was that if the respective parties alike had knowledge of the facts, the survivor could not testify, notwithstanding any difference there might have been in the degree of their knowledge; and it was remarked that it was the design of the regulation that one party should not be allowed to give his version of a transaction within the personal knowledge of both,

when death had precluded the other from being heard. 16 Mich. 211 213 et seq.

Wright v. Wilson supra, was ejectment, and it was held competent for the plaintiff to testify as to defendants' going into possession, and there staying, although one of the defendants was dead, and the facts in question must have been equally within her knowledge. The defendants were husband and wife, the action having been brought in form against both. In speaking of the circumstances which might take a case out of the reason of the statute, though within the words, it was observed that one of the defendants was still living and possessed of the same means of knowledge as the deceased defendant, and that the transaction, instead of being mere conversations between the parties, consisted of personal acts which were open and manifest to everybody. But lest inferences should be drawn of a purpose to abridge the operation of the statute, and give it a construction more narrow than was intended, it was observed further that if the testimony had been directed to a conversation with the deceased alone, or to some fact, the knowledge of which had been confined to the plaintiff and the deceased, the case might be different. That the principal object of the prohibition was to prevent a living party from obtaining an unequal advantage from his own testimony upon matters known only to himself and the deceased, or better known to them than to others, and of which the deceased party can, of course, no longer speak.

In *Moulton v. Mason* the administratrix sued to recover for goods alleged to have been sold by decedent. Proof was given by plaintiff that the parties made an inventory which was recorded in defendant's handwriting, and that shortly before his death decedent got it and had it copied, and told defendant why he wanted it, and there was proof identifying the copy. An offer was made to prove by defendant's testimony that the paper produced by the plaintiff was not a copy of the inventory or of any inventory of goods ever bought by defendant

of the decedent, or of any inventory ever made by him at all, or which he ever assisted in making, and moreover that he never had in his possession any book containing an inventory of which there was a copy. The evidence was excluded as within the prohibition of the statute. It appeared that whilst the essential facts were within the knowledge of decedent and defendant, they were also within the knowledge of others and provable by them, and it did not appear that the copying was done in the presence of either, and the whole controversy was about the correctness of the copying. It was suggested as questionable whether the statute had any reference to written documents intended to supersede evidence resting in memory and capable of perversion. But passing that, it was ruled that the exclusion was erroneous, and that where representatives have the means of proving the existence and contents of a document, and take it on themselves to do so by independent evidence, as in the present instance, the case is not within the mischief of the law and not covered by the provision. 21 Mich. 364.

In *Cook v. Stevenson* 30 Mich. 242, the court sustained the rejection of an offer of the defendant to testify that the contract between himself and decedent, which was oral, differed from that set up in the declaration. It was ascertained that the fact, if true, was known only to the parties.

Wheeler v. Arnold id. 304: There the facts related to what had been done in the absence of decedent and to some matters of value, and of the resulting cost of certain items of transportation of which decedent had no personal knowledge. The statute was held not to apply.

Van Wert v. Chidester 31 Mich. 207: Complainant asked to have his deed declared a mortgage, and the record contained complainant's history of oral transactions with decedent. It was decided that the statute excluded many of them.

Mundy v. Foster id. 313: Complainant swore to an

oral arrangement with his late wife, the devisor of defendants, by which he deeded to her upon her promise to will the property to him at her death. In passing on the case it was observed that if not within the literal terms of the prohibition the showing was within its policy and ought not to be allowed.

Twiss v. George 33 Mich. 253. It was decided here that the prohibition of the statute does not reach controversies with third persons acting in their own right as purchasers during the life of the deceased and not taking by *post mortem* estate.

Chambers v. Hill 34 Mich. 523 was trover by the administrator of the father's estate against the son, and it was held that an alleged conversation between the father and son concerning the title, even if it occurred and was exposed to the hearing of third persons, could not be testified to by the son without violating the statute; and in explanation it was observed that as what was said took place between the father and son, and related to their business, it was reasonable to assume that the facts concerning it were better known to them than they were to others, and that it was reasonable and proper, therefore, as one party was silent in death, that the party claiming adversely to the representative should be equally precluded from giving testimony in his own behalf.

Schratz v. Schratz 35 Mich. 485. This was a claim against an estate. The decedent died in Germany seized of a city lot in Detroit, and the claimant had taken charge of it under a written power. He presented a claim which embraced an item for a tombstone and another for a fence, and the heirs resisted the demand. He was allowed by the court below to testify that he had explained the charges by letter to the decedent in his lifetime and received replies which showed that decedent fully understood what was being done; that no copies of the letters written had been kept, and that the

replies had been lost or destroyed. The evidence was held to be inadmissible by reason of the statute.

Jones v. Beeson 36 Mich. 214. In this case various questions were ruled out by the circuit judge as forbidden by the law in question, when it was plain that part of them at least were wholly outside of the prohibition, and it did not affirmatively appear that any of them were subject to it. The particulars do not require statement.

Harmon v. Dart 37 Mich. 53. The administratrix sued Dart, as survivor of the law firm of "Dart & Wiley," for the proceeds of securities alleged to have been lodged by decedent in his lifetime with the firm. The defense set up that the securities were left under an agreement between decedent and the firm that the latter should have half of the amount they should collect, and should have a further allowance on account of another matter, and that the amount to be paid over had been rendered. Dart was allowed to swear to the arrangement between his firm and decedent, although it must have been known, if made, to no one except the original parties. It was decided that the admission of the testimony was improper.

In *Ward v. Ward* id. 253 the statute was held not to apply to a transaction between the surviving party on the one side and an agent, who is still living, of the other party, since deceased, on the other; and where two third persons were present and the decedent was not.

Lee v. Wisner 38 Mich. 82. Wisner was surety on a bond given by Dillingham as collector, and subsequently Dillingham and Lee gave Wisner their bond to indemnify him. The government recovered against Wisner on the first bond, and Dillingham died. Wisner sued Lee on the second bond for indemnity. This court decided that the statute did not preclude evidence of interviews between Lee and Wisner concerning their respective interests, whether before or after the date of the bond.

Howard v. Patrick 38 Mich. 795. The plaintiff, a daughter of decedent, Joseph Pardee, and administratrix of his estate, sued defendant, a son of decedent, upon

the claim that he had converted cattle belonging to the estate. He contended that at and for some time prior to his father's death he was in partnership with his father in the business of dealing in fat cattle, and that the cattle referred to belonged to the firm. The case decided that by reason of the statute it was not competent for plaintiff to swear to statements made to her by defendant to the effect that he was not a partner, but that it was not objectionable for Mrs. Evans, another daughter of decedent, to testify to acts and declarations of defendant subsequent to decedent's death, showing defendant's conversion of the cattle, inasmuch as she had previously assigned her interest.

Rust v. Bennett 39 Mich. 521. This case decides that in a suit brought on behalf of the estate of a deceased person, to which a private corporation is defendant, a corporator may testify in behalf of the corporation to facts which, if true, were equally within the knowledge of the deceased; that in contemplation of law the corporator is not to be confounded with the corporation.

McKeown v. Harvey 40 Mich. 226 decides nothing of importance on this question.

After this tedious reference it is only necessary to say that the cases demonstrate the correctness of the ruling made by the referee. The excluded offer was, in substance, to make out a case by the claimant's statements of certain facts which were known only by himself and decedent, and the claimant's right to swear to these facts is attempted to be defended on the ground that third persons were present, but who, after all, had no knowledge of these facts, and were not interested in the transaction, or apparently regarded by the immediate parties as persons to whom they were minded to explain the business relations between them as mother and son.

There is no error, and the judgment is affirmed with costs.

The other Justices concurred.

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MAXY C. ALLOR, RELATOR v. THE BOARD OF AUDITORS OF THE COUNTY OF WAYNE.

Construction of statutes—Local self-government—Constables.

The validity of particular provisions in a statute cannot properly be decided unless expressly involved in a case, and are not passed on where the only questions concern other provisions in the law.

Courts cannot lawfully be subjected to executive or ministerial interference in the exercise of their functions, and should not submit to it or receive directions for any purpose except from such other courts as by the Constitution have superintending control over inferior courts.

Judicial power in Michigan can be vested only in courts and judicial officers, and all the judges and judicial officers must be elected directly by the people of the State or of the local districts.

Due process of law for the restraint of personal liberty requires a warrant issued by a court or magistrate upon a proper showing or finding, except in cases of reasonable belief of treason or felony, or breach of the peace committed in the presence of the officer.

Municipal government, under the Constitution of Michigan, must be managed by popular representatives and agencies deriving their authority from the inhabitants, and no municipal business can be controlled by State or other outside authorities.

A statute is to be construed in view of its title and its lawful purposes, assuming as far as possible that broad language should be confined to lawful objects, and inferring no unlawful intent except where too plain to be mistaken.

Justices of the peace in Michigan have constitutional jurisdiction in civil cases, and are necessary magistrates in cities, as well as outside of them; their criminal jurisdiction is given them by the general statutes, but is to some extent contemplated by the Constitution, and in cities can only be restrained by the special municipal criminal jurisdiction.

Municipal courts cannot be authorized to try extra-municipal crimes; and justices of the peace in Detroit have power under the general laws of the State to dispose of all criminal business arising in Wayne county outside of the city.

The power to examine and commit persons charged with crime is not judicial, but is one of the duties of conservators of the peace, and it may be vested in other persons than courts; and those in whom it is vested by the Constitution cannot be deprived of it by legislation.

Officers named in the Constitution are there contemplated as having a known legal character, and though their duties may sometimes be varied by legislation, they cannot be so changed as to destroy the powers of the office or to essentially alter it.

The Metropolitan Police force of Detroit, so far as lawfully constituted, is merely an additional force of constables and watchmen appointed by the State for certain limited purposes. It cannot supersede the local peace officers for all common law purposes.

Constables in Michigan are local peace-officers, ministerial officers of justices of the peace, and bailiffs of courts of record of criminal jurisdiction in the county. Their power to serve process in civil cases was conferred merely because civil powers were conferred on justices.

Constables are the only peace officers elected by the corporation of Detroit, and they can act within the city as well as elsewhere in the county in serving the criminal process issued by justices, and are entitled to compensation for such service. Their powers cannot be superseded by the exclusive authority to serve process within the city conferred by the Police Act upon members of the Metropolitan Police.

Constables have always been peace officers in the arrest of criminals and the prosecution of crimes and disturbances, and have always been chosen by popular vote for the preservation of peace in the territory of their constituents.

MANDAMUS. Submitted Jan. 23. Granted Feb. 11.

Maybury & Conely for relator. Office is the right to exercise a public function or employment, and to take the fees and emoluments belonging to it, both in the case of a salaried office and of those offices that are compensated by fees where the receipt of compensation depends on the exercise of the prerogatives of the office. 2 Bl. Com. 36; 3 Kent's Com. 454; Bouvier's Law Dict. tit. "Office."

The office of *constable* is a most ancient one, and existed at the common law. Of all the offices known to the common law and still preserved, none, save perhaps that of sheriff, has the "grey antiquity" of that of constable. Like many other of the very ancient institutions of the common law, its origin is obscured with the mists of time, but at a very early day in the history of England, prior even to the legal "time immemorial" (A. D.

1189), we find offices possessing at least some of the functions of that of the comparatively short-time-later one of constable; and as early as the reign of King John (A. D. 1215) we find the office of constable, having functions of a bailiff, recognized as a then existing fact. Of the ancient functions and prerogatives of the office of constable, most of which were incident and appertaining to it at the common law, were those of serving and executing various civil and criminal writs, arresting on suspicion, serving and executing criminal warrants issued by justices of the peace, of being the ministerial officer of justices of the peace, of being conservators of the peace, and perhaps some other functions. Before the office of justice of the peace proper was created, which was in the reign of Edward III. (the justices sitting as a court at quarter-sessions before this), constables were the ministerial officers of the inferior and local courts, and executed their writs. Various functions have been from time to time attached to this office, some of a somewhat permanent nature, others more or less temporary, but those above mentioned were the most prominent, and constituted the principal duties of the office of constable. They gave to that office its peculiar characteristics, distinguishing it from other executive or ministerial offices, particularly from that of a mere policeman or patrol. *The function of serving criminal warrants issued by justices of the peace and that of being the ministerial officer of those magistrates*, has from the time the office of justice of the peace was created down to the present day, been a constituent part of the office of constable, and distinguished that office from all other bailiffs. These functions continued to mark that office from at least the reign of Edward III. down through the subsequent history of England to the colonization of America, through the old colonial days to the severance of the relations with the mother country, from that time through the settlement of the Northwest Territory to the erection of Michigan into a State, and through the subsequent his-

tory of the State to the adoption of the Constitution of 1850. They still continue to mark and distinguish the office of constable throughout the entire State of Michigan, except within the limits of the city of Detroit. Among the early allusions to the office of constable, showing the character of that office and some of its powers and functions, are the following from the Magna Charta of King John:

"No sheriff, *constable*, coroner or other our bailiffs shall hold pleas of the crown." "No *constable* or bailiff of ours shall take corn or other chattels of any man, unless he presently give him money for it, or hath respite of payment by the good-will of the seller." "No *constable* shall distrain any knight to give money for castle guard, if he himself will do it in his person, or by another able man, in case he cannot do it through any reasonable cause." "We will not make any justices, *constables*, sheriffs or bailiffs, but of such as know the law of the realm and mean duly to observe it." Creasy on the Eng. Const. pp. 120–147; Lieber's "Civil Liberty and Self-Government" appendix iv. pp. 459–470.

From the foregoing, and notes to chapter xi. of the work of Mr. Creasy, above cited, it will be seen that in addition to the powers of a bailiff and conservator of the peace, and perhaps other powers analogous to those of the later constable, that officer at the time of the Magna Charta, was possessed of the power to levy troops and provisions in the king's name. The Magna Charta was signed by King John, on June 19, A. D. 1215. Edward I. ascended the throne of England about A. D. 1272, and reigned until about 1307. Of this monarch Sir Matthew Hale said:

"It appears that the very scheme, mould and model of the common law, especially in relation to the administration of the common justice between party and party, as it was highly rectified and set in a much better light and order by this king than his predecessors left it to him; so in a very great measure it was continued the same in all succeeding ages to this day; so that the mark or epocha we are to take for the true stating of the law of England, *what it is*, is to be considered, stated and estimated from what it was when this king left it." Hale's Hist. Com. Law 163.

It was during the reign of this king that the Statute of Winchester (13 Edw. I. st. 2 c. 6), the first statute of "hue and cry" was passed. Reeves' Hist. Eng. Law, vol. ii. pp. 121 122 123. This statute recognizes the then and previous existence of the office of constable, and adds to it some powers:

"The Statute of Winchester ordaining every citizen to have armour according to his condition to keep the peace, requires that in every hundred and franchise *two constables* be chosen to make the view of armour twice a year, and that the said constables 'shall present before justices assigned such default as they do see in the country about armour, and of the suits, and of watches and of highways; and also shall present all such as do lodge strangers in uplandish towns for whom they will not answer.' These are the officers known as *high* constables, who are especially charged with the peace of the hundred just as the *petty* constables are charged with the peace of the parish or township." Enc. Britt. title "Constable;" 1 Bl. Com. 411.

In the reign of Edward III., which began about 1327, some additional legislation was had concerning constables.

"The Statute of Winchester, passed in the reign of Edward I., and all laws for the ordering of the police may be treated as ordinances calculated for the better discovery and bringing to justice of suspected persons, that being one of their great objects. It had been ordained by the Statute of Winchester that any stranger passing the country in the night might, upon suspicion, be arrested and delivered to the sheriff. It was now ordained that because many felonies had lately been committed by persons called *roberdesmen, waisters and draw-latches,* any person suspected of being such might be arrested by day or by night by the *constable* of the town (if within a franchise, by the bailiff), and delivered to the sheriff to be kept in prison till the coming of the justices of gaol delivery." Reeves' Hist. Eng. Law vol. ii. p. 322.

Prior to the reign of Edward III. it would seem that the justices of the peace sat for the trial of causes at quarter sessions, but in that reign they were given power to sit alone for the trial of certain offenses, and from that day to the present time they have possessed the

power to sit alone for the trial of causes, the jurisdiction varying somewhat from time to time, though in the main increasing in kind and magnitude. Reeves' Hist. Eng. Law vol. ii. p. 284 et seq. From this time certainly constables have executed the criminal process of justices of the peace, and have been their ministerial officers.

Ben Johnson, who was born about 1574 and died in 1637, makes frequent mention of the office of constable in his dramatic writings. Allusions to this office and some of the functions then appertaining to it, such as arresting for breach of the peace, serving warrants, and executing the directions of inferior magistrates, may be found in "Every Man out of his Humor," act v. sc. 4; "Bartholomew Fair," act ii. sc. 1; act iii. sc. 1, and "The Tale of a Tub," act i. sc. 3; act ii. sc. 1; act iii. sc. 1, sc. 3, sc. 5. Shakspeare was born 1564 and died 1616. His father was high bailiff and chief alderman of his little town. Taine's Hist. of Eng. Lit., title "Shakspeare." His father's office, coupled with his own life and occupation, undoubtedly made Shakspeare tolerably familiar with the functions ordinarily exercised by constables. He alludes to this officer in various portions of his dramatic writings, among others the plays of "Henry IV.," part ii. act v. sc. 4, and "Much Ado about Nothing," act iii. sc. 3. The functions of being a ministerial officer of justices of the peace and the right to arrest on suspicion are recognized.

Writing further of these ancient peace officers, Reeves, in his History of English Law, vol. ii. pp. 328–9, says:

"The peace in the most extensive sense of the word took in, perhaps, the whole of the criminal law; and as most offenses were said to be against the peace, all magistrates who had authority to take cognizance of such offenses might be considered as a sort of guardians of the peace *ex officio;* such were the king's justices, inferior judges, and ministers of justice, as sheriffs, *constables*, tything men, headborough, and the like; all these were *ex officio* guardians and conservators of the peace. * * * The manner in which these officers might exer-

cise their authority was by committing to custody those whom they saw actually breaking the peace; or, as is said, they might admit them to bail or oblige them to give sureties for keeping the peace. This might be done by them all, even down to the *constable*."

We find in the report of Coleman's case, decided in 16 Jac. I. Hil. Term. B. R., that constables not only might serve the warrants of justices of the peace, but were indictable for refusing to execute them.

"Nota que Coleman & auters constables de Chichester fueront indicted pur le refusing d'execute le garrant d'un justice de peace, que fuit directed a eur d'apprehend un pur contempt & l'indictment sur cest, matter fuit allowed:" 2 Roll Rep. 78.

Of the office of constable, Sir Matthew Hale, who died before 1680, writes:

"For the office of constable is of two-fold extent. I. Ministerial and relative to justices of the peace, coroners, sheriffs, etc., whose precepts he ought to execute, or in default thereof he may be indicted and fined. 2. Original and primitive, as he is a conservator of the peace at common law:" Hale P. C. (1st Am. ed.) pp. 88 to 97 and notes.

Writing of warrants issued by justices of the peace the same learned judge says:

"But if it be directed to a known officer, as to the sheriff, who is a known officer in the county, or *to a constable, who is a known officer in the vill*," etc.; Ibid. p. 116.

Hawkins, in his Pleas of the Crown, published in 1716, writes of this ancient office of constable and its functions as follows:

"And first, as to the antiquity of the office of constable, it seems to be the better opinion, that both constables of hundreds which are commonly called high constables, and also constables of tythings, which are at this day commonly called petit constables or tything men, and were anciently called chief pledges, *were by the common law*, and not first ordained by the statute of Winchester, cap. 6, as it is holden by some that they were, for that statute doth not say that there shall be such officers constituted, but clearly seems to suppose that there were such officers before the making of it. As to the nature of this office there seems to be no doubt but that the original institution of it was for the better preservation of the peace; for which purpose a constable is said to be

authorized by the common law to arrest felons, and also all suspicious persons that go abroad in the night and sleep by day, or resort to bawdy-houses, or keep suspicious company, and to suppress affrays. And to the same end also, it seems, that he ought by the ancient common law, to present at the Torn or Leet all those within his precinct who have not been admitted into some tything and sworn to the king's allegiance; and it seems that he still ought, by the law in use at this day, to present all offenses inquirable at the Torn or Leet; yet, in the oath set down by Kitchin, he only swears to present all bloodsheds, outcries, affrays and rescouses done within his office. Also, it is said that a constable was at the common law a subordinate officer to the conservators of the peace, and consequently, since the office of such conservators hath been disused and justices of the peace constituted in their stead, *it hath been always holden that the constable is the proper officer to a justice of the peace, and bound to execute his warrants*, and therefore it hath been resolved that when a statute authorizes a justice of the peace to convict a man of a crime and to levy the penalty by warrant of distress, without saying to whom such warrant shall be directed, or by whom it shall be executed, the constable is the proper officer to serve such warrant, and indictable for disobeying it." Vol. ii. pp. 61–2, and cases cited.

Blackstone, in his commentaries, the lectures composing which he commenced to deliver in 1758, uses the following language concerning the office under discussion:

"*Constables*, tything men, and the like, are also conservators of the peace within their own jurisdictions, and may apprehend all breakers of the peace and commit them till they find sureties for their keeping it." Vol. i. p. 350. "The *constable*, of whose office we formerly spoke, hath great original and inherent authority with regard to arrests. He may, without warrant, arrest any one for a breach of the peace committed in his view, and carry him before a justice of the peace. And in case of felony actually committed, or a dangerous wounding whereby felony is likely to ensue, he may, upon probable suspicion, arrest the felon, and for that purpose is authorized (as upon a justice's warrant) to break open doors, and even to kill the felon, if he cannot otherwise be taken; and if he or his assistants be killed in attempting such arrests, it is murder in all concerned." Vol. iv. p. 292. See also 2 Hale's P. C. 88, 89. "Fourthly, then, of the constable. The word *constable* is frequently said to be derived from the Saxon *koning-stapel*, and to signify the

support of the king. But as we borrowed the name, as well as the office of constable, from the French, I am rather inclined to deduce it, with Sir Henry Spelman and Dr. Cowel, from that language, wherein it is plainly derived from the Latin *comes stabuli*, an officer well known in the empire, so called because, like the great constable of France, as well as the lord high constable of England, he was to regulate all matters of chivalry, tilts, tournaments, and feats of arms which were performed on horseback. This office of lord high constable hath been disused in England, except only upon great and solemn occasions, as the king's coronation and the like, ever since the attainder of Stafford, duke of Buckingham, under King Henry VIII., as in France it was suppressed about a century after by an edict of Louis XIII.; but from his office, says Lambard, this lower constableship was first drawn and fetched, and is, as it were, *a very finger of that hand*. For the statute of Winchester, which first appoints them, directs that, for the better keeping of the peace, two constables in every hundred and franchise shall inspect all matters relating to *arms* and *armour*. Constables are of two sorts, high constables and petty constables. The former were first ordained by the statute of Winchester, as before mentioned, are appointed at the court leets of the franchise or hundred over which they preside, or, in default of that, by justices at their quarter-sessions, and are removable by the same authority that appoints them. The petty constables are inferior officers in every town or parish subordinate to the high constable of the hundred first instituted about the reign of Edward III. These petty constables have two offices united in them—the one antient, the other modern. Their antient office is that of headborough, tything-man, or borsholder, of whom we formerly spoke, and who are as antient as the time of King Alfred—their modern office, as that of constable merely, which was appointed, as was observed, so lately as the reign of Edward III., in order to assist the high constable. The general duty of all constables, both high and petty, as well as of other officers, is to keep the king's peace in their several districts, and to that purpose they are armed with very large powers of arresting and imprisoning, of breaking open houses and the like." Vol. i. pp. 355–6.

It would seem that Blackstone intended to convey the impression that the office of constable originated with the statute of Winchester, and Coke, in 4 Inst. 267, seems to take that view. I think, however, that the weight of history is the other way, and that it is quite clear that

the office of constable existed at the common law prior to the statute of Winchester. In addition to the authorities above cited, Mr. Chitty, in a note to an edition of Blackstone's Commentaries, says:

"Constables have been known as most efficient public officers long before the statute of Winchester: 13 Edw. I., st. 2, c. 6, A. D. 1285. This is evident from a writ or mandate preserved in the adversaria to Watt's edition of Matthew Paris, and from which cc. 4, 6, of the statute of Winchester are evidently taken, though it has, says Sir Thomas Tomlins, escaped the notice of every writer or speaker upon the subject."

Sir Matthew Hale also insisted that constables were of the common law, and that the statute of Winchester only gave some special and additional functions. 2 Hale P. C. (1st Am. ed.) p. 88 et seq. This same learned judge also so held in a case decided by him. Hawkins, cited above, fully sustains this view.

In 1 Salk. p. 175 occurs the following, under title "Constable:"

"The high constable was an officer at common law before the statute of Winton, as well as petit constable, and they are officers to the justices of peace, as the sheriff is to the court of King's Bench."

On page 380 of the same volume, the decision in the case of *Queen v. Wyat* is reported. This was by Lord Chief Justice Holt. In that case the court said:

"1st, Though the constable is not named in the statute, nor appointed to be the officer to execute these warrants, yet the justices may command him to execute them; for as at common law the constables were subordinate officers to the conservators of the peace, so are they now the proper officers of the justices: The constable of the hundred may arrest for breach of the peace as well as a petit constable, 3 Cro. 378, and was an officer at common law, notwithstanding the opinions to the contrary; and the statute of Winton only enlarges his authority. *Vide* Hale's Pleas of the Crown, 3 Keb. 231." "2dly, Where an officer neglects a duty incumbent on him, either by common law or statute, he is for his default indictable. *Et nota;* In this case, the indictment was not laid *contra formam statuti,* nor need it have been, though the constable had been named in the statute; because the constable is an officer of common law, and

when a statute requires him to do what without requiring had been his duty and he must have done, it is not imposing a new duty, and he is indictable at common law for it. *Vide* also 5 Vin. Abr. 427-8 title 'Constable;' Powell J. in 2 Ld. Raym. 1189."

Having thus reviewed the origin of this office, its history and its functions and prerogatives in England, and having seen that the service of the criminal warrants of justices of the peace and being the ministerial officers of such magistrates, were of the peculiar attributes of the office of constable by the common law, the *status* of that office in the American colonies and the states of the Union properly comes next in order for consideration. The office of constable seems to have existed in the early colonies as a matter of course. While it is probably correct to say that this office did not exist in Plymouth colony on December 25th, 1620, the day the originators of that colony disembarked from the May Flower, yet it is historically true that it has been in existence from the settlement of New England to the present time. The colonists organized a body politic before they landed, and in a few years thereafter we find the office of constable in full existence. The May Flower dropped her anchor in the roadstead of what is now Provincetown, on Cape Cod, November 11th, 1620. A journal of the proceedings on board says:

"This day, before we came to harbor, observing some not well affected to unity and concord, but gave some appearance of faction, it was thought good there should be an association and agreement that we should combine together in one body, and to submit to such government and governors as we should, by common consent, agree to make and choose, and set our hands to this that follows, word for word."

The following was the instrument which they executed:

"In ye name of God, Amen. We whose names are underwriten, the loyall subjects of our dread soveraigne lord, King James, by ye grace of God, of Great Britaine, Franc and Ireland, king, defender of ye faith, etc., having undertaken, for ye glorie of God and advancemente of ye Christian faith and honour of our king and countrie, a voyage to plant ye first colonie in ye north-

ern part of Virginia, doe by these presents solemnly and mutually, in ye presence of God and one of another, covenant and combine ourselves together into a civill body politick, for our better ordering and preservation and furtherance of ye ends aforesaid, and by virtue hearof to enacte, constitute, and frame such just and equall laws, ordinances, acts, constitution and *offices*, from time to time, as shall be thought most meete and convenient for ye generall good of ye colonie, unto which we promise all due submission and obedience. In witness whereof we have hereunder subscribed our names, at Cap Codd, ye 11 of November, in ye year of ye raigne of our soveraigne lord King James, of England, France, and Ireland ye eighteenth, and of Scotland ye fiftie-fourth, Ano. Dom. 1620." Bryant's Hist. U. S. vol. i. p. 388-9.

We see here, at the beginning of permanent civilized life on this continent, not only the contemplation of and provision for civil offices among the colonists, but also the practical application of the principle of local self-government, a principle of Anglo-Saxon derivation which, surviving the Norman Conquest, has always obtained, to a great and increasing extent, in England, and has ever been one of the fundamental principles of civil liberty in the rise, growth and progress of governments and governmental institutions in America.

We find that as early as 1623 the holding of "town meeting" in the spring for the election of officers and the transaction of other business had become established. Bryant's Hist. U. S. vol. i. p. 408. By 1632 the various settlements had formed into townships, and these had become an aggregated commonwealth. Ib. pp. 538-9. It was about this time that Eliot began his efforts to Christianize the Indians, and some of the converts were made magistrates and *constables*. Ib. p. 540.

It is fair to infer that this office had previously become fully established among the colonists. The following was a *warrant* addressed by an Indian magistrate to a constable:

"1. I, Hidondi. 2. You, Peter Waterman. 3. Jeremy Wicket. 4. Quick you take him. 5. Fast you hold him. 6. Straight you bring him. 7. Before me, Hidondi."—*The New England History*, by Charles W. Elliott, vol. 1 p. 326.

An incident in the history of the Massachusetts Bay colony serves to show the existence of this office and its functions. In 1651 the Rev. John Clark, a Baptist minister from Newport, the Rev. Obadiah Holmes, another Baptist minister, and one Crandall, went together to Lynn as representatives of the church at Newport, to visit one William Witter, a sick brother in the church, who was nearly seventy years of age and blind. While there the following is related of them:

"On Sunday after their arrival, 'not having freedom in our spirits,' says Clark, 'for want of a clear call from God to go unto the public assemblie to declare there what was the mind, and counsel of God concerning them,' he 'judged it a thing suitable' to hold divine service in the house and with the family of Witter, and four or five others who came in to join their worship. While thus engaged, there came in *two constables* with a *warrant* for their arrest. A request to finish the services was denied, and 'the erroneous persons being strangers,' whom the writ of Justice Bridges commanded should be brought before him in the morning, were marched off as prisoners—bail being refused—to the inn for safe keeping."—Bryant's Hist. U. S. vol. ii. p. 106.

In the same work, p. 180, is related an incident in the Plymouth colony in 1653, where the inhabitants would not permit the constable to take Nicholas Upshall on his warrant, who was charged with favoring Quakers. In New Hampshire, in 1662, it was ordered that a cage be made by the selectmen "to punish such as sleepe, or take tobacco on the Lord's Day out of the meeting in time of publick exercise," and that "one householder or more walk every Sabbath day in sermon time with the *constable* to every publick house in ye town, to suppress ill order, and if they think convenient, to private houses also." Bryant's Hist. U. S. vol. ii. p. 424. In the same work, on page 425, an incident is related as happening in New Hampshire in 1662, where Walter Barefoot prevailed upon a *constable* to surrender his warrant of execution against three Quaker women sentenced to be publicly whipped at the cart's tail through the town. See also same work, p. 469, for an account of the Rev. Stephen Burroughs being driven out of Salem

and afterwards arrested on a charge of witchcraft by *two constables* sent from that town.

In the early resolves of the Massachusetts Bay colony there are some, though few, allusions to the office of constable. There are no provisions creating that office, and those referring to it seem to indicate the office as existing with the ordinary functions appertaining to it. This office is in this country, unquestionably, by the common law, and would, without special enactment, possess those functions and prerogatives which go to make up that office and commonly appertain to it. In the colonies as in England, the functions which, among others, gave peculiar character to the office of constable were those of serving the criminal warrants of justices of the peace and of being their ministerial officer. They have continued to mark this office in the several States where the office has existed, not only in New England, but outside of it, in some of the original States and in many of those States which have come into existence as such since the formation of the Federal Union.

In the earliest state constitution of Connecticut, in that of New Jersey, adopted in 1776, in that of New York, adopted in 1777, and in that of Georgia, also adopted in 1777, this office is mentioned and continued, but alluded to by name only, as having a well understood signification. Webster in defining in his dictionary the word "constable," says:

"In the United States, constables are town and city officers of the peace, with powers similar to those possessed by constables in Great Britain. They are invested also with powers to execute civil as well as criminal process and to levy executions."

The foregoing definition would seem to involve an idea which is to a certain extent true, namely: that if anything can be said to have been added to the office of constable, it is the power to execute *civil*, not criminal, process, which latter would be a natural concomitant, certainly a necessary outgrowth of an office existing for the preservation of the peace and the like, and itself an

outcome of a rude and disturbed state of society. Constables being original peace officers, and having as functions of their office those involved in this case, namely, of serving criminal warrants of justices of the peace, and of being their ministerial officer, would very naturally have conferred by common consent or by statute the function of executing civil process when such justices should have conferred on them jurisdiction of civil causes. The function of serving civil would follow, not lead, that of serving criminal process of justices of the peace. Mention is made of this to illustrate that, in depriving a constable of the functions of that office, as attempted by the Police Act in respect to those herein involved, there are taken from that office what has ever constituted, above all others, its peculiar and original characteristics; and that a much greater inroad, a far more striking and radical change in the constitution of that office is thereby made, than there would be if the entire function of executing civil process were swept away.

This brings us to a consideration of the constitution of the office of constable in Michigan. This office, in respect to those of its functions involved in this case is, in this State as at the common law in England and the colonies. It has not been modified by legislation. The statutes, while pointedly referring to the functions last mentioned, and perhaps intensifying those peculiarities, are really declaratory. The prerogatives of this office involved in the present controversy have ever formed in Michigan a constituent part thereof. A glance at the legislation concerning it will verify this statement.

Among the early legislation relative to this office was an act passed Nov. 3, 1815, providing for the appointment of a competent number of *constables* in the judicial districts of the territory, who should have same powers and emoluments as marshals. It was also provided in this act that *sheriffs and coroners* should be the ministerial officers of all courts within their respective counties, *except those of justices of the peace.* 1 Terr. L. 220. On

Nov. 4, 1815, provision was made for the punishment of persons unlawfully resisting constables, etc. Ib. 124. On May 8, 1820, the county commissioners were authorized to divide counties into townships, and to recommend persons to the Governor for appointment as constables. The Governor was required to appoint a suitable number of constables. Ib. 661–671. In the same year, on May 11, constables were authorized to execute judgments of justices of the peace in criminal cases, and forms of writs were prescribed. Ib. 598–99. A few days later, May 20, an act was passed defining the powers of constables in civil cases, and prescribing the forms of writs. They were prohibited from advocating causes before justices of the peace. Ib. 604, 619. On Nov. 28, 1820, a general act concerning constables was passed. After providing for their appointment and other things, the following was enacted:

Section 5. And be it further enacted, That constables shall be *the ministerial officers of justices of the peace in their respective counties;* and it shall be the duty of constables to apprehend and bring to justice, all felons and disturbers of the peace; to suppress riots, and give information of all offences against the laws, which may come to their knowledge: they shall also keep and preserve the peace in their respective counties; *and the authority of constables, in civil and criminal cases, shall be co-extensive with the counties, for which they may be respectively appointed, within which they shall serve such process as may be directed to them, agreeably to law:* And they shall attend upon the Supreme Court and county courts in their respective counties, when thereto warned by the order of such courts, and shall do and perform such other services as are or may be required by law.

Section 7. * * * The same being adopted from the laws of three of the original states, to wit, the states of Massachusetts, New York and Ohio, as far as necessary and suitable to the circumstances of the territory of Michigan. Ib. pp. 683–6.

On June 29, 1832, the Legislative council passed an act amending an act relative to the city of Detroit. This provided, among other things,

"That hereafter the constables of the city of Detroit, while in office, shall be respectively vested with the same

power and perform the same duties which may be vested in and performed by any constable of the county of Wayne, and shall be subject to the same fees and take the same oath."

There was no important legislation after this concerning constables, except as to fees (Ib. p. 778), until Michigan became a State. The functions of this office, as indicated by section five of the act of 1820, have ever attached to and formed a component part of it in Michigan. Rev. Stat. 1838, pp. 66, 210, 398; Rev. Stat. 1846, p. 93; Comp. L. 1857, p. 241; Comp. L. 1871, p. 287.

This somewhat extended review of the origin, history, and functions of the office of constable brings us to 1850. It covers a period of over seven centuries. Whatever may have been the origin of this office, we find, beyond question, that for *more than five hundred years* continuously, and immediately prior to the adoption of the Constitution of 1850, constables served the criminal warrants of justices of the peace, and were the general ministerial officers of those magistrates. Those functions, during all of this long period of time, have ever constituted a part of that office, and have been its peculiar and distinguishing characteristics. It may be very justly said that they are of the original functions of that office, and that if any, others, not these have been added. They have ever been the functions of a constable in Michigan, and at the time of the adoption of the Constitution of 1850, they were known and understood to be a part of that office. The people of this State never knew the office of constable without these prerogatives. They had known this office as it existed at the common law, and as declared by their statutes from the time Michigan became a State, and earlier. They had inherited it. They were satisfied with it. Therefore, in 1850, the office whose existence had theretofore depended upon the legislative will was made *permanent* by the people in the organic law of the State. Constitution of 1850, Art xi. § 1.

Particular expressions used in a Constitution are to be understood as conveying the thoughts which they

represented when introduced, *Newell v. People* 7 N. Y. 97; *Gibbons v. Ogden* 9 Wh. 188; Cooley's Const. Lim. 58-61. As at the common law constables were the local peace officers, and the functions of being the ministerial officers of justices of the peace, and of serving criminal warrants, originally constituted the office of constable (his civil functions having been since added), and the office, as then constituted, having been confirmed and made permanent by the Constitution, the Legislature cannot deprive the locality of its constitutional office by transferring the functions which comprise it to some creature of the central government. *Hubbard v. Springwells* 25 Mich. 153; *People v. Draper* 15 N. Y. 532; *People v. Raymond* 37 N. Y. 428; *Warner v. People* 2 Denio 272; *State v. Hastings* 10 Wis. 525; *McCabe v. Mazzuchelli* 13 Wis. 478; *State v. Brunst* 26 Wis. 412.

Cornelius J. Reilly for respondents.

CAMPBELL, J. Relator, who is a constable of the tenth ward of the city of Detroit, presented a bill for services, as such, for allowance by the board of auditors, which they refused to consider. It is admitted by their answer that the bill is correct, if they have power to audit it. The services performed were in the arrest of parties charged to have committed crimes outside of the city and in Wayne county, partly subject to trial by a justice and partly beyond his trial powers, and in one case the respondent was arrested on a charge of bastardy,—he being in the township of Ecorces. The arrests were all made on warrants which were issued by justices whose offices were held in Detroit, and who belonged there. The auditors declined to consider the claim on the ground that all such warrants should have been served by the police and not by constables. This objection is based on certain provisions of an act entitled "An act to establish a police government for the city of Detroit," approved April 17, 1871. This statute appears to be a re-enactment, with a few alterations, of a former

act bearing the same title, approved January 24, 1865. It is not apparent, but it is not very important, why the act of 1871 was passed as an original instead of as an amendatory act. Possibly difficulty may have arisen under intermediate legislation amending the city charter in 1869. On the 15th day of April, 1871, a law had been passed to cure any previous irregularity or defect in the powers of the board. 3 Laws of 1871, p. 186. Whatever may have been the fact, the new law is, so far as has been shown to us, the only one involved in the present controversy, and we need not go behind it.

The sections of the Police Act supposed to bear upon the claim of relator are sections 13, 35, 36 and 38. These sections are substantially if not verbally identical with previous amendments adopted in 1867, and counsel, regarding the act of 1871 as only amendatory, have cited these former provisions instead of those of 1871. The statute of 1871 has, however, evidently superseded the older statutes, and is the only law now in force, except as it may have been amended since, directly or by implication.

Section 13, so far as now involved, contains the following provisions: "The members of the police force of the city of Detroit shall possess all the common law and statutory powers of constables, except for the service of civil process; and any warrant for search or arrest, issued by any magistrate of the State of Michigan, may be executed in any part of said State, by any member of said police force, without backing or endorsement from any other magistrate or officer of said State; and for all offenses committed in the county of Wayne, the expenses incurred in serving said warrant shall be certified by the board of police, and audited and paid by said county; and in all other cases such expenses shall be determined by and paid under the direction of the proper auditing board of the county in which the offenses charged in said warrant shall have been committed." * * * * "The members of said police force shall also serve and execute all process and subpœnas issued in the recorder's court and the police court of said city, and all process and subpœnas in criminal cases, issued by justices of the peace in said city."

Section 35. "The members of the Metropolitan police force shall have the exclusive power, and it shall be their duty, to serve all process within the city of Detroit, issuing from the recorder's court, police court, and from justices of the peace in criminal cases, within said city, whether directed to constables, the sheriff, or otherwise, and shall be detailed by the proper officers to attend, instead of deputy sheriffs or constables, all courts of criminal jurisdiction of said city. All the duties now performed by deputy sheriffs in serving writs, executing orders of said court, attending said court, conveying prisoners to and from the county jail for arraignment or trial before said court, and in conveying prisoners to the Detroit House of Correction, the Reform School, county jail, State prison, or other place of punishment and imprisonment, under the judgment, sentence, order, or process of said court, shall be performed by the members of said police force; and in no case shall deputy sheriffs, or any constable of said city, receive or be paid by the county or State any fee or compensation for services directed in this section, or in any part of this act, to be performed by the members of said force. The actual expenses of travel and of performing duties under this section shall be paid by the county of Wayne, upon bills allowed by said board of police and endorsed by the president and secretary thereof."

Section 36 abolished the offices of marshal and deputy marshal and provided that the duties should be performed by the superintendent of police, or by the captains and sergeants under his directions. This section, like some others, is evidently copied from the law of 1865, and refers to matters which had been before abolished.

Section 38 is open to the same criticism and refers to obsolete matters.

The powers given by section 13 are not exclusive, and have, therefore, no bearing on the present issue. Section 35 is exclusive, so far as it applies at all, and we are required to decide whether this section can be applied to the case before us, and whether if so applicable, it is so far valid. It did not, as first passed in 1865, apply to justices except when holding courts.

It was suggested for the respondents that we have already passed upon the validity of this statute in the

case of *People v. Mahaney* 13 Mich. 485. There is nothing decided by that case which settles or seriously concerns this controversy. The only question then before the court was whether the office of city marshal had been lawfully abolished by the Police Act. It was decided that the statute was passed in a constitutional manner, so far as this court could lawfully inquire into the course of legislation, and that the substitution of the police officers for the marshal was within the general purview of the title; and that the office could be lawfully abolished. The court very carefully abstained from passing upon the validity of other parts of the act. It was distinctly stated that no decision could properly be made upon the validity of particular powers and provisions, until some case should arise calling for a decision. The amendments of 1867 had not then been adopted.

The city marshal of Detroit, as provided for at that time, was not an officer named in the Constitution, nor a necessary officer for any purpose. He had not any statutory powers which were not concurrent with those of other known officers. If his office had been abolished, as it might have been, with no one designated in his place, no serious confusion could have arisen. Sheriffs or constables could perform his statutory powers, and the common council could provide as they pleased for such powers as he derived from their grant.

It is unfortunate that other portions of the law have not been sooner brought up for construction. It has been changed in some important particulars since 1865, and amendments have been made to the city charter which cannot fail to create discussion. The provisions before referred to are more or less dependent on the sections concerning the organization and government of the force, which were claimed with much earnestness on the argument to allow the police board and its officers and servants to interfere with the powers of the courts, as well as of the city.

Upon that subject it is for most purposes enough to

say that no court, in the exercise of its functions, can be lawfully subjected to the control or interference of any executive or ministerial authority, or can receive directions for any purpose except from such other courts as are authorized by the Constitution to have "superintending control over inferior courts." No court has a right to allow any other interference or to submit to it.

And in this same regard it is also very clearly settled by the Constitution that judicial power can only be vested in courts and judicial officers, and that all of the judges and judicial officers, without exception, must be elected directly by the people of the State or of their local districts. This makes it necessary to be cautious in extending other powers when a conflict is likely to be created.

The Constitution has also provided that no one shall be deprived of liberty without due process of law, and has provided that no warrant shall issue except upon oath or affirmation establishing probable cause. It has been settled for centuries, and the doctrine has been recognized here, that except in cases of reasonable belief of treason or felony, or breach of the peace committed in presence of an officer, there is no due process of law without a warrant issued by a court or magistrate upon a proper showing or finding. *Drennan v. People* 10 Mich. 169; *Quinn v. Heisel* 40 Mich. 576; *Sarah Way's Case* 41 Mich. 299.

The question is whether the power of justices in Detroit in criminal matters, and in the enforcement of their process, or the power of constables in that city to serve their criminal process has been taken away by any valid legislation. Both of these matters belong together. And in considering this question we are bound to construe the Police Act in view of its title and its lawful purposes, assuming, so far as we reasonably can, that broad language should be confined to lawful objects, and inferring no unlawful intent, except where too plain to be mistaken.

It is not, and it certainly cannot be claimed, that under

our Constitution there can be any such thing as a municipal government which is not managed by popular representatives and agencies deriving their authority from the inhabitants. No business which is in its nature municipal can be controlled by State or any other outside authorities. *People v. Hurlbut* 24 Mich. 44; *Hubbard v. Springwells* 25 Mich. 153; *Park Com'rs v. Common Council of Detroit* 28 Mich. 228; *Attorney General v. Common Council of Detroit* 29 Mich. 108; *Attorney General v. Holihan* 29 Mich. 116.

There can be no complete city corporation without means of enforcing such regulations as are necessary for the peace and good order of the community, and this can only be done by the aid of officers. A great majority of the regulations needed to prevent confusion in cities lie entirely outside of criminal law, and authorize interference of an official character where no arrest would be lawful. And in many of these cases it is not uncommon for quarrels to arise which go far enough to create breaches of the peace, when it would be very dangerous if the municipal officer must at that point stop short in the performance of his civil duty and call to his aid a different officer. Until the Police Act of Detroit was passed, there was not a single place in the State where these functions were not united, and the Police Act itself attempts to unite them, not by giving city officers functions under State law, but by giving State officers functions under municipal regulations, and depriving municipal officers of municipal powers. We can hardly believe that when the police system was adopted in 1865 the Legislature had any idea that they were doing more than adding desirable auxiliaries to municipal authority. It is not to be supposed they meant to revolutionize our institutions by superseding local by central authority. The police force is nothing more nor less, so far as it is lawfully constituted, than an additional force of constables and watchmen appointed by the State for certain limited purposes; and unless some power exists in the Legisla-

ture not only to add to the force of local peace officers but to supersede them entirely for all common law purposes, the provisions complained of in this statute cannot be maintained if they are to be construed as respondents construe them.

The purpose of the Police Act expressed in its title furnishes no suggestion which would lead courts or officers to look for any legislation in the body of the act to affect their powers or jurisdiction in any matters not relating to the interests and peace of the city of Detroit. No liberality of construction could allow an inferential or express repeal of the general laws of the State except to that extent. And it is not easy to see how under such a statute courts whose criminal powers are not confined to the city and for most purposes are entirely extra-territorial to it, can be included within its terms merely because they may hold sessions there. The general laws direct how they shall act and what officers shall be their bailiffs. Any such officer must obey their mandate, or stand punishable. A large portion of the police force which respondents correctly or incorrectly claim to be subject entirely to orders from superiors, would by such a rule be subjected to conflicting orders, which would create confusion, because all are not employed in the same duties. This, of itself, might raise serious questions if the police can be made exclusive officers for any of these purposes. It is not clear that the act will bear so extreme a construction even in regard to the municipal courts properly so called. If any court under it is compelled to depend on the discretion of the police authorities for officers to perform its mandates, it would be such a subjection of judicial to ministerial oversight as could not be tolerated. We are, therefore, called on to look with some care into the constitutional provisions and the general legislation had under them, touching the matters now litigated. And it must be borne in mind that the jurisdiction of the local courts, and the functions of local officers, while distinct in many respects, have more or less connection.

The power of justices of the peace to try civil causes is so fixed by the Constitution that they are absolutely necessary magistrates in cities as well as elsewhere. Their power to try criminal offenders is statutory, but it is contemplated by the Constitution that it shall exist to some extent, and the general statutes have extended this jurisdiction to a large class of minor offenses, and it can only be restricted by the special municipal criminal jurisdictions in cities. A municipal court could not be authorized to try extra-municipal crimes, and no attempt has ever been made to permit it. The result is that the general statutes of the State give every justice in Detroit power to dispose of all criminal business within the county of Wayne arising beyond the city. Those same laws make constables competent and compellable to serve their criminal process, as the sheriff is also in some cases. Comp. L. chapter 179.

The power to examine and commit persons charged with crimes beyond the cognizance of justices to try, is also entrusted to justices of the peace in common with various judges, judicial officers, and city officers. Comp. L. ch. 259. This power is not exercised by those officers as courts, and it is not in the proper sense of the term judicial power. It may be vested in other persons than courts, as well as in courts. It belongs to the duties of conservators of the peace; and the Constitution has made supreme and circuit court judges, as well as justices of the peace, such conservators. Art. 6 § 19. The difference between this power and that of trying offenders is referred to, among other cases, in *Daniels v. People* 6 Mich. 381 and *Ex parte Farnham* 8 Mich. 89. This power of preliminary examination was by the Police Court Act of 1850 vested in the police court of Detroit, and that act was continued by the schedule to the Constitution, sec. 11.

But no reference is made in the original Police Court Act or in the first Police Act to the important functions of conservators of the peace in the prevention of crime, which is fully provided for by chapter 258 of the Com-

piled Laws. It is very remotely referred to if touched at all by the present act. This power is not one which can be taken away by implication, if at all. It is essential to the public safety, and the constitutional grant of this power to various judicial officers,—which was only limited by section 11 of the schedule,—is imperative. No doubt others may be, as they always have been, entrusted with similar powers. But no one in whom the Constitution has vested it can be deprived of it. This power exists in the city as well as out of it, and in relation to crimes threatened to be done there or elsewhere.

In view of the peculiar provisions found in various portions of the act, it is perhaps not a strained construction to construe it,—so far as crimes committed within the city are concerned,—as intended to cut off deputy sheriffs and constables from performing any criminal services whatever. But the sheriff himself—(whose duties under the laws of the State are all,—unless with some possible slight exceptions,—as well performed by deputy as in person) is not covered by all of these sweeping provisions; and inasmuch as all of the courts of record sit in Detroit, he would be substantially deprived of his office in its most important functions if he had been, and if the act covered any but city crimes. For the purposes of the present controversy it is necessary, in order to avoid attributing to the Legislature an intention very far beyond the title of the act, to hold that the section which gives exclusive power to the police force for the service of process "in criminal cases within said city" does not refer to any cases where the crime was committed out of the city. But we do not mean to be understood as recognizing the legality of any such exclusive power any where, under the laws of the State and the Constitution. The shape the controversy has taken and the differing characters of the relator's claims render it necessary to refer to rules which may apply somewhat further.

Counsel on the argument very properly and very ably placed the right to redress chiefly on the ground that

the rights and duties of constables were for many purposes recognized and fixed by our constitutional polity, and so connected with the course of criminal justice as to be beyond legislative annihilation. The argument, although dealing with very ancient affairs, in no sense belongs to mere antiquarian curiosity. It is very unfortunate and very discreditable that so little heed is sometimes paid to the continued and perpetual importance of institutions which form an essential element in the organic life of our government. Courts, at least, are bound to respect what the people have seen fit to preserve by constitutional enactment, until the people are unwise enough to undo their own work. The loss of interest in the preservation of ancient rights is not a very encouraging sign of public spirit or good sense.

The municipal corporations of this State,—as we have had frequent occasion to declare, are all organized, and constitutionally required to be organized, in such a way as to preserve to the inhabitants full means of local self-government. There has never been a time when the city of Detroit has not had in common with townships the right to choose its own constables. When the city was not divided into wards, they were chosen at large. When so divided, each ward was given the choice of its own constable, as well as of other ward officers. For election purposes, each ward is made by the Constitution equivalent to a township. Art. 7 sec. 1. The Constitution, in terms, requires each township to elect constables. Art. 11 sec. 1. It required the Legislature to provide for cities and villages (Art. 15 sec. 13); and it continued in force all existing corporations. Schedule, sec. 2. No municipal corporation had ever existed here or in England, without constables or officers answering to constables. Under the charter of Detroit there are no other officers chosen by the people or by the corporation, having powers at all analogous.

It cannot be maintained that legislation would be valid which retained the names but destroyed the powers of such officers. While there is an undoubted power

to vary the duties of such officers, it cannot be lawful to so change those duties as to practically change the office. When offices are named in a Constitution they are named as having a known legal character.

The general laws of the State have made constables in all important particulars what they were at common law, when our American systems were framed. They are here, and always have been, the local peace officers of their vicinage, the ministerial officers of justices of the peace, and the bailiffs of courts of record of criminal jurisdiction in the county.

The only powers they have ever possessed as process-servers for civil purposes have been given to them not as a change in their own offices, but as the result of a change in the official powers of justices. It is simply because they are the ministerial officers of justices that civil process was issued to them as a result of civil powers conferred on justices. Those civil powers have no concern whatever with the municipal interests.

It would serve no useful purpose to enter into any of the doubtful questions concerning the origin and meaning of the term *constable*. His powers and duties are among the best known subjects of legal inquiry. From the high constable of the realm to the ordinary constable, the different ranks were all, within their several spheres, guardians of the public safety, and conservators and defenders of the public peace, with power to summon to their aid any persons whom they found it necessary to call. The ordinary constable is the most ancient peace officer known, and was by various names, but with substantially identical powers, the legal head of his community for the purpose of enforcing the peace. Until conservators of the peace were appointed, he had during much of the time nearly all of the authority afterwards conferred on them. The watchmen and other persons from time to time provided for by statute, and now represented by the police, were usually legally subordinate and to some extent under his direction. Most arrests were made by him or under his supervision. The

office was an onerous one, and in process of time became more troublesome than pleasant, and met with the treatment which all offices meet which deal with the handling of rogues and vagabonds, but it has never ceased to be important and responsible. And it is remarkable as the one office which, in all the mutations of prerogative, has continued since the times long prior to the Conquest an office filled by popular choice for the preservation of the peace in the territory of its constituents. See 1 Backus on Sheriffs, Coroners and Constables, 38 *et seq.*; Finch's Law, chap. 22, fol. 127; Comyn's Dig. "Leet" M. 6-12; 2 Hale P. C. ch. 10, 11, 12; Tomlin's Law Dic. "Constable;" *King v. Routledge* Doug. 531.

The researches of the counsel for relator have brought forward many interesting references which it is not necessary for us to dwell upon, as they generally tend to the same result.

It will appear from these and many other authorities, that the one class of duties belonging to the office of constable which never changed, is the performance of the functions of a peace officer in the arrest of criminals and the prevention of crimes and disturbances. Other duties have become obsolete, and still others have been granted and changed.

It is as a peace officer that he has been known to our laws from the beginning, and it is as such that our General Statutes chiefly refer to him. As before suggested, he is required to be chosen in Detroit, and he is the only peace officer who is chosen by the corporation or the people of Detroit. We think the Constitution used the name as having a known meaning, and that while the police may be auxiliary they cannot supersede him in his functions; and that his service of process in the cases brought to our notice is authorized and to be compensated under the criminal laws of the State.

The mandamus must issue as prayed, but without costs.

The other Justices concurred.

The German American Seminary v. Herman Kiefer.

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Election of remedy—Laches—Equitable remedy outlawed.

It seems that bringing suit against only one of several persons to recover an entire sum received by him under a constructive trust, but divided with the others, should preclude separate suits against the rest if the complainant had full knowledge of their interests when he elected to sue a particular defendant.

Equity will not interfere where, with full knowledge of the facts, suit on a merely constructive trust has been delayed until many of the persons concerned in the transaction are dead, and the recollection of the others is such that the court must be in doubt whether the case established by the evidence is not partial and misleading.

Courts of equity will not encourage the splitting of causes of action and needless litigation.

An equitable action of assumpsit, if it lies at all, will be outlawed by the same lapse of time as bars an action at law, particularly if it rests on a merely constructive trust and the defendant has always denied the equity and relied on an adverse claim.

Whether a trustee's sale of corporate property to trustees and members of the corporation can be sustained if seasonable objection is raised—*Q.*

Appeal from the Superior Court of Detroit. Submitted January 23. Decided February 11.

Bill for accounting. Dismissed. Complainant appeals.

Alfred Russell for complainant. Trustees cannot rightfully put themselves in a position where their interests will be adverse to the beneficiary. *Jackson v. Ludeling* 21 Wal. 625; Letter of Sewell, Vanderpoel and Bennett, 9 Chic. Leg. News, 31; *Ingerson v. Starkweather* Wal. Ch. 346; *Clute v. Barron* 2 Mich. 192; *People v. Overyssel* 11 id. 222; *Flint & P. M. Ry. v. Dewey* 14 id. 477; *Wardell v. Union Pacific R. R.* 4 Dill. 320; where the defendant is not placed in any different position by lapse of time, it will not be considered, *Allore v. Jewell* 94 U. S. 512; *Sullivan v. R. R.* id. 811; *Wollaston v. Tribe*

L. R. 9 Eq. 44; *May v. LeClaire* 11 Wal. 217; *Kempson v. Ashbee* L. R. 10 Ch. App. 15; *Hatch v. Hatch* 9 Ves. 292; an election of remedy will not preclude choosing another unless it involves a contradictory action, *Thompson v. Howard* 31 Mich. 312.

Otto Kirchner and *Ashley Pond* for defendant. A trustee may buy directly from a *cestui que trust* if there is no fraud, *Schwarz v. Wendell* Wal. Ch. 267, which case is distinguished from *Dwight v. Blackmar* 2 Mich. 330; *Beaubien v. Poupard* Har. Ch. 206; and compare *Ashhurst's Appeal* 60 Penn. St. 296; *Spencer's Appeal* 80 Penn. St. 317; *Twin Lick Oil Co. v. Marbury* 91 U. S. 587; Green's Brice's Ultra Vires 402; proceedings to rescind a contract must be taken promptly, *DeArmand v. Phillips* Wal. Ch. 186; *McLean v. Barton* Har. Ch. 279; *Street v. Dow* id. 427; *Wilbur v. Flood* 16 Mich. 40; *Russell v. Miller* 26 Mich. 1; *Dunks v. Fuller* 32 Mich., 242; *Miller v. Thompson* 34 Mich. 10; *Loomis v. Brush* 36 Mich. 48; *Phillips v. Rogers* 12 Met. 405; *Bruce v. Davenport* 3 Keyes 472; the Statute of Limitations applies to a suit in equity if the demand could have been recovered at law, *Kane v. Bloodgood* 7 Johns. Ch. 248; *Sherwood v. Sutton* 5 Mas. 144; *Sheppards v. Turpin* 3 Gratt. 374; *Field v. Wilson* 6 B. Mon. 479; *Bruen v. Hone* 2 Barb. 586; *Southwick v. Everest* 4 Hill 71; resort cannot be had to equity to evade the statute, *Wilhelm v. Caylor* 32 Md. 151; *Mobley v. Cureton* 2 S. C. 140; *Clay v. Clay* 7 Bush 95; *Badger v. Badger* 2 Clifford 137; *Kane County v. Herrington* 50 Ill. 232; *McCartee v. Camel* 1 Barb. Ch. 456; *Perkins v. Cartmell* 4 Har. (Del.) 270; *Manchester v. Mathewson* 3 R. I. 237; *Dean v. Dean* 1 Stockt. 425; *Railroad Co. v. Bowler* 9 Bush 468; *Miller v. McIntyre* 1 McL. 85: 6 Pet. 61; *Elmendorf v. Taylor* 10 Wh. 152; *Bailey v. Carter* 7 Ired. Eq. 282; *Nimmo v. Stewart* 21 Ala. 682; *Wilson v. Anthony* 19 Ark. 16; *Knight v. Brawner* 14 Md. 1; *Goff v. Robins* 33 Miss. 153; *Hill v. Boyland* 40 Miss. 618; *Bruen v. Hone*

2 Barb. 586; *Oakland v. Carpentier* 13 Cal. 540; *Murphy v. Blair* 12 Ind. 184; *Phares v. Walters* 6 Ia. 106; *Pratt v. Northam* 5 Mas. 95; *Gunn v. Brantley* 21 Ala. 633; *Crocker v. Clements* 23 Ala. 296; *Teackle v. Gibson* 8 Md. 70; *Manning v. Warren* 17 Ill. 267; *Young v. Mackall* 3 Md. Ch. 398; *Breckenridge v. Churchill* 3 J. J. Marsh. 11; *Burditt v. Grew* 8 Pick. 108; *Paff v. Kinney* 1 Bradf. Sur. 1; the statute does not apply only where there are express trusts or actual fraud, *Strimpfler v. Roberts* 18 Penn. St. 302; *Michoud v. Girod* 4 How. 503; *Clarke v. Boorman* 18 Wal. 506; to escape the bar of the statute the complainant must allege his ignorance of the fraud, *Carr v. Hilton* 1 Curt. C. C. 390; the election to sue a particular defendant for an entire fund debars complainant from afterwards suing another for part of it (*Lathrop v. Bampton* 31 Cal. 17; 4 Kent's Com. 307; 2 Story's Eq. Jur. § 1262) after he has had a decree for it, Lindley Partnership 828; Pars. Partnership 65; *King v. Hun* 3 M. & W. 494; *Exp. Higgins* 3 De G. & J. 33; and equity will not relieve against this result, *Perry v. Johnson* 4 Johns. Ch. 64.

Cooley, J. The bill in this case is filed to compel the defendant to account for moneys which it is claimed are held by him in constructive trust for the complainant. The record is somewhat voluminous, and the evidence conflicting, but it will be sufficient for the purposes of this decision to state the facts as we find them established by the evidence or by the admissions of the parties.

In January, 1865, complainant was owner of a considerable body of pine lands in the county of Midland in this State, and was desirous of selling them. The official board of the seminary at that time consisted of Julius Stoll, Bernard Stroh, Edward Eccard, Rudolph Diefenbeck, Karl Busch, Edward Kanter and the defendant. The lands had been thought worth from two to four dollars an acre, but purchasers were not found. Finally Mr. W. H. Craig offered one dollar an acre, and

a committee to whom the board had referred the matter were disposed to close a bargain at that price. Mr. Stroh objected to this, and thought a man should be sent to examine the lands. He finally agreed that if that course should be adopted he would guarantee that the corporation should lose nothing by it, and that if Mr. Craig should withdraw his offer in the meantime Mr. Stroh would himself take the lands at the price offered. This was agreed to, and Mr. Charles Stange was sent to learn what he could about the lands. He went, and on his return reported verbally his opinion that the lands were worth from six to ten shillings an acre; the evidence on the report being conflicting, but ranging between these sums. It was then arranged that the lands should be put up at auction and sold to the highest bidder, and February 2, 1865, was fixed upon as the time. The trustees came together at that time, and a few others who it was thought might be disposed to bid on the lands. The defendant took some pains to invite in parties who were known by him to be able to become purchasers. The quantity of land offered was about 3700 acres, and bids were made for it, beginning with one of $4100 by Mr. Stroh, and closing with one of $5100 by the same person, and the lands were struck off to him. Mr. Craig was a bidder several times, closing with an offer of $5050. The lands, by request of Mr. Stroh, were deeded to his wife.

It was afterwards known that Mr. Stroh's purchase was made on an understanding with Mr. Stange, Mr. Arnold Kaichen and the defendant, that each of them should take equal interests with him in the lands, and that this understanding was carried out. The reason assigned by the parties for making this arrangement was that they were all interested in the seminary, and anxious to assist it by procuring as much for the lands as possible, but none of them were willing to take the whole risk of buying at the price which was offered; and we are satisfied from all the evidence in the case

that the land at that time had no definite market value, and that the parties buying could then have counted upon a profit from their purchase only by holding the title for some considerable period. Some public criticism of the sale appeared in the newspapers soon after it took place, but at a meeting of the corporation held more than a year afterwards, a resolution was adopted approving of the sale and of the action of the trustees respecting it.

Within two years after the sale the price of pine lands in the part of the State where these lands were situated began to go up rapidly. This was due in part to the building of a railroad which gave better access to the territory, and in part to an increased demand for pine timber. In October, 1868, Stroh sold all the pine timber from these lands to Newell Barnard for $24,000, receiving his pay in instalments, the last of which was made in 1872. This sum was divided with Stange, Kaichen and the defendant, each receiving $6000. In 1874 after there had been an entire change in the trustees of the seminary, it was decided to proceed against Stroh to charge him as constructive trustee of the seminary in holding these lands and selling the timber, and a bill was accordingly filed against him in the Midland circuit in chancery, which resulted in a decree made November 17, 1876, which set aside the conveyance of the lands to Stroh as fraudulent, and directed that he pay forthwith to complainant the sum of $14,006 and the costs. No appeal was taken from this decree, but meantime Mr. Stroh had become insolvent, and the personal decree uncollectible. The present bill was then filed, the purpose of which is to collect from the defendant the sum which he received on the sale of the timber from these lands.

It is alleged in the bill that complainant did not discover the interest of this defendant in the purchase until some time in the course of the suit against Stroh. This allegation is not sustained by the evidence. It appears

beyond dispute that some of the persons who were trustees at the time of the sale knew of defendant's interest soon afterwards, and the evidence is full and conclusive that the new board were fully aware of it before beginning suit against Stroh, and that they deliberately chose, with knowledge of all the facts, to proceed against Stroh alone, and not to proceed against this defendant. It was not until that remedy had been found ineffectual that this suit was brought.

The position of the case then is this: Complainant has charged Stroh as constructive trustee, electing not to join this defendant, and has obtained the decree sought for. This suit, then, is instituted to recover from defendant the sum of money known to have been received by him. The bill calls for no discovery and no accounting, but simply for the payment to complainant of the moneys received by defendant from Stroh. It is therefore a suit in equity to recover a sum of money had and received by the defendant to complainant's use: an equitable action of assumpsit and nothing more.

Whether the case can be distinguished from *Bay City Bridge Co. v. Van Etten* 36 Mich. 210, in which it was held that jurisdiction could not be given to equity of a claim for money by merely charging fraud in its reception, we shall not stop to consider, as we think there are other grounds on which the bill should be dismissed. If the proper authorities of the complainant intended to disaffirm the transaction in question, as far as the defendant was concerned, we think that they lost the right by delaying beyond all reason the institution of suit.

It had been known for ten years by members of the board of trustees that defendant was interested in Stroh's purchases. It was known by the board generally that such was the fact for some time before the suit was brought against Stroh. The institution of a suit under such circumstances against Stroh alone, with the deliberate decision not to proceed against the defendant, if not

a conclusive election on the part of complainant as between remedies, was at least a circumstance of high importance in its bearing upon this equitable complaint against this defendant afterwards. It is not the policy of courts of equity to encourage needless litigation and the splitting up of causes of action; and if the purpose existed to pursue the defendant at all, he should have been joined in the suit against Stroh. On the theory of the original suit he was as much constructive trustee as Stroh was: the case against both rested upon the same facts, and a second suit, if the two were to be proceeded against separately, would needlessly duplicate the labor, trouble and expense.

But another fact is also of high importance. While complainant has been delaying to bring suit against this defendant, quite a number of the persons who must have known the principal facts in the case have been taken away by death. Among these are Karl Busch and Edward Eccard, two of the trustees who were present at the sale, Rudolph Diefenbeck, who acted as auctioneer in making the sale, Anthony Lederle, who was prominent as a member of the corporation in making the sale, and Arnold Kaichen, one of the purchasers. Thus a very considerable proportion of all the persons who presumptively knew all the facts can no longer testify to them, and it is manifest from the discrepancies in the testimony given by others that their memory of the facts has been much obscured by time. If the defendant's connection with the transaction had but recently come to the knowledge of the officers of the corporation, this might be no conclusive reason for refusing to the complainant relief; but it would be the height of injustice to permit complainant, with full knowledge of the facts, to delay suit while the persons who were familiar with the facts were one by one passing away, and at last bring suit under circumstances which at the best must leave the court in doubt whether the remaining evidence does not disclose a partial, defective and misleading case.

A court of equity ought to refuse interference under such circumstances. *Campau v. Van Dyke* 15 Mich. 371; *Russell v. Miller* 26 Mich. 1.

But complainant's demand is more than a stale claim; it is equitably barred. As is said above, the suit is a suit to recover a sum of money had and received by defendant to complainant's use. The moneys were received by defendant in 1868, 1869, 1870, 1871 and 1872. This suit was instituted in 1879. Had the appropriate action of assumpsit been brought this claim would have been barred by the statute of limitations, which requires action of assumpsit to be brought within six years after the cause of action accrued. Conceding for the purposes of this case that complainant had a right to proceed in equity, yet the period allowed by law for bringing suit could not thereby be enlarged. *Smith v. Davidson* 40 Mich. 632; *Strimpfler v. Roberts* 18 Penn. St. 302. This is an old rule and a just one. Equity applies the statute of limitations by analogy.

There is a well understood exception in the case of actual trusts founded on and resting upon the mutual confidence of the parties; but as a case of constructive trust, resting upon a charge of fraud, and where the person sought to be charged has constantly denied the equity set up and stood upon an adverse claim, is not within the exception or within its reason. *Covington etc. R. R. Co. v. Bowler's Heirs* 9 Bush 468. Every reason for prompt action that can apply in any case is forcible here. We are therefore of opinion that if complainant ever had any equity it is barred by laches in bringing suit, and barred by the statute of limitations applied by analogy as courts of equity apply it.

We deem it proper also to add that the evidence does not convince us that any actual fraud was ever perpetrated or contemplated. But for the great and unanticipated rise in the value of pine lands in Midland county the charge of fraud would probably have never been made, or at least, never been taken notice of

by the corporation. Whether under the circumstances the sale made to persons who were members of the corporation, and two of them trustees, would have been upheld had suit been instituted seasonably we do not consider. Concurring in the general conclusions reached by the judge of the Superior Court, we order an affirmance of his decision with costs.

The other Justices concurred.

ALEXANDER RODGERS v. JOHN TORRANT.

Construction of agreement to pay royalty.

A machine may be sold independently of the patent right; and if sold or taken on execution a purchaser does not acquire a right to use it under the patent.

The assignee of a patent right agreed to pay the patentee a certain sum "for each and every one of said machines sold or caused to be sold by him." *Held* that this covered any transfer by him of the mere right to use the machine, and any "settlements" made with persons who were using machines of the kind.

Error to Muskegon. Submitted Jan. 23. Decided Feb. 11.

ASSUMPSIT on contract. Defendant brings error.

C. C. Chamberlain for plaintiff in error.

Smith, Nims, Hoyt & Erwin for defendant in error. A settlement by the assignee of a patent with an infringer is equivalent to a sale, 1 Chitty Cont. 215-21; 1 Pars. Cont. 49-53; *Spaulding v. Page* 1 Sawyer 702; *Bloomer v. Millinger* 1 Wal. 350; *Howell v. Pack* 7 East 164; *Ferguson v. Carrington* 9 B. & C. 509; Story's Eq. Jur. § 250.

GRAVES, J. Esau Torrant patented an implement for turning saw-logs, and subsequently assigned the right to Rodgers, who in consideration thereof, agreed to pay $40 "for each and every one of said machines sold or caused to be sold" by him. Some time later the patentee, Esau Torrant, transferred to John Torrant, the defendant in error, all his right and interest in the patent and in the obligation of Rodgers for the payment of royalty. Rodgers, discovering that several parties were using the same kind of machine or machines within the scope of his patent, without being entitled, and without any right, proceeded to settle with them for a consideration and allowed them to continue.

The defendant in error brought this action to recover the royalty of $40 for each of such cases, and the circuit judge allowed the jury to return a verdict therefor. Complaint is made that these settlements are not within the agreement to pay $40 on the sale of each machine, and do not support the claim based on that undertaking. In case a machine is sold, it is said, the vendee not only gets the property right to use, but gets the property in the machine also, whereas upon a settlement as here, nothing is disposed of but the right to use, and that Rodgers only bound himself to pay royalty in those instances where the machines should be transferred as well as the privilege of use.

The court is of opinion that this view does not satisfy the sense or harmonize with the essence of the obligation. The law makes a distinction between the machine—that is, between the arranged and connected materials which constitute the thing completed for business—and the patent right. The former may be sold without the latter, and if of any appreciable value in itself may be seized and sold on execution, and no right will result to the purchaser to use it under the patent. *Sawin v. Guild* 1 Gall. 485.

There was no agreement that the machines on which there should be a royalty must be of Rodgers' manufac-

ture. He need not make any at all, and the right to royalty was not made to depend on his selling. It was provided to attach upon such sales as he might cause, and it would not be impossible to cause machines to be sold without the privilege of using them under the patent right. But the parties could not have contemplated a royalty when the privilege under the patent should be withheld. Being vested with the patent, Rodgers could grant the privilege to any purchaser of a machine, and it was the valuable right of use on the transfer of which a royalty was to be paid, and not on the barren fact of having caused an arranged bundle of materials to be conveyed.

Were the construction of plaintiff in error to be adopted, and the right to royalty from him be denied except in case of actual sales of machines by him, or by his procurement, it would lead to singular results. He could always defeat his obligation to pay royalty by the simple course of leaving it to third persons, without arrangement for the purpose, to go on and sell the machines, whilst he should sell and convey separately the right of use for each machine under the patent. No such interpretation was intended.

Now it appeared conclusively before the jury, and by the testimony given by the plaintiff in error, that by means of the settlements he effected he transferred sufficient separate right of use covered by the patent, to give, in royalties, the sum found by the jury, and it is not at all material that the machines used in some of these cases differed in size, shape or construction from the machines made by Rodgers. The right of use covered by the patent was involved, and was granted or assured, and that is enough.

The view taken is considered by the court as disposing of every point worthy of particular notice, and it leads to an affirmance of the judgment with costs.

The other Justices concurred.

APRIL TERM, 1880.

THE ADVERTISER AND TRIBUNE COMPANY v. CITY OF DETROIT.

Municipal contracts—Notice to common council—Audit and allowance of public claims.

In an action involving a contract with a municipal corporation to do its printing at a certain per cent below the statutory rates for legal notices, it being farther provided that no constructive charges should be allowed, evidence of a printer's usage allowing double measure in paying for "figure work," such as advertisements of tax sales, was *held* to be inadmissible.

Where a city charter gives the common council the power to audit and allow accounts, and only permits the comptroller to receive, examine and report upon them, the latter cannot modify a contract on the part of the city, and the city is not bound by notice to him that has not been communicated to the council.

The doctrine that notice to the agent is notice to the principal is based on the view that the agent represents the principal in the particular transaction, and the latter is bound by the knowledge which the agent then has.

A common council empowered to audit and allow all accounts against the municipal corporation is presumed to investigate all claims presented and to have had full knowledge of all existing facts relating thereto before allowing them.

A municipal council, after allowing claims with no effort to investigate them, cannot order an investigation and rescind their action and recover back the money paid because of facts which they did not know of, but might have ascertained by reasonable diligence.

The objection relied on as error, or the correct theory of the case to be presented, must be brought to the notice of the trial court when not readily apparent, so it may be distinctly passed upon.

Error to the Superior Court of Detroit. Submitted January 14. Decided April 7.

ASSUMPSIT. Defendant brings error.

C. I. Walker for plaintiff in error. A payment voluntarily made on a contract by a municipality, without fraud, but under a mistake as to the legal construction of the contract, cannot be recovered back, *Detroit v. Martin* 34 Mich. 174; *Railroad Company v. Com'rs* 98 U. S. 541; *Lamborn v. Com'rs* 97 U. S. 181; *Doll v. Earle* 59 N. Y. 638; notice to a city officer who has powers and duties in relation to the matter as to which notice is given, is notice to the city, Dill. Corp. § 176; Ang. & Am. Corp. § 303; *Field v. Mayor* 2 Seld. 179; *Nichols v. Boston* 98 Mass. 39; *Williamsport v. Richter* 81 Penn. St. 508; a contract can be modified by custom, *Merrick v. McNally* 26 Mich. 374.

City Counselor *F. A. Baker* for defendant in error.

MARSTON, C. J. The city of Detroit brought an action of assumpsit to recover back money paid under the following facts:

The *Advertiser and Tribune Company* in 1875 entered into a written agreement with the city to do its printing at a certain discount below the statutory rates. A clause was inserted in the contract that "no constructive charges whatever are to be made for printing, publishing or furnishing material."

Under this contract the *Tribune Company* published the list of tax sales, known among printers as "figure work," and evidence was given that according to a custom among printers double measure was allowed for such work, in the payment of employees and in charges to customers. During the time of such publication the manager of the company on discovering such fact and ascertaining the custom, went to the city controller, informed him fully of all the facts as stated—that the company would make a claim against the city for double measurement—and the controller, after taking time to counsel with others, informed the manager that the claim as made would be allowed.

An account was afterwards made out against the city and presented to the controller, in which the city was charged according to the contract rates, but upon a double measurement of the actual work done upon the tax sale lists, and was thus allowed and paid. The controller had full notice of all the facts. There was no evidence tending to show that the common council or any member thereof had any notice of the facts or the manner in which the account had been made out.

Counsel for defendant requested the court to charge the jury:

"1st. The only ground upon which recovery can properly be sought in this case is that the money was paid by the plaintiff to the defendant under a mistake of fact.

2d. If paid under a mistake merely as to the construction of the contract, there can be no recovery.

3d. If the claim for printing was properly presented to the controller, who has the general supervision of the financial concerns of the city, and he was fully informed as to the mode of measuring for the work done, and the mode of charging therefor, and he reported the claims to the common council with his approval, and they audited and allowed the same, and the money was thereupon paid, there can be no recovery for the money thus paid, as notice to the controller was notice to the city."

These requests were refused, and under the instructions given a verdict was rendered in favor of the city.

Proof of the custom referred to would not entitle the defendant to double measurement under the contract. The price agreed upon was to be eighty-six per cent below the rates fixed by the statutes of Michigan for publication of legal notices, including tax sales. The statute does not allow double measurement, and to allow such in this case would be to give the defendant much more than the price agreed upon, and the contract also provided against the allowance of constructive charges.

Under the charter of the city of Detroit the controller had no power or authority to alter or change the contract with the defendant, or to agree for the city that a double measurement would be allowed, or to audit or allow the account at all. The power to audit and allow

accounts against the city is given to the common council. While the controller may receive, examine and report thereon, yet it is not for him, but the council, to finally pass upon and allow them.

Counsel, upon argument, conceded that it is not easy to determine when municipal corporations are bound by notice to their officers. There certainly are cases where notice to an officer may very fairly be held notice to the corporation, and there just as clearly are many cases where it would not be. The reason upon which the doctrine of notice to the agent being held notice to the principal rests, is that the agent is substituted in the place of and represents the principal in the particular transaction, and therefore while acting in such matters he takes the place of the principal, and the latter is bound by his agent's act in the light of the knowledge then possessed by the agent. If it had been the duty of the controller to examine, audit and allow the account in question, the city would have been bound by his act, in view of the facts then known to him. Farther than this, in the case of municipal corporations, the doctrine of constructive notice should not, we think, be extended. The common council of a city are its representatives; they act for and are given authority to bind the city in certain matters. Ordinarily they have but little power or control over the controller, who is an officer provided for in the charter, with certain powers therein prescribed; and to hold the city bound by knowledge which he possessed, not communicated to the council in matters like the present, would, we think, be dangerous.

Where power is given to the common council of a city to audit and allow all accounts chargeable against it, the law presumes that they will investigate all claims presented, and it is clearly their duty so to do. They cannot formally allow claims without any investigation or effort to investigate, and afterwards order an investigation and rescind their action and recover back moneys paid, because of facts existing but not known at the time

the account was allowed, and which a proper examination would then have brought to their attention. Such a doctrine would be productive of endless mischief and litigation. It would encourage the grossest carelessness in the performance of official duties, in reliance upon a future investigation to correct. The rights of third parties would not be safe under such a rule, and no one would ever know whether the allowance of his account was final or not, at least until the statute of limitations had placed the question at rest. In the absence of fraud, the body who is given the power to allow claims, when they have officially passed upon a claim, must be conclusively presumed to have had at the time full knowledge of all the facts pertaining thereto, which a proper investigation would then have disclosed.

The only doubt I have in this case is whether any error was committed as the case was tried. The theory presented was that notice to the controller was notice to the city, and this we are unable to concur in, and the several requests to charge were based upon this view of the case. The several requests to charge were each properly, I think, refused. This court has repeatedly held that justice to the trial court requires the particular objection relied upon, or the correct theory of the case, to be presented, where it is one that might not readily occur, so that it may be considered and distinctly passed upon. *Howry v. Eppinger* 34 Mich. 35; *Ward v. Ward* 37 Mich. 259, and cases cited; *Turner v. People* 33 Mich. 382.

The court instructed the jury to find a verdict for a certain amount, and this was excepted to and error assigned thereon. Under the facts a majority of this court is of opinion that the plaintiff was not entitled to recover, and that the direction to find for the plaintiff was erroneous.

It follows therefore that the judgment must be reversed with costs.

The other Justices concurred.

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EMILY HOWARD, ADMINISTRATRIX OF THE ESTATE OF JOSEPH PARDEE v. JOSEPH PATRICK, ADMINISTRATOR OF THE ESTATE OF JOHN W. PARDEE.

Exclusion of testimony—Impeachment—Admissibility of evidence—Error must be shown by the record—Partnership.

In a litigation between two estates as to the right to property which defendant's intestate claimed as surviving partner, a question at issue was the amount of live stock kept by the decedents at a certain time. *Held* that evidence as to how many cattle there were before the building of a certain shed that had been put up in the life-time of plaintiff's intestate, and as to how they had been cared for the winters before and after his death, was not material.

An exception to the general rule of the competency of testimony must come fairly within the statute excluding it.

Testimony cannot be excluded as equally within the knowledge of a deceased opponent unless it comes fairly within Comp. L., § 5968; and where enough does not appear to indicate that the witness' knowledge was necessarily so obtained as to exclude it, the proper ruling would be to restrict the examination to such matters as were not within the excluding rule.

Impeaching testimony is governed by strict rules as to relevancy, and ought not to be received unless clearly competent.

P's administratrix, who was his daughter, brought suit for the estate against the estate of P's son as for property converted by the latter. The administratrix testified that she and her sisters were to have had a certain amount from their father's estate, and that settlements had been made accordingly. Evidence that before she was administratrix she had said she had no claim against the defendant estate was offered by way of impeachment. *Held* that it was foreign to the issue, which was the son's liability, and the fact whether or not the administratrix had any private interest left in her father's estate had no bearing on the question whether the father or son owned the property in dispute. But questions relating directly to the father's disposal of his property to his sons during his life-time, bore on the issue and were proper for impeachment.

In showing the admissions of a witness for purposes of impeachment, the time and place of the admissions should be given with certainty.

It is not necessarily important that a plaintiff should show why a certain line of proof was not introduced on a former hearing.

Where it was claimed in defense to a suit for converted property, that the defendant took it by right of survivorship as partner, testimony that he lacked means was immaterial and had no tendency to disprove the partnership relation, which would have to be made out.

The existence of litigation over property is enough, in the absence of a defense showing a right to it, to render immaterial any evidence that there had been no settlement.

Where the record does not show what answer a witness gave to a question that might have been proper, the appellate court cannot know that there was any injury in admitting it. There is no presumption of error.

Cross-examination of a witness as to his contribution to the expenses of the suit, bears on his interest or bias, and is admissible.

Proof of the character of parties is allowed in criminal cases, but rarely as independent testimony in civil suits, though it might perhaps be proper to cross-examine a witness thereon where it would bear on his belief as to their sincerity.

In an action by one estate against another, the fact that the administrator of the latter had presented a claim against the former can have no bearing on the relations of the two intestates, though if his decedent had lived and presented the claim, it might possibly have shown inconsistency in his position.

Testimony that the widow of an intestate continued in possession of the property at the homestead, bears on the claim that the son had converted it.

Where the defense to a suit for converted property was that defendant had taken it as surviving partner, testimony as to his business capacity would not be relevant standing alone, but might not be prejudicial if connected with evidence of the extent and manner of his management and the trust reposed in him in the partnership.

The statements of a decedent as to what he had already done with his business are admissible in a suit concerning the right of another to carry it on as partner, but not as evidence of an intention to transfer it as by a verbal will.

A witness' knowledge of handwriting cannot be tested by comparing papers in the case with others not in it, as *e. g.* fictitious specimens.

Objections to the admission of testimony cannot be considered if the answers given do not come within them.

Error to Wayne. Submitted Jan. 14. Decided April 7.

APPEAL from an order of the Probate Court confirm-

ing the disallowance of a claim against the estate of John W. Pardee. Judgment was given for the estate, and claimant brings error.

Levi Bishop for plaintiff in error.

C. I. Walker for defendant in error. Whatever bears directly on the credibility of a witness is material to the issue, *Van Wyck v. McIntosh* 14 N. Y. 439; when the character of a party has been attacked, it becomes a material issue, 1 Greenl. Ev. §§ 54, 55; 1 Ph. Ev. C. & H. Notes 529; *Doe v. Walker* 4 Esp. 50; *Ruan v. Perry* 3 Cai. 121; See *King v. Francis* 3 Esp. 116; *Ray v. Donnell* 4 McL. 504; papers outside of the case cannot be introduced to test the knowledge of an inexpert witness as to the handwriting, Ph. Ev. C. & H. Notes 610; *Griffits v. Ivery* 11 Ad. & El. 322; *Hughes v. Rogers* 8 M. & W. 123; *U. S. v. Chamberlain* 12 Blatch. 390; *Vinton v. Peck* 14 Mich. 287.

CAMPBELL, J. Plaintiff in error presented a claim against the estate of John W. Pardee, on behalf of the estate of Joseph Pardee who was father of John, and whose personal estate she claimed John had converted after the father's death. The claim was for the value of the property alleged to have been converted. Joseph Pardee died November 21, 1859, leaving three sons and several daughters, of whom plaintiff is one. There are also some descendants named Conklin, by a former marriage. John Pardee died October 19, 1872. Joseph Pardee also left a widow, who continued to live on the homestead. Plaintiff obtained letters of administration on January 5, 1875. There had been no previous appointment.

The case having been appealed to the Wayne Circuit Court, has been tried four times. It was before us in 1878, when several matters were settled by the decision, which is reported as *Howard v. Patrick* 38 Mich. 795.

The chief controversy—and substantially the only one

in the court below, except as to some household furniture—was whether John Pardee was in partnership with his father, and therefore entitled to the personal property of the firm as survivor. This came up in different ways, and most of the questions upon the record are more or less connected with it.

Among other things relied on to prove the partnership was an account book claimed to have been chiefly kept by John with his father's concurrence, which had a tendency to show such dealings. Some dispute arose concerning the genuineness and purpose of this book. There was also testimony to show what amount of live stock was possessed and owned at the death of Joseph Pardee.

Two inquiries on this latter point were ruled out. The first was to show how many cattle had been kept before a certain shed was built, which had been put up in Joseph's lifetime, and the second was as to how the cattle had been cared for the winter before and the winter after his death. No objection was made to inquiry confined to the winter of his death. We do not think such evidence was material, or tended to explain any of the facts in issue.

The court below refused to allow plaintiff to testify concerning several distinct inquiries, on the ground that her testimony would relate to matters which were to be excluded as equally within the knowledge of herself and John Pardee. We held on the former argument that she came within the statute so far as any such questions of exclusion existed. The views of the court have been recently given further in *Downey v. Andrus* ante p. 65, and we do not think it necessary to discuss the general doctrine. In order to authorize the exclusion of such testimony it must—being an exception to the general rules of competency—be brought fairly within the statute. It seems to us that enough does not appear as to some of the inquiries to indicate that plaintiff's knowledge was necessarily so obtained as to be privileged, and that the rulings and

objections were too broad. *Jones v. Beeson* 36 Mich. 214. The proper ruling would have been in all ambiguous cases, to restrict the examination to such matters as were not within the exclusion. In some cases the question itself was enough to show this. But in some it was not. The inducements offered by Joseph to John to induce him to remain at home might or might not have been learned from John only; the manner of John's doing work, whether under his father's direction or not, might also appear from circumstances and in various ways, involving no exclusive knowledge or communications; the circumstances attending the account book were testified by some witnesses to have been family talk and open. Looking into the record upon the testimony drawn out on these matters, it does not apper that it was impossible for plaintiff to have knowledge on them derived in such a way as not to be objectionable.

Upon the former hearing we held that evidence of the admissions and statements of plaintiff and her sisters that they were to receive only a certain amount from their father's estate, and of settlements on that basis was outside of the merits of this controversy, and not good foundation for impeachment. It was used on the former trial, not only for impeachment, but as evidence on the merits, and it seems to have been thought by counsel for defendant that the ruling only covered the use of it on the merits. We held the evidence in contradiction should be rejected altogether as on a collateral issue. The evidence offered in the present case that plaintiff said she had no claim against John Pardee's estate, was certainly foreign to this issue, as she was not then administratrix, and it is not now important whether she had or had not any claims of her own. The present controversy relates to John's liability to his father's estate, and to nothing else. And whether plaintiff has or has not any private interest left in her father's estate, can have no bearing on the question whether John or his father owned the property in dispute.

Those questions which related directly to the disposal by Joseph to his sons of his property during his life did bear upon the issue, and that testimony was proper for impeachment. That was the very issue to be tried. It may be that some of the other inquiries bear very nearly on the same questions, but impeaching testimony is governed by strict rules as to relevancy, and ought not to be received unless clearly competent.

The objection that there was no sufficient certainty of time and place given as to the admissions intended to be shown, is well taken as to some of the inquiries.

It does not seem to be important that plaintiff should be permitted to show on her own behalf why she did not introduce a certain line of proof on a former hearing. The record does not show any exceptional reason for allowing such testimony, and it is not apparent to us why it should be received.

While there could have been no harm done by allowing the testimony offered that the Conklin heirs were not intimate with the rest, the rejection of it must have been probably because when offered it had no apparent materiality. The subject was covered afterwards fully enough. Neither do we regard the proposed testimony concerning John's lack of means as important. It had no tendency to disprove any actual arrangements, and such had to be made out. And the existence of this controversy without any such defense being put in was evidence enough to render proof that there had been no settlement quite immaterial.

The record does not show what answer Mrs. Evans gave to the question touching the consideration of a certain lease which was referred to in the record, and we cannot, therefore, know that it was any injury to admit it.

There could be no objection to cross-examining the witness Putnam concerning his contribution to the expenses of this suit. It bore upon his interest or bias. Nor do we discover from the record how the testimony, on cross-examination, that Andrew Pardee had an inter-

est after his father's death in carrying on the farm was improper. The facts concerning the handling of personal property were material. The answer not being given, we cannot know that it went too far. The record also fails to show Putnam's answer to a question when he first heard of the ten years' lease. No prejudice can be presumed.

Mrs. Clark gave some testimony tending to show that the account book chiefly relied on as corroborative of partnership relations was fictitious and designed to raise false appearances to prevent the Conklin heirs from setting up claims in the estate. This controversy as to its character figured somewhat prominently in the charge. Objection was made to the ruling of the court allowing her to be asked on cross-examination whether John and his father were not honest and upright men, which she answered affirmatively, and to some independent testimony as to their character.

We cannot say that the inquiry was not proper on cross-examination, as it would have some bearing on the belief of the witness as to whether such purposes, if expressed, were sincere or jocular. But we think there is no sufficient authority for the introduction of such proof of character as independent testimony. It is allowed in criminal cases, but rarely in civil cases, and we think it would be going too far to consider the characters of John and Joseph Pardee as very directly, if at all, involved in this issue.

The fact that John Pardee's administrator presented a claim against Joseph's estate can throw no light on the relations of the two intestates. If John had lived and presented such a claim in person, it might or might not have shown an inconsistency in his position, according to its nature and circumstances.

It was proper to show the continued possession of the property at the homestead by Joseph's widow. It bore legitimately on the claim that John had converted it. The testimony of John's business capacity, standing alone,

would have no relevancy, but as it was connected with the extent and manner of his management and the trust reposed in him in the partnership, we are inclined to think the admission was not prejudicial or erroneous. It is certainly not as clear as it might be.

We think Joseph Pardee's statements of what he had done with his business were admissible. They related to past and not future transactions, and it does not appear that they were within the Statute of Frauds. No intention of a future transfer to operate as a verbal will could be shown, but the record does not rest on such a showing.

It was not error to refuse permission to test a witness' knowledge of handwriting by showing him real and what were claimed to be fictitious specimens. It does not appear that any of these were papers which belonged in the case. Unless both parties were agreed which were genuine and which false, it would raise side issues which would complicate the case. The rule in this State does not allow comparison with outside papers, and while there is some force in the claim that there should be full means of testing the witness' knowledge, we can see no substantial distinction. *First National Bank of Houghton v. Robert* 41 Mich. 709; *Vinton v. Peck* 14 Mich. 295; *Van Sickle v. People* 29 Mich. 61.

There are several objections to the admission of testimony which cannot be considered because the answers of the witnesses do not appear to have come within the objections.

So far as the charge is concerned, it covered sufficiently the law points presented, and in most respects was in accordance with principles heretofore laid down. If—as we infer from the record—there was a dispute concerning the delivery during the life of Joseph Pardee of certain deeds, the charge could not properly take it away from the jury. The record is not very clear on this point. A lease, the delivery of which is also referred to in the exceptions, is alleged by claimant herself in her claim to have been in force, and no further question

can arise concerning it. The charge is certainly rather strong on the facts, but as the case is to be retried, we need not consider whether it went beyond the judicial province.

Judgment must be reversed with costs, and a new trial granted.

The other Justices concurred.

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STILLMAN LIVINGSTON v. MARTIN HAYES ET AL.

Amendment of bill on final hearing.

Where the prayer of an auxiliary bill is inconsistent in some respect with a merely auxiliary proceeding, the limited jurisdiction is not enlarged in consequence.

A decree should follow the case pleaded and the allegations of the bill.

A prayer for foreclosure and sale as an independent remedy is inconsistent with a bill framed to aid proceedings in ejectment, and makes the bill multifarious and demurrable; and if it contains no other requisites of a foreclosure bill it will not support a foreclosure decree.

A bill in aid of ejectment proceedings cannot be converted into a foreclosure bill by merely substituting the ordinary prayer for foreclosure in place of the prayer originally made.

A mortgagee is not entitled as such to bring ejectment, and cannot maintain a foreclosure bill as a proceeding auxiliary to the ejectment suit.

It is very much within the discretion of a trial court to allow a bill to be amended at the final hearing on the pleadings and evidence; and where the amendment would transfer the case to a different head of equity jurisdiction, a dismissal of the bill without prejudice will not be reviewed unless the refusal to allow the amendment was clearly error.

An amendment to a bill in equity proposed on the final hearing with the design of introducing or substituting a new controversy in principle, will generally be refused. Bills of discovery have in some cases been made bills for relief at an earlier stage of the suit.

A bill filed and resisted as merely auxiliary to an action at law cannot be converted by amendment on final hearing, into a bill for complete and independent relief under another branch of equity.

Appeal from Montcalm. Submitted January 15. Decided April 7.

BILL to restrain defendant in ejectment from interposing his legal title as a defense. Dismissed. Complainant appeals.

Mitchel & Pratt for complainant. Amendments may be made on the hearing if not inconsistent with the case and if justice will be advanced thereby, 1 Barb. Ch. Pr. 215; or if germane to the suit or explanatory, *Slater v. Breese* 36 Mich. 89; *Munch v. Shabel* 37 Mich. 166.

Wm. O. Webster for defendants. A bill framed for one purpose will not generally be allowed to sustain a different relief than it prays, 1 Dan. Ch. Pr. 383, n; 1 Hoffm. Ch. Pr. 49, n.; *Wilkin v. Wilkin* 1 Johns. Ch. 111; *Rochester v. Anderson* Litt. Sel. Cas. 146; a complainant cannot allege inconsistent facts and ask alternative relief, Story's Eq. Pl. §§ 42 a, 42 b; Mitf. Eq. Pl. 38; *Colton v. Ross* 2 Paige Ch. 327; *Lloyd v. Brewster* 4 Paige Ch. 537; foreclosure cannot be had on a bill which does not allege that no proceedings are pending at law, *North River Bank v. Rogers* 8 Paige 648; *Lovett v. Reformed Church* 12 Barb. 67.

GRAVES, J. Livingston sued Hayes in ejectment and was allowed to recover on the strength of an estoppel *in pais*. Hayes brought error, and it was determined that the plaintiff in ejectment could not found his title on mere equitable estoppel and shut out the legal paper title of the defendant, and the judgment was reversed and the case remanded for a new trial. *Hayes v. Livingston* 34 Mich. 384. The opinion contains a plain statement of the substantial facts. Still, a present glance at the controversy will be convenient. Hayes became

grantee of the premises in September, 1866, and went into possession, and subsequently to that time has continuously occupied them as his homestead. He gave his note and mortgage for $920, with interest at eight per cent from April 1, 1867. The principal was divided into five annual instalments, each for $200 except the last, and the first being provided to be paid on April 1, 1868. June 9, 1870 he gave his note and mortgage on the premises, in which his wife Adeline joined, to one Charles A. Corey for $470 payable in three years with annual interest at ten per cent.

Measures had been taken in 1868 to foreclose the first mortgage by publication, and in November of that year the sheriff had sold and deeded to Ezra L. Koon.

In May, 1873, Corey obtained a quitclaim deed from this gentleman, together with an assignment of the old mortgage, and in November, 1873, gave a warranty deed to Livingston. It turned out that the proceedings to foreclose were invalid. Livingston contended on the trial of the ejectment, and has since maintained, that Corey, in dealing with Koon and in selling to him, Livingston, acted in strict compliance with an arrangement expressly made with Hayes by which he, Corey, was to buy the title and interest which accrued from the foreclosure proceedings, and then, on finding a proper purchaser, to convey the premises, and from the proceeds reserve the amount called for by his mortgage of $470, together with the expense incurred in acquiring the foreclosure title, and pay over the remainder to Hayes; and that he and Corey called on Hayes and consulted him before he, Livingston, concluded the purchase from Corey, and that Hayes then held out to him and expressly stated that Corey could grant the premises to him, and that he, Hayes, in case that should be done, would give up possession the next spring. Hayes disputed this representation of the facts, and insisted that Corey, in dealing with Koon, did so for his benefit, and that the amount necessarily expended was to be a mere loan to be repaid with interest.

On the remand of the ejectment suit for a new trial it seems to have been thought by counsel that the obstacle to recovery in that action might be obviated by recourse to a court of equity, and that on an exhibition of the facts that tribunal, in the exercise of its mere auxiliary jurisdiction, would regard Hayes' assertion of his legal title, and his setting up defects in that granted by Corey, as against conscience; and would, in aid of a fair trial of the ejectment, restrain him from insisting on the invalidity of the title conveyed by Corey, and compel him to release his own. Fonb. B. 1 ch. 1 § 3; Mitf. Pl. 134 *marg.*; 2 Story Eq. §§ 903, 904; 2 Dan. Ch. Pr. 1660; Hill on Inj. ch. 6 § 15.

The view adopted was that the action at law to obtain possession was the fundamental proceeding and not to be waived or superseded, and that the aid of equity should be sought, not as a separate independent remedy for final redress, but as a means to render according to its peculiar jurisdiction and ability, that incidental assistance to the court of law which would enable it to reach a result not otherwise attainable. The proceeding was contemplated as one to merely prepare for the next trial at law, and was not thought of as an independent expedient to decide the whole controversy upon a new ground. Following this theory, the plaintiff in ejectment kept that action on foot and filed this bill under oath. He framed it as one exclusively in aid of his action at law, and grounded it entirely on the assistant jurisdiction of the court. It was not so shaped as to conform to any other principle. It did not show expressly or by necessary intendment that Livingston was the holder of any mortgage, either legal or equitable, or that Hayes and wife, or either of them, held property subject to any incumbrance of his. Neither did it contain the fact which the statute says must be inserted in all foreclosure bills, as to whether there had been proceedings at law to make collection, etc. Comp. L. § 5151.

There were plain implications from references that the mortgages were accompanied by personal obligations,

but no explanation was suggested as to their custody or ownership, or as to where they were, and no account whatever is given of them in the case. There is nothing in the record to prove they remain on foot. *Bailey v. Gould* Walk. Ch. 478; *Bassett v. Hathaway* 9 Mich. 28; *Young v. McKee* 13 Mich. 552; *Hungerford v. Smith* 34 Mich. 300.

Everything like an averment that the foreclosure at law was invalid was carefully avoided, and complainant satisfied himself by setting up merely that the court had ordered a new trial in the ejectment cause "on the grounds that the legal title to said premises was still in said Martin Hayes, and that the equities of your orator could not be litigated at law." The bill did not admit, much less allege, that anybody was impleaded in character of owner of the equity of redemption. The structure of the pleading, no less than the entire theory of the case, was against any such interpretation. The prayer was that defendants should be compelled to release their title to the complainant, and that defendant Martin Hayes should be restrained from setting up his legal title as defense in the ejectment suit, and that such other and further relief should be allowed as should be found proper. If some part of this prayer is considered not consistent with a proceeding merely auxiliary to the ejectment, it is of no importance. The scope of the case is not enlarged nor the limited jurisdiction altered. *Lewis v. Campau* 14 Mich. 458.

The defendants answered the bill as one simply in aid of the ejectment, and both parties produced their evidence and conducted the case down to the time of hearing, under the assumption that it was only what it appeared.

At the January term of the court below for 1878 the case was formally submitted, and complainant then waived all relief through estoppel. In the following April the cause was argued, and the complainant thereupon, dispensing with his special prayer for relief, moved the

court to grant under the general prayer, an ordinary decree of foreclosure of the two mortgages mentioned in the bill, for such amount as (according to the language of the record) was conceded to be due and unpaid.

The argument being closed, the circuit judge held the case under advisement until a future day, and then orally announced his decision to dismiss the bill. But before any decree was settled the complainant petitioned for an amendment of the bill by substituting, in lieu of the original prayer, a prayer for foreclosure and sale in the form ordinarily used in foreclosure cases. Thereupon counsel were heard again, and upon consideration the judge overruled the petition and made a decree dismissing the bill without prejudice. The complainant appealed. Is he entitled to a reversal of the ruling of the circuit court, and to a decree here of foreclosure and sale? No advantage need be taken of the inaccuracies, of which there are several found in the bill, nor any question be made in regard to the effect of omitting to crave amendment before the case was given to the court after argument on the merits.

The motion for a decree of foreclosure on the case originally made by the bill was plainly untenable. There was no basis for such a judgment. The decree ought to flow regularly from the case pleaded; but this bill had neither the form nor substance to lead to a decree of foreclosure. The rule which requires a sensible correspondence in proceedings, and that the judgment shall follow the allegations, is too well understood to excuse comment in so clear a case. *Thayer v. Lane* Walk. Ch. 200; *Bellamy v. Sabine* 2 Phil. 425, 448; *Crocket v. Lee* 7 Wheat. 522; *Hayward v. National Bank* 96 U. S. 611.

At this point another matter is suggested. The proposition for a decree of foreclosure, whether based on the bill as framed, or on it as it would be if amended by the introduction of the prayer petitioned for, must be equally subject to a peculiar consideration not to be dis-

regarded. As already shown, the case was commenced and cognizance taken of it by the court as being one merely auxiliary to the action at law and exclusively designed to help the plaintiff therein to get possession by means of that action. The litigation has been governed throughout by this principle. Now the plaintiff and complainant, electing to keep his action of ejectment on foot, still insists on transforming this equity proceeding, thus dependent and wholly subsidiary, not only into a suit for new and plenary relief, but into one conveying a positive denial of all right to have and maintain the ejectment—the principal case itself; and by necessary consequence conveying also an impeachment of the very ground of the proceeding immediately in question.

If complainant's right is that of *mortgagee*, then, in view of the transactions as he represents them, where is there any foundation, *first*, for his action of ejectment, and *second*, for this bill as a proceeding to aid it and based on the strength of it? If the principal case is admitted to be untenable, what foundation is there for a case instituted merely to assist it?

Would it be regular or consistent practice, on reaching the final hearing on the merits, not only to change the incidental and dependent case to an original and independent remedy, but to do so, moreover, in flat contradiction of the main case, and while maintaining in theory and fact the pendency of that case? It seems to me that the contradictions and inconsistencies involved in the course contended for were sufficient to justify the ruling objected to.

The question of allowing the bill to be amended at the final hearing of the cause on the pleadings and evidence is one subject very much to the discretion of the court; and where the amendment sought would transfer the cause to a different head of equity, and the court refuses permission and dismisses the bill, as in this instance, without prejudice, an appellate court will decline

to disturb the result unless, in view of all the circumstances, the impropriety of the refusal is conspicuous. *Darnley v. London, Chatham etc. Ry. Co.* 1 De G. J. & S. 204 219; *Budding v. Murdoch* 1 Ch. D. 42; *King v. Corke* 1. Ch. D. 57. And in case the change so moved for contemplates the introduction or substitution of a new controversy in principle, it is the general rule to disallow it. *Watts v. Hyde* 2 Phil. 406; *Palk v. Clinton* 12 Ves. 62. But short of this there is great liberality (Story Eq. Pl. §§ 892, 893, 904), and in some very peculiar cases the court will deem it just and politic to deviate from the general rule, and will allow the complainant, on fair and equitable terms, to revise his bill and give it a new bearing. *The Tremolo Patent* 23 Wall. 518. But no authority has been found for permitting him, at this stage of the case, to convert a bill filed and resisted as one merely auxiliary to a case at law, into a suit for full and independent relief under another head of equity.

A few cases are found where bills of discovery have been allowed under peculiar circumstances to be turned into bills for relief. But in every instance the change was sought and granted at a much earlier stage.

Had the complainant in the present case proposed to remodel his bill so far as to give it the necessary requisites of a foreclosure bill, this court, in view of the facts, would not have revised the action of the circuit court in refusing and dismissing without prejudice. But the amendment asked for here would not, if granted, have made the bill sufficient in form or substance. The request was to insert a prayer for foreclosure and sale. No other requisites were proposed to be supplied, and the effect of the introduction of the new prayer would have been to render the bill multifarious and inconsistent with itself and demurrable. It would have lost its primary character as a bill in aid of the suit brought at law to recover possession on the strength of legal ownership, without acquiring that of a bill alleging the plaintiff in ejectment to be a mere mortgagee, and constituting a bill of fore-

closure. It would still have been bad and insufficient to found a decree of foreclosure. From whatever quarter the matter is viewed the result is the same. The case actually laid by the bill was abandoned. The complainant turned from it and urged another, and we cannot consent to set aside his election and go back to that state of the litigation from which he withdrew the circuit judge, and in respect to which therefore no consideration was given. It would be not only irregular to do so, but unjust.

The decree should be affirmed with costs.

The other Justices concurred.

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THE COUNTY OF WAYNE v. JAMES A. RANDALL.

Fraudulent Debtors' Act—Circuit court commissioner—Fees.

Proceedings under the Fraudulent Debtors' Act are not of a criminal nature.

Fees for services performed under the Fraudulent Debtors' Act are not a charge upon the county.

Fees of a circuit court commissioner under the Fraudulent Debtors' Act are chargeable on the defendant if the proceedings are sustained; and if they cannot be collected from him the magistrate may look to the plaintiff, from whom he may require security for them, and who, if he prevails, may recover them from the defendant.

Where a claim is allowed by a board of auditors after they have been informed that their liability is doubtful and have taken advice, they cannot recover back the sum paid on such allowance, as their mistake is one of law and not of fact.

Case made after judgment from Wayne. Submitted January 16. Decided April 7.

ASSUMPSIT. Defendant had judgment below.

Charles E. Miller for plaintiff. See as to payment of fees in fraudulent debtors' cases, *Bromley v. People* 7 Mich. 472; proceedings therein are civil, *Randall v. Auditors*, on hearing for order to show cause, October, 1878.

Edwin F. Conely for defendant. The Fraudulent Debtors' Act contemplates public and penal proceedings and that the county shall pay the fees, Comp. L. §§ 7174-87.

MARSTON, C. J. One of the important questions raised in this case relates to the liability of counties to officers for their fees for services performed under the Fraudulent Debtors' Act.

While many expressions may be found in that act which would give color to the theory that the proceedings are not strictly of a civil nature, yet there are certain provisions therein to which a controlling effect must be given, because so utterly at variance with well settled and unalterable legal principles of the criminal law.

The whole object of the chapter and the proceedings thereunder is to enable the plaintiff to collect a money demand of a certain kind from his debtor out of property beyond the reach of an ordinary execution. The plaintiff has such control over the proceedings that he may cause them to be stopped at any time, and the defendant may also, in the manner prescribed by the statute, bring the proceedings to an end. If upon examination the defendant is discharged, any other creditor, and perhaps the same one, may commence new proceedings, specifying the same offense, and the first will be no bar; thus, if criminal, placing the accused twice in jeopardy.

The party arrested, on being brought before the magistrate, may controvert the facts, and may at his option verify his allegations by his own affidavit, and in such case the complainant may examine him on oath touching any fact or circumstance material to the inquiry, and the answers of the defendant on such examination shall

be reduced to writing and subscribed by him,—a course wholly unknown to our criminal law.

The proceedings are not criminal. It is not claimed that there is any express provision of the statute making the fees in these cases a charge against the county. The thirteenth section of the act certainly does not so provide; it but fixes the rate of compensation. Nor does the fourteenth section even by implication make the charge a proper one against the county by providing that if the complaint is dismissed the complainant shall be liable for all fees, costs and expenses. If the complaint is dismissed the defendant should not be obliged to pay them, and it does not follow even in criminal cases, that the county under similar circumstances is obliged to pay the costs in all cases. They are very properly charged to the complainant. It is said, however, that where the complaint is not dismissed, the commissioner will lose his fees unless he can charge them to the county. If the proceedings are sustained the fees are taxed against the defendant, and if he has property may thus be collected. If he has not, that fact would not justify a charge against the county. There are very many cases where costs are taxed up against the losing party, and are never collected for the same reason, yet no one thinks of looking to the county or public to pay them. The magistrate in these, as in all civil cases, may look to the plaintiff for his fees, and may require him to give security therefor, and if he does not in this way protect himself he has no one else to blame. If the plaintiff succeeds he recovers the amount so paid, or for which he is liable, from the defendant; if he does not, he is but paying certain officers of the law their statutory fees for services rendered at his request in an effort to collect a debt.

It appears from the finding of the court in this case that the claim in question was presented to the board of auditors, and they fully informed of all the facts relating thereto and also that doubts existed as to the liability

of the county therefor. It farther appears that the board took advice regarding the liability of the county, allowed the claim, and that it was paid. Under such a state of facts we are of opinion that the sum so paid cannot be recovered back. The mistake was one of law and not of fact. The same reasons which would prevent an individual from recovering back money paid under such a state of facts should apply here also. Our views upon this point are more fully set forth in *Detroit v. Advertiser etc. Company* ante p. 116, decided at the present term, and need not here be repeated.

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

COOLEY and GRAVES, JJ., concurred.

CAMPBELL, J. I concur in the result.

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CITY OF DETROIT v. DETROIT & HOWELL PLANK ROAD CO.

Amendment of charters—Removal of toll-gates.

A charter forbidding a turnpike corporation to erect toll-gates within city limits does not oblige them to remove gates brought within the limits by their subsequent extension.

The rights of a private corporation under its charter cannot be taken away as forfeited until there is a judicial finding of the forfeiture.

A legislature cannot bind its successors where the elements of contract, concession and consideration do not appear. A legislative provision in a particular statute that the act shall bind only those who assent to it, may limit the scope of that statute, but is void as to any subsequent act on the same subject.

Where the essential elements of a contract do not appear in a statute granting a franchise, the courts will not be astute in discovering contract obligations therein for the purpose of defeating later statutes on the same subject, but will solve all doubts in favor of the State.

The right of the Legislature to change the methods or the extent of taxation must always exist where there is no express contract to the contrary.

Municipal corporations are protected in their rights to property which they have lawfully acquired for local purposes, and cannot be deprived of it by the State.

Act 219 of 1879 requiring any plank road company to remove its toll-gate beyond municipal limits is invalid as taking property without due process of law.

The reserved right to amend the charter of a corporation will not authorize the Legislature to add requirements that would be inconsistent with constitutional principles, as by depriving it of its property without due process of law.

Courts must look beyond the particular case to the governing principle and be governed thereby regardless of special and temporary inconvenience.

MANDAMUS. Submitted January 20. Decided April 7.

City Counselor *F. A. Baker*, *E. F. Conely* and Attorney General *Otto Kirchner* for relator. The power to amend, alter or repeal a charter, reserved by the Constitution or by an express provision of the act, is a reservation to the State of its full legislative power, and legislative action thereon can be held void only because it is unconstitutional on other grounds, *Holyoke Co. v. Lyman* 15 Wal. 500; *Parker v. Metropolitan R. R. Co.* 109 Mass. 506; *Railroad Co. v. Georgia* 98 U. S. 359; *Tomlinson v. Jessup* 15 Wal. 454; *Fitchburg R. R. Co. v. Grand Junc. R. R. Co.* 4 Allen 198; *Mass. Gen. Hospital v. State Assur. Co.* 4 Gray 227; *Oldtown R. R. Co. v. Veazie* 39 Me. 581; *Schenectady P. R. Co. v. Thatcher* 11 N. Y. 102; *Buffalo v. Dudley* 14 N. Y. 336; *Northern R. R. Co. v. Miller* 10 Barb. 260; *Durfee v. Railway Co.* 5 Allen 230; *Joslyn v. Steamship Co.* 12 Abb. Pr. (N. S.) 329; *In re Lee & Co's Bank* 21 N. Y. 9; *Sherman v. Smith* 1 Black 587; *Anderson v. Com.* 18 Gratt. 295; *Miller v. State* 15 Wal. 478; *Pennsylvania College Cases* 13 Wal. 190; *Perrin v. Oliver* 1 Minn. 202; *Railroad Co. v. Greenbush* 5 Lans. 461; *Simpson County Court v. Arnold* 7 Bush 353; *Robinson v. Gardiner* 18 Gratt. 509; *Hyatt v. McMahon* 25 Barb. 457; *White v. R. R. Co.* 14 Barb. 559; *Iron City Bank v. Pittsburgh* 37 Penn. St. 340; *Com. v. R. R. Co.* 55 id. 452; *Bailey v. Power St. Church* 6 R. I. 491; *Zabriskie v.*

Railroad Co. 18 N. J. Eq. 178; acts of incorporation and other statutes derogating from the power of the State must be strictly construed, *Dugan v. Bridge Co.* 27 Penn. St. 303.

Chas. A. Kent and *G. V. N. Lothrop* for respondent.

COOLEY, J. A mandamus is applied for in this case to compel the respondent to remove beyond the city limits a toll-gate located on Grand River street. The questions the application presents are questions of statutory construction and of constitutional law.

The respondent was incorporated April 3, 1848, for the purpose of building and maintaining a plank road from the city of Detroit to the village of Howell, with certain specified branches. The third section of the act of incorporation provided that the corporation "shall be subject to the provisions of an act entitled 'An act relative to plank roads,' approved March 13, 1848, except so far as otherwise provided in this act." The fifth section was as follows: "This act shall be and remain in force for the term of sixty years from and after its passage; but the Legislature may at any time alter, amend or repeal this act by a vote of two thirds of each branch thereof; but such alteration, amendment or repeal shall not be made within thirty years of the passage of this act, unless it shall be made to appear to the Legislature that there has been a violation by the company of some of the provisions of this act: *Provided*, That after said thirty years, no alteration or reduction of the tolls of said company shall be made during its existence unless the yearly net profits of said company, over and above all expenses, shall exceed ten per cent on the capital stock invested, provided there be no violation of the charter of said company." Laws 1848, p. 398.

This act of incorporation was one of a considerable number passed by the same Legislature, all very short, and doing little beyond fixing the line of the proposed road, and the period of corporate existence, but referring for all other directions to the "Act relative to plank roads," subject to the provisions of which they were all made. That act prescribed a method of organization,

enumerated the corporate powers and franchises, provided for an annual report to the Secretary of State, prescribed rates of toll, and limited the imposition of taxes. Laws 1848, p. 59.

Several sections of the general act of 1848 were amended in 1853, and several new sections were added. One of the new sections was as follows: "Any plank-road company, organized under the provisions of this act, shall be subject to the provisions of all amendments made or to be made thereto, whenever the assent of any such company, certified by the president and secretary thereof, to the provisions of such amendments, shall be filed in the office of the Secretary of State." Laws 1853, p. 69. The respondent filed its assent to these amendments, and no question is made of its being bound thereby.

In 1879 a further section was added to the general act of 1848 as follows: "No plank-road company organized subject to the provisions of this act, shall, without the consent of the local authorities, keep or maintain a toll-gate within the present or future corporate limits of any city, or village; and no such company shall collect toll for any portion of its road, within such limits, on which a pavement is maintained by such municipality. The assent of any such company to this amendment shall not be necessary in order to make this act applicable to such company. And if any plank-road company or companies in this State are, at the time of the passage of this act, maintaining any toll-gate within the present corporate limits of any city or village, said plank-road company or companies, are hereby required to discontinue and remove said toll-gate beyond the limits of said city or village, within sixty days after they are notified by the municipal authorities to so discontinue or remove the same." Public Laws 1879, p. 197.

It is upon this last amendment that the questions in this case arise. The toll-gate of the respondent on Grand River street is within the existing corporate limits of the city of Detroit, and the city authorities notified the respondent to discontinue and remove the same more than sixty days before this proceeding was instituted. The respondent denies the validity of the act of 1879, and refuses to conform to it. It is admitted that but for the act of 1879 respondent might lawfully maintain the

gate where it is, the city having been extended to embrace it since the gate was located. *Chope v. Detroit & Howell P. R. Co.* 37 Mich. 195.

The effect of this legislation, if valid, would be to take from respondent about two miles and a half of the road upon which it now collects toll. It is not pretended that this is done by reason of any forfeiture done or suffered by the respondent, and if it were, a judicial finding would be necessary. *Flint etc. Plank-Road Co. v. Woodhull* 25 Mich. 99. Nor is it claimed that the act of 1879 was passed as a regulation of police. It would probably be conceded that it goes quite beyond the competency of an act of mere regulation, and that it must be sustained, if at all, as an act passed in the exercise of that complete power to amend and repeal, which was reserved in passing both the general act of 1848 and the charter of respondent. The city relies upon it as an exercise of that power, and not otherwise.

The respondent claims that the act of 1879 is unconstitutional for many reasons; one which is especially relied upon being that it is inconsistent with the act of 1853, by one of the provisions of which subsequent amendments were to be binding on companies which were subject to the provisions of the general plank-road act, when they should file with the Secretary of State their assent thereto. That section, it is insisted, constitutes a contract between the State and the companies, prescribing while it stands the terms and the only terms on which companies can be bound by amendments, and is irrepealable except as to such companies as may assent. The city insists, on the other hand, that so long as a general power to amend and repeal is reserved, all amendments must themselves be amendable and repealable, and that inconsistent legislation does not repeal them.

If the act of 1879 in what it proposes to accomplish is fairly within the scope of any legitimate power to amend charters, the difficulty raised upon the act of 1853

would probably not be serious. An examination of that act will show that its provisions were amendments for the ease and advantage of plank-road companies; enlarging their powers and capacities, decreasing the taxes to which they would be liable, extending the time within which they might complete their roads, relieving them of penalties, and so on, and that the consent of corporations thereto could not have been required by way of assent to onerous conditions as a consideration for favors conferred. On the contrary, the State could have passed and enforced the act without the provision for assent, and that provision can only be understood as leaving it optional with companies to claim the benefits of the act of 1853 as their interests might seem to dictate. But so far as that act undertook to limit the power to amend in the future—if it can be understood as having done so—it must have been wholly inoperative. A legislative declaration embodied in a particular law, that it shall be binding only on those who may assent to it may limit the scope of that law, but a declaration that any future law on the same subject shall be thus restricted must be void. *Bloomer v. Stolley* 5 McLean 158, 161; *Kellogg v. Oshkosh* 14 Wis. 623. Legislators cannot thus bind the hands of their successors where the elements of contract, concession and consideration do not appear; and the doctrine that they may do so by contract is one so exceptional and so liable to abuses that courts will not be astute in discovering the existence of a contract between the State and those who claim franchises under it, where the essential elements of a contract are not manifest. All questions of doubt are to be solved in favor of the State in such cases, and "to be in doubt is to be resolved." *Pennsylvania R. R. Co. v. Canal Commissioners* 21 Penn. St. 22; *East Saginaw Salt Manfg. Co. v. East Saginaw* 19 Mich. 259; *Richmond etc. R. R. Co. v. Richmond* 26 Gratt. 83.

But leaving out of view the act of 1853, is the act of 1879 a legitimate exercise of the power to amend the

plank-road charters? It has been seen that in the case of this particular company it takes from it about two miles and a half of its road, and this may be and probably is from the most profitable portion of it. That this diminishes essentially the value of the road is not to be doubted, though the extent is immaterial.

There are cases in which amendments to charters having some resemblance to this have been sustained, but it is in general easy to distinguish them. Many of these are cited in the brief for the relator. *Commissioners v. Holyoke Co.* 104 Mass. 446, in which a company having a dam across the Connecticut river was required to construct a fish-way, was a case involving a mere police regulation for the preservation of rights of others in the fishery above and below. All the following cases involved the same principle: *Commonwealth v. Eastern R. R. Co.* 103 Mass. 254, where a railroad company was required to build a station house and stop its trains at a certain locality; *Albany etc. R. R. Co. v. Brownell* 24 N. Y. 345, in which it was held competent to require a railroad company to permit and provide for the crossing of its track by highways; *Roxbury v. Boston R. R. Co.* 6 Cush. 424, in which a like question was involved; *English v. New Haven etc. Co.* 32 Conn. 240, in which a bridge, made necessary for the convenience of a railroad company, and used by the company and the public, was required to be made wider by the company; *Worcester v. Norwich etc. R. R. Co.* 109 Mass. 103, in which the railroads coming into a city were required to unite in a common passenger station at a point to be determined by commissioners; *Meadow Dam Co. v. Gray* 30 Me. 547, in which a company incorporated to build a dam across a river was required to construct a lock for purposes of navigation; and there are many others of the same sort. Cases involving only the right to change the methods or the extent of taxation, may be dismissed altogether from consideration, as this right must always exist when there is no express contract to the contrary. *East Saginaw Salt*

Manfg. Co. v. East Saginaw 13 Wall. 373. So may cases involving only the question of the liability of corporations to the control of the general police laws of the State. *Beer Company v. Massachusetts* 97 U. S. 25; *Fertilizing Company v. Hyde Park* id. 659.

But there is no well considered case in which it has been held that a legislature, under its power to amend a charter, might take from the corporation any of its substantial property or property rights. In some cases the power has been denied where the interest involved seemed insignificant. The case of *Albany etc. R. R. Co. v. Brownell* 24 N. Y. 345 is an illustration. It was there decided that although the legislature might require railroad companies to suffer highways to cross their tracks, they could not subject the lands which the companies had acquired for other purposes, to the same burden except in connection with provision for compensation. The decision was in accord with that in *Commonwealth v. Essex Co.* 13 Gray 239, 253, in which, while the power to alter, amend or repeal the corporate franchises was sustained, it was at the same time declared that "no amendment or alteration of the charter can take away the property or rights which have become vested under a legitimate exercise of the powers granted." The same doctrine is clearly asserted and affirmed in *Railroad Company v. Maine* 96 U. S. 499, and is assumed to be unquestionable in the several opinions delivered in the *Sinking Fund Cases*, 99 U. S. 700.

But for the provision in the Constitution of the United States which forbids impairing the obligation of contracts, the power to amend and repeal corporate charters would be ample without being expressly reserved. The reservation of the right leaves the State where any sovereignty would be if unrestrained by express constitutional limitations, and with the powers which it would then possess. It might therefore do what it would be admissible for any constitutional government to do when not thus restrained, but it could not do what would be inconsistent with constitutional principles. And it can-

not be necessary at this day to enter upon a discussion in denial of the right of the government to take from either individuals or corporations any property which they may rightfully have acquired. In the most arbitrary times such an act was recognized as pure tyranny, and it has been forbidden in England ever since *Magna Charta*, and in this country always. It is immaterial in what way the property was lawfully acquired; whether by labor in the ordinary avocations of life, by gift or descent, or by making profitable use of a franchise granted by the State: it is enough that it has become private property, and it is then protected by the "law of the land." Even municipal corporations, though their charters are in no sense contracts, are protected by the Constitution in the property they rightfully acquire for local purposes, and the State cannot despoil them of it. *Terrett v. Taylor* 9 Cr. 43; *Pawlet v. Clark* 9 Cr. 292; *State v. Haben* 22 Wis. 660; *People v. Common Council* 28 Mich. 228.

We have said nothing of those cases in which charters have been amended by limiting the tolls that may be taken, as it is conceded by relator that that is not what has been attempted in this case. It was a part of the original contract that the tolls should not be reduced by the State until the annual returns should realize to the stockholders ten per centum annually on their investment, and it is not claimed that that limit has been reached. What the State claims a right to do is to deprive the respondent of the privilege any longer to take tolls for travel and traffic on two miles and a half of its road. If it may do this in respect to one part of the road, it may in respect to any other part. If it may exclude the respondent from Detroit, it may from Howell also, or from any township on the line, and a single section of a statute may annihilate the property of respondent altogether. A statute which could have this effect would not be a statute to amend franchises, but a statute to confiscate property; it would not be a statute of regulation, but of spoliation.

It may be that what the Legislature of 1879 proposed to accomplish would in itself work no hardship to respondent, and would be highly desirable to the city; but the principle violated is the fundamental principle that underlies all property; and the first successful inroad upon it that obtains judicial sanction may be a precedent that shall let in innumerable evils. Courts must look beyond the particular case to the governing principle, and be governed by that, regardless of temporary and special inconveniences. But even such inconveniences must be trivial, since the power to appropriate private property to public uses is always ample and always at command.

It results, from what has above been said, that the mandamus must be denied.

The other Justices concurred.

EDWARD H. CHOPE, RELATOR v. DETROIT AND HOWELL PLANK ROAD COMPANY.

INFORMATION in the nature of quo warranto. Submitted January 20. Denied April 7.

F. A. Baker and *E. F. Conely* for relator.

C. A. Kent and *G. V. N. Lothrop* for respondent.

COOLEY, J. This is an application for leave to file an information in the nature of a *quo warranto*, to inquire by what right the respondent claims to have, hold and exercise the privilege to exact, demand and collect tolls of persons passing over any of the paved portion of Grand River avenue within the limits of the city of De-

troit. The questions involved have been fully considered in the case of the *City of Detroit v. The D. & H. Plank Road Co.* just decided, and to which we refer. The conclusions there reached lead to a denial of the application.

The other Justices concurred.

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WILLIAM MITCHELL v. ROBERT CHAMBERS, WARREN FULLER AND THOMAS G. LESTER, SURVIVORS OF GARRY CHAMBERS.

Bail for release of vessel—Power of ship's husband to bind co-owners.

Any written agreement that constitutes part of the bargain by which title has been acquired may properly be put in evidence where the purchase is to be shown.

Non-joinder of proper co-defendants must be taken advantage of by plea in abatement and does not continue open to objection till the submission of the case.

A general count for money paid is sufficient in an action by a bondsman to recover back money paid for the benefit of his principal; and if the action is brought on both general and special counts, any objections based on the latter are immaterial.

Findings are not open to dispute; but additional facts cannot be presumed, and must be regarded as not having occurred.

Proceedings in another court when introduced collaterally, cannot be questioned for error or irregularities where no jurisdictional defect is alleged against them.

Part-owners of a vessel are by construction of law, parties to any proceedings *in rem* against her, and are entitled to intervene actively and contest its liability, the extent of the claims against it, and the validity of its seizure and detention.

Judgments against a vessel on a claim against her, and against her managing owner and the surety upon a recognizance for her release from detention, are part of a general adjudication of the liability.

The several part-owners of a vessel are usually co-tenants, not partners, and will not be regarded as partners unless it distinctly appears that they are so.

A vessel-master has no authority as such to find bail for the ship in behalf of the owners.

The ship's husband cannot bind co-owners by obtaining bail to release the vessel from seizure on civil process if the co-owners themselves were not personally liable and neither authorized him to obtain it or acquiesced, and if there was no such emergency as would call for the assumption of personal responsibility.

The assent of vessel-owners to the acts of the ship's husband cannot be implied from their silence except as to such acts as are fairly appropriate to occasions with which he is usually allowed to deal.

Co-owners of a vessel are not personally liable on claims incurred by it before they acquired their interest.

The necessity for obtaining the release of a vessel from seizure does not necessarily imply that the release was obtained on such conditions as to bind owners personally.

It seems that a ship's husband is not warranted in assuming extraordinary powers without obtaining authority from the owners if they can be readily communicated with, as by telegraph.

One who consents to become surety for a party in a legal proceeding must see to it that he acts on the request of the party himself or his attorney or agent duly authorized to represent him in that respect.

The interest of the managing owner of a vessel entitles him to act for himself in obtaining bail for its release from detention, and the bail cannot hold co-owners personally liable for the security without showing that they were parties to the transaction.

Case made after judgment from Bay. Submitted January 22. Decided April 7.

ASSUMPSIT. Plaintiff brings error.

Holmes, Collins & Stoddard for plaintiff in error. Joint owners of a vessel are partners as to its earnings while run upon their joint account, *Muldon v. Whitlock* 1 Cow. 290; *King v. Lowry* 20 Barb. 532; *Williams v. Lawrence* 47 N. Y. 462; Abbott on Shipping 111, 115; the managing owner of a vessel can obtain bail for her release from seizure, and his co-owners will be liable to the bail, *Bangs v. Lowber* 2 Cliff. 157; *Burns v. Parish* 3 B. Mon. 8; *Hikes v. Crawford* 4 Bush 19; *Elmendorph v. Tappan* 5 Johns. 176; *Purviance v. Sutherland* 2 Ohio St.

478; *Weaver v. Tapscott* 9 Leigh 424; *Hamilton v. Johnston* 82 Ill. 40.

Hatch & Cooley for defendants Chambers, as to the admissibility of a contract for bail made by the managing owner of a vessel to free it from detention, as evidence to bind co-owners, cited *Pipp v. Reynolds* 20 Mich. 88; *Turner v. M'Carthy* 22 Mich. 265; *Halsted v. Francis* 31 Mich. 113; *Hurd v. Brown* 37 Mich. 484; *Hayes v. Knox* 41 Mich. 529; a surety for one partner to secure the payment of a firm debt has no redress against the other partners, *Tom v. Goodrich* 2 Johns. 213; *Walden v. Sherburne* 15 Johns. 409; *Krafts v. Creighton* 3 Rich. 273; *Knox v. Devens* 5 Mas. 380; *Sluby v. Champlin* 4 Johns. 460; a joint owner of a vessel is not a partner with other owners thereof, *Sheehan v. Dalrymple* 19 Mich. 239.

GRAVES, J. Mitchell having paid certain executions from the District Court of the United States for the eastern district of Michigan, issued on a recovery in admiralty upon a stipulation in the nature of a recognizance in which he had joined as surety for the release of a vessel under seizure for previous supplies. repairs and wages, sued Lester, Fuller and the two Chambers, as respective part-owners of the vessel, for what he had expended as so much money paid to their use. No defense was made except on the part of Chambers and Chambers. They pleaded the general issue, and denied on oath that they had anything to do with the giving of the stipulation or recognizance. The learned circuit judge heard the cause upon the facts, and made a special finding and awarded judgment thereon in favor of Mitchell. The contending defendants proceeded to bring up the controversy for review upon several points of law by means of a case, but before the record was made up and signed, one of them, Mr. Garry Chambers, died. His death was suggested and the case was then completed and certified, and is now before us. The findings are as follows:

I.

That prior to the 15th day of March, 1875, the propeller Dunkirk was owned by the following parties and in the following parts: the defendant Thomas G. Lester, one-half; one Samuel Murdock, one-fourth, and one George Delmage the remaining one-fourth; and that on the said 15th day of March the said Samuel Murdock sold his said one-fourth part of the said propeller to the defendants Warren B. Fuller, then residing in Wenona, Michigan, and Garry Chambers and Robert Chambers, residing in Genesee county, Michigan; and that on said date the said Murdock by a written bill of sale in the usual form, conveyed to said Chambers, Fuller and Chambers, jointly, his said one-fourth part of said propeller, and took from them their joint contract, in which they agree with him in consideration of said sale, among other things, as follows:

"This memorandum of an agreement made and entered into this 15th day of March, 1875, by and between Warren B. Fuller, of Wenona, Michigan, and Garry Chambers and Robert Chambers of Flint, Michigan, of the first part, and Samuel Murdock, of Bay City, Mich., of the second part, witnesseth:

"For and in consideration of the sum of one thousand two hundred and ninety-two dollars lawful money of the United States to them in hand paid by the said party of the second part, the said party of the first part agrees to pay or cause to be paid a certain mortgage on one-quarter of propeller Dunkirk, for one thousand dollars, with interest at ten per cent, said mortgage bearing date of August 15th, 1874, and due August 15th, 1875, in favor of Amos Easton. Also two hundred and ninety-two dollars of sundry claims against one-quarter of said propeller Dunkirk, and also to pay any and all other legal claims now due against said one-quarter, and to see the said Samuel Murdock harmless from the same.

"Said party of the first part further agrees that on the fifteenth day of August, 1876, to pay or cause to be paid to the said party of the second part the sum of four hundred and fifty-eight dollars, the same being the difference between one thousand seven hundred and ninety-two dollars paid and assumed by the said party of the first part, and two thousand two hundred and fifty dollars, the purchase money agreed on by said parties for one-quarter of propeller Dunkirk.

"And it is further agreed by and between said parties that should any legal claims come against said one-quarter over and above the two hundred and ninety-two dollars mentioned above, then it may be lawful for said party of the first part to pay said amount out of said four hundred and fifty-eight dollars.

"Witness hands and seals this 15th day of March, A. D. 1875.

W. B. FULLER, [L. S.]
GARRY CHAMBERS, [L. S.]
ROBERT CHAMBERS, [L. S.]
SAM'L MURDOCK, [L. S.]

JOHN MCDERMOTT."

II.

That prior to the said 15th day of March, 1875, the said Thomas G. Lester was the managing owner of said

propeller Dunkirk, and continued to act as such managing owner until the close of navigation of that year, and that shortly after the said 15th day of March the said defendant, Warren B. Fuller, became the master of said vessel and remained such during the remainder of the season of navigation of 1875.

III.

That said propeller Dunkirk was a vessel of 622 42-100 tons burthen, and was from said 15th day of March, 1875, until the close of the season of navigation of that year, run and operated on the joint account and for the joint benefit of her owners, and was engaged in carrying lumber and towing other barges loaded with lumber on the great lakes, and during the times herein mentioned Bay City, Mich., was her home port.

IV.

That on the second day of October, A. D. 1875, the said propeller Dunkirk was lying at Bay City, Michigan, with a tow of vessels on the point of leaving and ready to leave said port to carry lumber loaded on her, and to tow said vessels to the port of Sandusky in Lake Erie; and that while situated as aforesaid the said propeller Dunkirk was seized by a deputy United States marshal on attachments issued out of the District Court of the United States for the Eastern District of Michigan, in a suit *in rem* on the libel and intervening libels of George A. Coreon, Duncan and Neil McKinnon and Frank Williams against said propeller Dunkirk. That said claims were separate and distinct claims arising at different times and for different services contracted at the times hereinafter mentioned; that said proceedings were commenced by the filing of the libel of said Coreon and the issuing of an attachment thereon; that afterwards said Duncan and Neil McKinnon filed an intervening libel therein and an attachment was issued thereon, and that afterwards said Williams filed an intervening libel therein and an attachment was issued thereon. That it was desirable and for the benefit of the owners that said vessel should be permitted to proceed on her destination, and that the defendant Thomas G. Lester, then managing owner as aforesaid, and the defendant Warren B. Fuller, then master as aforesaid of said propeller Dunkirk, while thus acting as such managing owner and master as aforesaid, requested the plaintiff to become a surety on the stipulation hereinafter referred to for the release of said propeller. That in pursuance of said request the plaintiff signed and executed as surety the said stipulation on the 2d day of

October, a true copy of which is set forth in the special count in plaintiff's declaration. And that Lester signed the said stipulation as principal and as claimant.

V.

That upon such stipulation being executed as aforesaid, the same was delivered to said deputy marshal, who upon the receipt of the same released said propeller, and that thereupon said propeller proceeded upon her destination with her cargo and vessels in tow. That the claim of George A. Coreon and of Duncan and Neil McKinnon, for which their libels were filed, were claims which accrued against said vessel during the season of 1874, and while said vessel was owned as above stated by said defendant Lester, and by said Delmage and Murdock. That the claim of said Franklin Williams for which said libel was filed, accrued during the year 1875, and while said vessel was owned by defendants Lester, Fuller, R. Chambers, G. Chambers and said Delmage. That after said last mentioned claim accrued, said Delmage sold and conveyed his one-fourth interest in said vessel to Messrs. Noyes and Reed, of Buffalo, N. Y., and that at the time of the seizure of said vessel and the giving of the stipulation hereinbefore referred to, said vessel was owned, one-half by defendant Lester, one-fourth by defendants Fuller, R. and G. Chambers, and one-fourth by said Noyes and Reed; and that said Noyes and Reed at the time of the signing of said stipulation and the commencement of this suit, resided in the State of New York.

VI.

That afterwards such proceedings were had in the said District Court of the United States for the Eastern District of Michigan, that decrees were taken in said admiralty cases as follows, that is to say:

On the libel of George A. Coreon, a decree for $34.50 debt and $15 as costs of suit. On the libel of Duncan and Neil McKinnon for $149.89 debt and $36.70 as costs of suit; and on the libel of Franklin Williams for $314.22 debt and $39.20 as costs of suit. That said defendants Chambers were not served with process in said cause, and did not appear therein; and that the decrees taken therein were against said vessel, her apparel, &c. That afterwards and in accordance with the rules and practice of said court, judgments were duly entered against Lester as claimant of said vessel, and said Mitchell as surety upon said stipulation, for the several amounts decreed against said vessel upon said libels.

VII.

That afterwards and in accordance with the rules and practice of said court, a *fi. fa.* was issued on each of said decrees, and placed in the hands of the proper officer for collection, and they not being paid by defendants or any of them, were paid by plaintiff at the times and in the amounts as follows, that is to say: On the *fi. fa.* on the decree of Williams and accruing costs, $381.09 on the 16th day of Dec., 1875; on the *fi. fa.* on the decree of Coreon and accruing costs, $60.90, and on the *fi. fa.* on the decree of Duncan and Neil McKinnon, the sum of $205.74. The amounts of said last items, viz., the $60.90 and the $205.74, were paid on the 15th day of March, 1876.

FINDINGS OF LAW.

And the said court finds as conclusions of law from the foregoing facts:

1st. That the defendants Chambers, Fuller and Chambers became joint owners of one-fourth part of the propeller Dunkirk, on the 15th of March, 1875.

2d. That by the contract of that date the said Chambers, Fuller and Chambers became personally liable for the claims then outstanding against the part of said propeller purchased by them.

3d. That the defendants in this case, at the time of the execution of the aforesaid stipulation of October 2d, 1875, were, together with George Delmage, personally liable to said Williams on the claim set forth in his said libel.

4th. That at the time of the execution of said stipulation by the said plaintiff, the said claims of said Coreon, Duncan and Neil McKinnon and Williams were liens upon the said propeller.

5th. That by the seizure of said propeller under the attachment issued against her on the said libels and intervening libels of said Coreon, Duncan and Neil McKinnon, and Williams, the said propeller became subject to the jurisdiction of the United States District Court for the Eastern District of Michigan, in admiralty, and was in the custody of said court, and subject to the liens of the said libellants in said proceedings at the time of the signing of said stipulation as aforesaid.

6th. That the signing of the said stipulation by the defendant Lester, and the procuring of the same to be executed by the plaintiff, were acts done by him within the scope of his powers as managing owner, and that all the defendants became bound thereby to respond to the plaintiff upon his being subjected to the payment of the claims of the said libellants.

7th. That the execution of said stipulation and the payment on said writs of *fi. fa.* by the plaintiff extinguished the indebtedness owing to said Coreon, Williams and Duncan and Neil McKinnon, and released said propeller from all claims or liens of said libellants on said vessel and discharged the defendants from all personal liability on such indebtedness, and that the defendants are liable to the plaintiff in this action for the amount of said payments with interest at 7 per cent from the time of such payments respectively.

Dated June 24, 1879.

S. M. GREEN,
Circuit Judge.

There are many exceptions in the record to rulings concerning evidence, but only one appears to be insisted on.

It is objected that the contract dated March 15th, and embodied in the finding, was not admissible. It was made at the same time Fuller and defendants Chambers became part owners by purchase from Murdock, and was a part of that transaction. If their purchase and acquisition of title was a matter proper to be made out by an exhibition of the facts, it was competent to show the bargain, and this contract was a portion of that bargain. The whole group of facts to prove that Fuller and Chambers bought in on the 15th of March was offered and received in pursuance of the plaintiff's theory of the action, and there is no occasion for making it a question to be separately decided.

The intimation in the brief of defendants' counsel that the right to take advantage of the non-joinder as defendants, of two part-owners living in New York, was still available when the case was submitted, has no force whatever. If persons who ought to have been made co-defendants were not joined, the defect should have been taken advantage of by plea in abatement. 1 Chitty's Pl. (16th ed.) 53, 54; Story on Part. §§ 454, 455. The effect of the peculiar proceedings at the trial and of the respective rulings, was to leave the question of non-joinder to stand precisely as it did when the trial opened, and hence there was no foothold for the point.

The general count for money paid was sufficient for the cause of action contended for (1 Chitty's Pl. 361, 362 and notes) and it follows, therefore, that the special count is not a proper subject for controversy, and all questions which derive their importance from viewing that as an essential statement of the cause of action must be laid aside.

The facts found by the learned judge are not open to dispute. They are here conclusive. Any review by this court must proceed on that assumption. At the same time no additional facts can be intended. Anything not fairly comprehended by the finding must be considered as not existing.

At the time of the suit in the District Court of the United States the persons made defendants in this suit were respectively part-owners of the vessel. That action was against the vessel and not against persons. But by the very nature of the case, as one against a thing of which the Chambers were part owners, they were to certain purposes parties by construction of law. They were entitled to intervene actively, and contest the liability of the vessel, the extent of the claims, as well as the validity of the seizure and detention. They did not do so, and the proceedings have remained wholly undisturbed. It would be no answer to say that, in point of fact, the action was not known to defendants until it was too late. No one imputes any jurisdictional defect, and of course the proceedings cannot be questioned here on any charge of error or irregularity. *Cooper v. Reynolds* 10 Wall. 309.

The ship was adjudged liable for the claims brought against her, and inasmuch as the stipulation or recognizance was given and taken in her place (*The Steamer Webb* 14 Wall. 406) the court according to the course in the admiralty, gave judgment upon that against Lester, the principal, and the surety, Mr. Mitchell. Each of these determinations was a part of the general adjudication. *The Alligator* 1 Gall. 145; *McLellan v. The*

United States id. 227; *Bartlett v. Spicer* 75 N. Y. 528; *United States v. Ames* 99 U. S. 35; *The Palmyra* 12 Wheat. 1.

In the existing state of the litigation these results must be accepted. It is impossible for defendants to go back and contend that the claims were not valid charges against the vessel. That they were so stands established by an adjudication which, whether correct or incorrect, is binding here on defendants. Hence it follows that all objections and matters of defense which suppose any right to contend that the ship was not so liable are wholly inadmissible. Thus far the case is with the plaintiff.

But there is a further consideration which is not free from difficulty. There arises the general question whether the facts found by the circuit judge make out a cause of action in Mitchell's favor against Chambers as for money paid by him to their use. And this general question is divisible into two of a more precise character: *first*, whether upon the finding, it appears that Lester and Fuller, or either of them, had authority to stipulate in such manner for the release of the vessel as to create a personal though contingent liability upon the part of Chambers for an amount up to its value; and *second*, whether it appears from the finding that the stipulation was given to operate in the interest of the defendants Chambers, and was so made as to have the effect to bind them personally, and oblige them to make up to the plaintiff as surety whatever he should be compelled to pay.

First. As to the question of authority, and in respect to which the case made by the finding must be adhered to.

Fuller and Lester were severally part-owners. At the same time the latter was managing owner or ship's husband, and the former was master. The vessel was at Bay City, found to have been her home port; and

the home port, under the laws of the United States, is that at, or nearest to which, the owner, if there be but one, or if more than one, the husband or acting and managing owner, usually resides. U. S. Rev. St. (2d ed.) § 4141; *White's Bank v. Smith* 7 Wall. 646; *Morgan v. Parham*, 16 Wall. 471. The defendants Chambers were residents of Flint, in the county of Genesee, which was near by. The several part-owners were not partners in respect to the vessel. Their relation was that of co-tenants. That is the ordinary relation, and they will not be regarded as partners unless the fact is distinctly shown (3 Kent's Com. 155; *Wetherell v. Spencer* 3 Mich. 123; *Macy v. De Wolf* 3 Woodb. & M. 193), and there is no such finding. The case can, therefore, derive no aid from the rule of agency applicable to those who own as partners. And in the present state of the law it cannot be maintained, on the facts found by the circuit judge, that as mere part-owners Lester and Fuller were competent to find bail for the ship on the behalf and responsibility of the defendants Chambers, and it is very clear that in his character of master, Fuller had no such power. Story on Part. §§ 421, 422, 453; *Brodie v. Howard* 17 C. B. 109: 33 E. L. & E. 146; *Mitcheson v. Oliver* 5 El. & Bl. 419; 32 E. L. & E. 219; *Revens v. Lewis* 2 Paine C. C. 202; *Hardy v. Sproule* 31 Me., 71.

This conclusion is not supposed to be contested, and it brings the inquiry under the first head to the point whether Lester's position as ship's husband clothed him with the power. And this is a question of agency and not one concerning the existence, character and force of a pure element of part-ownership.

"The ship's husband," says Chancellor Kent, "may either be one of the part-owners or a stranger, and he is sometimes merely an agent for conducting the necessary measures on the return of the ship to port; but he may have a more general agency for conducting the affairs of the vessel in place of the owners, and his contracts, in the proper line of a ship husband's duty, will

bind the joint owners. His duty is, generally, to see to the proper outfit of the vessel, as to equipment, provisions and crew, and the regular documentary papers; and though he has the powers incidental and necessary to the trust, it is held, that he has no authority to insure or borrow money for the owners, or bind them to the expenses of lawsuits." 3 Kent's Com. 157. He cites *French v. Backhouse*, 5 Burr. 2727; *Sims v. Brittain* 4 B. & Ad. 375; *Bell v. Humphries* 2 Stark. 345; *Campbell v. Stein* 6 Dow 134; 1 Bell's Com. 504; Bell's Principles of the Law of Scotland § 449; Collier on Part. bk. 5, ch. 3 § 4; Story on Agency § 35. To these citations may be added, Story on Part. § 446; 1 Pars. Maritime Law 97; Abbott on Shipping 107, 137; 2 Duer on Ins. 200; 2 Pars. Cont. 268; Evans' Agency by Ewell 219, 220; *Holcroft v. Wilkes* 16 Ind. 373; *McCready v. Woodhull* 34 Barb. 80; *Hewett v. Buck* 17 Me. 147; *Patterson v. Chalmers* 7 B. Mon. 595; *Hoogland v. Wight* 7 Bosw. 394; *Foster v. United States Ins. Co.* 11 Pick. 85; *Turner v. Burrows* 8 Wend. 144.

In describing the authority generally possessed by the ship's husband, Judge Story says he "is understood to be the general agent of the owners, in regard to all the affairs of the ship in the home port," and as such "is intrusted with authority to direct all proper repairs and equipments, and outfits for the ship; to hire the officers and crew; to enter into contracts for the freight or charter of the ship, if that is her usual employment; and to do all other acts necessary and proper, to [prepare and] dispatch her for and on her intended voyage. But his authority does not extend to the procuring of any policy of insurance on the ship, either in port, or for the voyage, without some express or implied assent of the owner." Story's Agency. § 35. The same learned writer, in his work on Partnership, discusses the implied authority of one part-owner to bind another, and observes that "one part-owner may bind the others by his contract for repairs and materials and expenses of outfits by implication, when there is no known disagreement among them,

and there is an *acquiescence* in what is done, or is doing. But there are certain other authorities, which do not arise by implication of law under ordinary circumstances; and, therefore, such authorities, whether exercised by a ship's husband, or by a mere part-owner, will not bind the other owners, unless there is either direct proof, or a strong presumption, that they have been positively conferred upon them. Thus, for example, neither the ship's husband, nor any part-owner, as such, has a right to insure the ship, or to borrow money, on account of the owners, or of other part-owners; or to pledge their shares in the ship for the expenses of a law suit." § 446.

Parsons observes that the managing owner or ship's husband is the general agent of all the owners in respect to the ship; but that it is not customary to define his powers and duties by any written or oral bargain, because they are supposed to be sufficiently determined by usage. In referring to the limits of the authority, he says the managing owner cannot borrow money and bind the owners for it, nor give up the lien for freight earned, nor insure the ship for the owners, nor purchase a cargo for them without their special authority. 2 Pars. Cont. 268.

There is no finding of any *express agreement* in regard to Lester's powers as ship's husband, nor any finding of usage concerning the nature and extent of such agency, nor any finding that the proceedings to release the vessel were accepted or acquiesced in by defendants Chambers as proceedings on their account. Neither is there any ascertained final inference of fact on the subject. The whole question is left as one of legal implication from the group of findings reported by the learned judge.

It recurs to inquire whether they are competent to imply the power claimed. Lester held, in respect to the defendants Chambers, just such authority as their silent indifference and acquiescence admitted, and no more; and it will be conceded that their assent, as drawn from their saying nothing and doing nothing, can be made

to cover only such incidents and occasions as the ship's husband is usually allowed to deal with, and to justify only such steps on his part as are fairly appropriate to the incident or occasion arising.

It is said in the finding, that the propeller "was lying at Bay City with a tow of vessels, on the point of leaving and ready to leave said port to carry lumber loaded on her, and to tow said vessels to the port of Sandusky, in Lake Erie," at the time of seizure, and "that it was desirable and for the benefit or the owners that said vessel should be permitted to proceed to her destination." She was therefore under seizure on civil process out of the admiralty, at her home port, and in a state of security; and it is not found that either of the demands for which she was detained was a personal charge against the defendants Chambers, or included in those designed to be provided for by the agreement with Murdock, and the fact cannot be presumed by the court. Granting, for the purpose of this review, that the claims were liens on the vessel, no facts are found to show that they were incurred in any such manner as to work out a personal charge against Chambers. On the contrary, the facts disprove such liability in respect to two. They were incurred before those parties acquired any interest. *Mackenzie v. Pooley* 11 Exch. 638: 34 E. L. & E. 486; *Myers v. Willis* 17 C. B. 77: 36 E. L. & E. 380; *Macy v. Wheeler* 30 N. Y. 231; *Weber v. Sampson* 6 Duer 358; *Donnell v. Walsh* 6 Bosw. 621; *Howard v. Odell* 1 Allen 85.

And as to the claim of Williams for repairs, there is no finding as to where or at whose request or under what circumstances they were made. Concede that their necessity cannot be questioned now, and still it is not to be assumed that the transaction was under such conditions as to bind the defendants Chambers as personal debtors. Story on Agency §§ 119 119*a* 120 121; 3 Kent's Com. (Holmes' ed.) §§ 138–173 and notes; *Freeman v. Buckingham* 18 How. 182; *Beldon v. Campbell* 6 Exch. 886: 6 E. L. & E. 473; *Pentz v. Clarke* 41 Md. 327; *The Troubadour*

L. R. 1 Ad. & Ec. 302; *The Kalorama* 10 Wall. 204, 214; *The Woodland* 7 Ben. 110; *Arthur v. Barton* 6 M. & W. 138. For the purpose of this case the situation of the defendants Chambers relative to the stopping of the vessel and the probable effects of the proceeding must be looked at under the assumption that they were not personally liable at all for the demands, and that apart from their chance to gain something by sharing in future earnings, their sole interest was that of owners of one-sixth of the vessel.

There is no finding of the vessel's value or of her time, or any finding to explain in any way, in dollars and cents, the necessity there was for her speedy departure, and there is hence no basis for legal belief that the defendants Chambers could gain anything by the assumption of a personal responsibility to release her. In short, the facts afford no ground for saying that their interest favored any personal risk, in order to permit her "to proceed to her destination."

The exigency did not present one of those ordinary incidents which the ship's husband may of course meet and overcome under his usual power, without recourse to an owner, where that is practicable. And there was no such ground for inferring authority as may exist where an owner leaves the ship's husband to face an emergency without the benefit of an express direction as to the course he is to pursue in such an event, and at the same time either withholds or does not afford opportunity to obtain his advice or decision. The case was one which dictated a reference, if practicable, to the defendants Chambers, if it was intended to bind them personally, and according to the finding there was no obstacle in the way of doing so. They were in the neighboring county of Genesee, and where they could be speedily communicated with, and most likely within the space of a few minutes, by resorting to the telegraph. *Merritt v. Walsh* 32 N. Y. 685; *Gager v. Babcock* 48 N. Y. 154; *Beldon v. Campbell*, supra; *Woodruff & Beach Iron Works etc. v. Stetson* 31 Conn. 51; 2 Bell's Com. 199.

Finally, the case made by the finding does not contain "either direct proof or a strong presumption" that the authority was "positively conferred," and it therefore does not establish what, according to the doctrine laid down by Judge Story, was absolutely requisite to "bind" the defendants Chambers. Story on Part. § 446.

In the able argument submitted for the plaintiff the authority chiefly relied on was *Barker v. Highley* 15 C. B. (N. S.) 27: s. c. L. J. C. P. 270, and it was pressed with much force; and perhaps no other single case can be found having so many points in common with the one before us. The broad proposition was there laid down that "the ship's husband, or managing owner, is an agent appointed by the owners to do what is necessary to enable the ship to prosecute her voyage and earn freight."

Now it is scarcely necessary to say that this statement cannot be taken literally and without regard to the facts which bore upon the controversy and qualified the discussion. The court naturally assumed there would be no failure to understand that what was said was with tacit reference to all the modifying conditions in the case; and felt, consequently, that it would be an idle performance to expressly repeat them.

The statement must be restricted to the question as shaped and modified by the state of facts of which all were cognizant, and about which there was no thought of controversy. Unless this is done the observation of the court must be wholly rejected as in plain contradiction of settled law, and moreover as not reasonable at all upon its face. In terms it takes no notice of those variations of power which depend on variations of circumstances and imputes an authority in the agent in all cases to do whatever the owners could do themselves if actually present and consenting. Certainly, the law is not so. The result adjudicated was, that *on the facts* the co-owner was liable to the surety on the bail bond for the money the latter had been compelled to pay.

But what were the facts? There were two co-owners, and one was managing owner or ship's husband. The vessel ran against another vessel, whereby she became liable to seizure for the tort. But her owners were likewise liable personally. Process was taken in the admiralty against her, and she was accordingly attached. The co-owner, who was not ship's husband, was abroad and beyond reach. The other was hence left by his co-proprietor to act on his individual judgment and with the like power of a partner.

The case was within the rule stated by Chancellor Kent, that "as the law presumes that the common possessors of a valuable chattel will desire whatever is necessary to the preservation and profitable employment of the common property, part-owners, on the spot, have an implied authority from the absent part-owners, to order for the common concern whatever is necessary for the preservation and proper employment of the ship." 3 Com. 155. Accordingly, the managing part-owner, who was "on the spot" or sufficiently near for the purpose, assumed to act for the "absent part-owner" and caused a bond to be given (and as explained in a later case) in the name of himself and his absent co-owner for the release of the ship, and procured Barker to become surety. The ship was thereupon discharged from arrest, and she proceeded on her voyage, earned freight, and was lost whilst under insurance for the benefit of her owners. The absent co-owner, Highley, received his share of the freight and of the insurance money. The suit in admiralty having terminated in favor of the plaintiffs there, the surety was compelled to pay the damages, interest and costs, and he sued Highley for indemnity. The being placed under such formal contract relation to the transaction as to entitle Barker, the surety, to maintain a claim against him *personally* for repayment, did not alter Highley's liability in its essential character. His condition was not changed from that of mere holder of an interest subject to a charge for which

he was not personally liable, to that of one personally liable, and for the entire charge. The collision authorized a personal remedy against him, and the new obligation did no more. He could not object that it was incumbent on his co-owner to have recourse to him before assuming to connect him with the bonding of the vessel. By his absence he precluded all opportunity to do otherwise than act on a presumption of what he wished, and left his co-owner to proceed on that basis. He could not object that no power was given to shift his concern with the seizure from a *non-personal* to a *personal* liability. No such change was made. The liability was personal before as well as after. He could not object that in getting bail his co-owner did not attempt to act for him. The bail was given in his name. He could not object that he had done nothing tending, however remotely, to waive his defense or estop him from asserting his entire want of connection with the transaction. When he received his share of the freight which the liberation of the vessel enabled her to earn, and took his portion of the insurance money which arose as indemnity for her loss, he accepted benefits connected in some degree with the fact which caused her to be restored, and supplied some evidence tending to show his acquiescence in what had been done in that direction. These facts and considerations distinguish the two cases in the clearest manner, and prove as it seems to me, that *Barker v. Highley*, instead of being an authority in favor of the power ascribed to the acting co-owner here, is negatively an authority the other way, if fairly applicable at all to the precise issue to be determined.

In regard to the second question only a few words are called for.

A person who consents to become surety for a party in a legal proceeding must see to it that he acts upon the request of the party himself, or his attorney or agent duly authorized to represent him in that particular.

Gager v. Babcock 48 N. Y. 160, 161. And when the question of authority concerns the act of a part-owner of a vessel, and the act is one which may be on his individual account, and not on the account of his co-owner, and the transaction does not furnish explanation on its face, it is incumbent on him who alleges that the act was on behalf of both, to show, as matter of fact, that it was so. Broom's Com. 534, 535.

Now Lester was owner of half of the vessel, not only at the time of the arrest but also for the whole preceding period in which the several claims arose, and had consequently a large and much the largest interest to be protected and fostered. It was quite competent for him to act on his own account when he proceeded to get the vessel liberated. The stipulation or recognizance was made by him as sole principal and by Mitchell as his surety, and the finding is express that the request to the latter to become surety proceeded from Lester and Fuller, and that "Lester signed the said stipulation as principal and as claimant" and that Mitchell "signed and executed as surety." The plain meaning is that Lester was principal and Mitchell his surety.

There is no finding or suggestion that the defendants Chambers were parties to the request made to Mitchell, or that the proceedings were in their behalf, or authorized or desired by them, or that Lester or Fuller assumed to be their agents. Neither is there any finding that Lester assumed to represent or had it in his mind to represent any interest except his own and possibly Fuller's. On the other hand, the stipulation indicates and the finding states that Lester acted "as principal and claimant" and the effect is to raise an inference that he did not act for the defendants Chambers. According to the obvious construction of the finding, Lester, in getting Mitchell to become surety and in doing what was done, did not intend to act and did not assume to act for those parties, and did not intend to get Mitchell and did not assume to get him to be their surety, and

there is no finding of any conduct on the part of the Chambers tending in any manner to indicate their accession to the transaction or submission to liability.

The result is that as to the defendants below, Robert Chambers and Garry Chambers, who alone made defense, and on whose account only the case has come up, the judgment must be reversed, and judgment must be entered in this court on the findings in favor of the said Robert Chambers, as survivor of himself and the said Garry Chambers, and for the costs of both courts.

The other Justices concurred.

THE CITY OF DETROIT, RELATOR v. THE BOARD OF AUDITORS OF WAYNE COUNTY.

Detroit House of Correction—Maintenance of Convicts.

The maintenance of prisoners sentenced by the Recorder of Detroit to the Detroit House of Correction is a proper charge against Wayne county, even though no contract has been made for their support; and the county auditors must audit claims therefor at reasonable rates.

MANDAMUS. Submitted January 23. Granted April 7.

Alfred Russell for relator. Mandamus is the proper mode of compelling the allowance of a claim by the board of supervisors, if the county is liable for it, *Bristow v. Supervisors* 3 Mich. 475; the House of Correction of Detroit is not subject to the control of the city, *Detroit v. Laughna* 34 Mich. 402, and as to the county of Wayne it is simply a substitute for the county jail, *Elliott v. People* 13 Mich. 365; the expense of keeping prisoners in a county jail shall be paid by the county itself, Comp. L. § 2195.

Cornelius J. Reilly for respondent. The Legislature cannot create a debt from one person or corporation to another without the consent of the person to be charged with it, *Hampshire v. Franklin* 16 Mass. 83; *Sharpless v. Mayor* 21 Penn. St. 165; *McCagg v. Mayor* 51 Ill. 17; *People v. Hurlbut* 24 Mich. 44.

MARSTON, C. J. In *Wesley v. People* and *Dupont v. People* 37 Mich. 384, it was held that the House of Correction must for certain offenses be treated as if it were the jail of Wayne county, and that the Recorder of the city of Detroit had authority to sentence convicts to the House of Correction, and that no contract was necessary with the county as a condition precedent to such right.

The legislation relating to this subject in no way interferes with the right of the board of auditors of Wayne county to adjust claims against their county, or places that county in this respect upon a footing essentially different from other counties in the State.

The Legislature would seem to have the undoubted right to prescribe where parties convicted of crime should be confined. In reference to the Detroit House of Correction it is left optional with the board of supervisors of the several counties except Wayne to enter into contracts for the keeping of certain of their convicts, and upon such contracts being made, prisoners are to be confined in the House of Correction. No such contract is required in the first instance with Wayne county. The statute directs that prisoners shall be sentenced to that institution, and contemplated that the compensation therefor shall be determined, not by a contract, but upon the rendition of the account thereafter. The Superintendent of the House of Correction cannot claim and insist upon any rate of compensation he may deem proper, nor could the board of auditors practically annul the legislation by declining to audit such claims or by auditing them at a sum far below what would be right

and proper. The Legislature has thought proper to create the liability, leaving it with the auditors to fix and adjust the compensation, and this in the light of the contracts made with other counties would seem to be a very simple matter indeed. This places Wayne county substantially on the same footing with other counties in the State, and leaves no room for complaint.

The writ must issue as prayed for.

The other Justices concurred.

FREEMAN GODFREY AND SILAS F. GODFREY v. GEORGE H. WHITE, AMOS RATHBONE, ALFRED D. RATHBONE ET AL.

Partnership accounting—Disposition of lands—Allowance of compensation to partners and of interest on advances.

Lands that are part of a common partnership stock have in equity the character of personalty; and the legal title thereto is subordinated to the incidents of partnership funds and accounting.

Partnership lands cannot, in Michigan, be distinguished from other assets for purposes of settlement.

Proceedings between partners for an accounting are always for the principal purpose of reaching a statement of money balances and a division of assets as personalty, and being essentially a personal and not a real controversy, may be carried on in courts within whose jurisdiction the parties live and do business, irrespective of the location of the partnership lands.

Partners cannot ordinarily claim allowances for services exceeding those of their associates; but where those who do not expect to be personally charged with the business of the firm perform special services, it is proper to allow them compensation beyond their share of the profits if they had an understanding with the others that they were to be compensated for them.

Failure in duty as a partner may be a ground for dissolving the partnership, but not for a claim by diligent partners for compensation.

An agreement to compensate cannot be implied from the mere fact that services were rendered.

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	97	14
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	108	25
	43	171
	110	115
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	123	325
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A merchant who for his own purposes sends his customers to another dealer does not thereby acquire any claim on him.

Interest cannot be allowed at ten per cent on an accounting if there has been no written agreement for that rate.

Advances by partners for the benefit of the business do not draw interest unless an intent that they shall do so can be inferred from usage or from circumstances, or unless it is understood by the partners that it shall be allowed.

In a suit for an accounting an allowance was properly made for a reasonable sum paid by complainant to a competent accountant for the purpose of arriving at an adjustment, the services being necessary and of use to all parties and therefore a common charge on them.

Partition may be made by consent; but it is not an incident to a suit for a partnership accounting in which the partners usually have a right to have the assets disposed of. If land belonging to the firm is not disposed of, it must be left as a distinct tenancy in common so that the tenants may have it partitioned in a separate suit.

Partition is a local proceeding, and can only be enforced in a court which has jurisdiction of the territory where the land is.

Deponents cannot waive the reading of their depositions before signing them; depositions so signed are inadmissible in evidence.

Where all the parties to a partnership accounting appealed and the case was so disposed of that neither prevailed rather than another, the cost of printing the record was apportioned according to the interest of the parties in the firm, and in other respects each party paid his own costs.

Appeal from the Superior Court of Grand Rapids. Submitted February 10 and 11. Decided April 7.

BILL for partnership accounting. Both parties appeal.

Norris & Uhl for complainants. A consent decree cannot be materially varied without the assent of both parties (2 Dan. Ch. Pr. 1029 n. 10; *Leitch v. Cumpston* 4 Paige 476; *Jenkins v. Eldredge* 1 Woodb. & M. 61; *Clark v. Hall* 7 Paige 382), nor can it be set aside, *Harrison v. Rumsey* 2 Ves. 488, nor appealed from, 2 Dan. Ch. 1459; *Coster v. Clarke* 3 Edw. Ch. 405; *Atkinson v. Manks* 1 Cow. 691; *French v. Shotwell* 5 Johns. Ch. 564; *De Carters v. Lafarge* 1 Paige 574; *Monell v. Lawrence* 12

Johns. 521; partnership real estate is regarded in equity as personal property, 1 Story's Eq. Jur. § 674; 3 Kent's Com. 37; Story Partnership §§ 92–4; Pars. Partnership 207, 350; *Howard v. Priest* 5 Met. 582; *Buchan v. Sumner* 2 Barb. Ch., 165; *Delmonico v. Guillaume* 2 Sandf. Ch. 366; the mode of keeping partnership accounts in regard to real property belonging to the partners, has weight in determining whether it is partnership property, *Fairchild v. Fairchild* 64 N. Y. 477; a decree for an accounting should order a sale of partnership realty, and the distribution of the receipts, Story Partnership 207, 350; Pars. Partnership 474; *Darby v. Darby* 5 Drury 505; *Stevens v. Stevens* 39 Conn., 474; *Carter v. Bradley* 58 Ill. 101; *Levi v. Karrick* 8 Ia. 150.

Blair, Kingsley & Kleinhans for defendant and appellant White.

CAMPBELL, J. The bill in this cause was filed to settle the affairs of an alleged partnership wherein the complainants claim an interest of one-third, Alfred D. Rathbone one-fourth, and George H. White and Amos Rathbone the remaining five-twelfths. The other defendants have no interest in the chief controversy. The original arrangements, with slight exceptions, are not in dispute, although there is some difference of claim concerning their legal effect. The chief difference now arises out of claims for personal services of different partners, claims for interest on advances, and some special items of credits and charges. Defendant White sets up want of jurisdiction. The suit was brought in the Superior Court of Grand Rapids, and he insists the suit is local, and should have been in the circuit court for Kent county.

In the spring of 1865 an agreement was made verbally between complainant Freeman Godfrey, acting really on behalf of himself and his brother Silas, with defendants Amos Rathbone and George H. White, with a view to the acquisition of title to certain lands near Grand Rapids, valuable for gypsum beds, and then held in common

by various owners. During that year the control of the title was completely vested in White and Rathbone. It was understood that complainants should have a third interest and pay a third of the purchase money. It was further understood that Alfred Rathbone, who was then just at the close of his minority, should have a fourth interest. In 1868 conveyances were made vesting in complainants and in Alfred Rathbone record title to those amounts.

The purpose of this purchase of lands was to develop the plaster beds and get out and sell plaster in its various shapes, rough and ground. At first there was no provision made for calcining the gypsum, but after a few years this was added to the other works. Godfrey & Brother had at the beginning, and continued to have, separate plaster mills of their own, which, although claimed by White to have been connected with the common enterprise, are to be regarded as foreign to it.

From 1865 to 1871 the business was continued without any arrangement for calcining. In that year works were set up for that purpose. From that time until 1876, when this bill was filed, the business was carried on in all its branches, and extensive improvements put on the land, and large profits received. In July, 1876, the parties not agreeing, and failing to come to terms, this bill was filed, and the property was put into the hands of a receiver.

During all this interval the books were never balanced, and no accounting was ever had. A considerable part of the charges and credits in controversy never came into any recognized statement.

The absence of any written articles of partnership, and the failure to make any such entries as would bear upon the terms of the business, must be regarded as the cause of this litigation. Nearly all of the questions we are called upon to determine should have been easily settled by the partnership books, if they had been kept as they ought to have been.

The bill set forth the partnership on the terms already

referred to, carried on under the name of George H. White & Co., one object being to prevent the appearance of any common interest with Godfrey & Brother, the parties supposing an appearance of competition might help them. Complainants set out various services done by them in the business, and averred as a special ground of pecuniary allowance to them the turning over of a large amount of orders for plaster from Godfrey & Brother to the firm, for which a claim was made of $25,000, and also various other contracts with outside parties, on which similar credit was demanded. A claim was also made for personal services.

Defendants filed an answer and cross-bill admitting the common interest and business, but denying it was a partnership. These pleadings claimed that Godfrey & Brother's calcine business was to be combined with the other, and should be joined in the accounting. There were some other special allegations which need not be repeated here, but which may be referred to in another connection as far as necessary.

After issue had been joined under the cross-bill and preparations made to ascertain the truth of some facts in it, a consent decree was made on the 9th of June, 1877, for the submission to a jury of the two main questions—*first*, of a partnership; and *second*, whether it included Godfrey & Brother's calcine business.

On July 18, 1877, when these issues came on to be heard, a new decree was made by consent, dismissing the cross-bill, and directing an accounting to be had on the theory of the original bill. It was found there was such a partnership as there set up, "in which the interest of Freeman Godfrey and Silas Godfrey was and is one-third, and the interest of Amos Rathbone, Alfred D. Rathbone, and George H. White was and is two-thirds."

Subsequently, in November, 1877, the court allowed amendments of the pleadings setting up claims for personal services on both sides and interest on advances, and ordered, by way of further directions, that in the

accounting there should be a separate finding as to each of the defendants.

It is not very important, in our opinion, to consider the precise extent to which the parties or court could go beyond the terms of the consent decrees. It does not seem to us that either of the amendments was beyond the fair scope of the accounting. If the matters referred to had appeared on the books, this would be very manifest. And while, from a technical reading of the decree, it might perhaps be claimed that the firm consisted of two members—Godfrey and Brother jointly being one, and White and the Rathbones jointly the other—there can be no harm done by making an apportionment among the several defendants so far as relates to the strictly partnership business, if it will not confuse the accounts. In the present case we think this may be done to a certain extent, at least. It could not include separate interests not concerning the firm at all.

The court below in the final decree not only settled the individual interests in the assets, but required the land to be divided and partitioned in described parcels, and the remaining assets distributed in accordance with the finding of the court on the proper balances.

An important preliminary question is presented concerning the actual extent of the assets. We are called on to determine whether the real estate is partnership assets, and also whether it is to be regarded as purchased entire for the firm in the outset, or as furnished by the respective partners as their separate property, each interest being treated as several.

We have no doubt from the testimony and from the conveyances of 1868, made some three years after the business was commenced, that it was intended to consider each set of tenants-in-common as turning in their respective interests in a fixed proportion to the general business. At that time, when there was no attempt made to balance the accounts, complainants received a

conveyance of one-third, and Alfred Rathbone of one-fourth. There can be no doubt this showed them to be tenants-in-common in the strictest sense at that time, so far as the documentary title went. Whether the land was or was not to become assets for distribution, it is quite plain that each was, so far as the firm was concerned, considered as bringing in his own undivided interest as his own property. The cost of the property cannot be treated as so much money paid out of the common stock for the common interest. If any money was paid out of the firm for that purpose, each individual to whose benefit it enured thereby became indebted separately for so much advanced him on account. In taking the final accounting each is to be treated as owning in the outset a separate interest, in the purchase of which the firm was not involved as a firm. Complainants held one-third and defendants the rest, and complainants are not concerned in any dispute between defendants as to the original consideration for Alfred's quarter, or as to which of the defendants paid for it. All disputes between Alfred and the other defendants as to the state of his dealings with them, and as to the guardianship and estate accounts they were bound to settle with him as custodians of his father's estate, are outside of this controversy and must be settled elsewhere. He stands here as original owner of one-fourth of the land, and entitled to one-fourth interest in the business, chargeable with any moneys paid to or for him out of the firm assets, and creditable with all money advances made by him outside of the land, and with any other items of credit properly chargeable to the firm in his favor.

This being so, there is some force in the claim set up by White that the firm merely became tenants of the land, and interested only in its rents and profits. To this view, however, there is, we think, a fatal objection.

No written agreement having been made creating any tenancy, and no term having been fixed for the continu-

ance of the business, it would follow from any such theory that if either party became considerably indebted to the firm beyond his share in the assets, there would be no lien upon the land against him; and in case of dissolution, the tenancy would end in such a way as to leave the firm without any security. No doubt such agreements may be made, but we do not think such was the understanding. On the contrary the purpose of the arrangement was to expend money in permanent improvements on the land itself, all of which were subservient to the business of quarrying and disposing of plaster in its different forms. Money was thus expended out of the common earnings as well as advances in successive years, and no difference was made in the accounts between funds used for one purpose and those used otherwise, and nothing in the accounts would indicate that any person drawing more than his share at any time would peril the security of the rest on the land for his deficiency on a final accounting. If all these persons were really partners, as the consent decree indicates, it is impossible to suppose the lands were not understood to be part of their common stock.

This being so, the realty becomes in equity impressed with the character of personalty, and the legal title is subordinated to the incidents of partnership funds and accounting. In the present case, the fact that the parties are all living removes some complication in settlement, but it has always been the law of this State that partnership lands cannot be distinguished from other assets, for purposes of settlement. The authorities in Michigan are referred to in *Merritt v. Dickey* 38 Mich. 41, where it was held that a surviving partner was entitled to the proceeds of the sale of his deceased partner's interest in partnership lands, disposed of by an administrator, and that having bid off the interest himself, for a considerable sum, without paying the price to the administrator, bondsmen of the latter could not be held liable for the failure of the administrator to demand or

collect the bid, the remedy of the estate being against the surviving partner, as such, to compel a faithful settlement of the firm business out of the assets, all of which he was entitled to control. See also *Davies v. Games* 12 Ch. Div. 813. This doctrine becomes more especially important as bearing on the question of jurisdiction. Defendant White claims that the controversy is one concerning lands, which he insists is local under our statutes, and therefore not cognizable in the Grand Rapids Superior Court, because none of the land is in the city.

Proceedings between partners for an accounting are always for the principal purpose of reaching a statement of money balances and a division of assets as personalty. It may, no doubt, in some cases, turn out that there is enough pure personalty to settle all balances without reference to such lands as are owned by the firm, so that if parties choose they may keep the lands separate. But this cannot usually be known until the accounts are taken; and unless the lands are kept out of the accounting altogether, originally by general consent, there must be some difficulty in treating them as distinct at any time. It would be contrary to all principle to hold a court capable of maintaining jurisdiction up to the last stage of a cause, and then incapable of completing its work over any part of the property in controversy. Partnership settlements cannot very well be made piecemeal. The court that deals with them must determine all of the equities. The proceeding is in its essence a personal and not a real controversy. It could hardly be claimed that a partner could get an accounting in any State or region where lands were to be found, and proceed to a decree without personal service or appearance, and without a personal accounting. The decree when it reaches lands does it incidentally and its chief purpose is different.

By section 5058 of the Compiled Laws it is provided that if the subject-matter of the suit is local, the suit must be brought in the county in which the property in dispute is

situated; but if not local, in the county where some party resides, if either is a resident of the State. By section 13 of the act of 1875 regulating the jurisdiction of the Superior Court of Grand Rapids, its equity powers were allowed to be exercised in close analogy to those of circuit courts. It was declared it should have "the same jurisdiction as the circuit court for the county of Kent, in all cases in equity in which any complainant or defendant shall be a resident of the city of Grand Rapids, or in which the subject-matter of such suit shall be situated or located in said city," etc. Laws of 1875, p. 44.

If the subject-matter of this suit could be regarded as local, and confined to the land, the suit was improperly brought in the Superior Court. But as all the partners lived in Grand Rapids, and kept their place of business there, that court clearly had jurisdiction if the suit is not local. We have already indicated our views on that question. We do not think the objection to jurisdiction can be maintained. The case of *Harris v. Fleming* 13 Ch. Div. 208, is a very recent decision, where jurisdiction was maintained in England concerning a partnership in mines in India. While there were some other questions presented, the case was mainly put upon its character as intended to reach partnership dealings. Such, we think, is the sensible view of this class of litigation.

The questions, therefore, which we are to determine relate entirely to the accounting, and to the disposition of the assets and balances.

The decree required a payment to each partner in money by the receiver of a sum mentioned in it, and then after ordering a sale of the personal assets, directed the proceeds to be divided ratably, according to the proportions of the several partners. The real estate was partitioned in specified parcels.

In settling the separate accounts the firm was adjudged to owe complainants $13,871.40; to Alfred Rathbone, $11,011.57; to Amos Rathbone, $5412.94½; to White,

$8783.94½. If this computation is correct, it would have been much simplified by reducing the share payable to each partner by what he would be bound to contribute towards paying these debts, which would result in requiring $1241.61 to be paid to Alfred Rathbone, $844.78 to complainants and $642.30 to be paid to White, making an aggregate of $2728.69 to be paid out of the share of Amos Rathbone. This would have simplified the division and balanced the accounts. But inasmuch as these results are complained of by all the parties, and must be changed in some respects, at least, we need not further dwell on them.

In making up the decree, the court below allowed claims for services in favor of Freeman Godfrey, Alfred Rathbone and White. Complainants are allowed for the services of Godfrey $6500. Alfred Rathbone was allowed $13,500. White was allowed $4800.

The commissioner in his accounting allowed to Godfrey $11,395.23; Alfred Rathbone, $16,933.33; and to White $3516.66. The court increased White's allowance and reduced the others.

One main question in the case arises out of these allowances. Without now going into full particulars it may be said that the record shows Godfrey's services were chiefly in planning and looking after the improvements, and giving the benefit of his own personal experience in seeing to the general course and development of the plaster business.

White attending more particularly to financial arrangements, Alfred Rathbone was book-keeper and general clerk in charge. Both White and Godfrey claim to have rendered services in building up a run of custom.

White claims that none of the firm should be paid for personal services, but insists he should be if the rest are. Godfrey claims each was to be paid for what he did, but disputes the amounts to be allowed.

This question is attended with some difficulty. In ordinary partnerships it is very clear that no partner

can claim allowance for his services, whether greater or less than those of his associates. *Heath v. Waters* 40 Mich. 457. Unless there is a distinct agreement for another rule, it is not to be doubted that what each one does for the common good is done *gratis*. When partners unite their fortunes, it can seldom be expected that each is as valuable to the firm as every other. And so long as the firm lasts no premium is given to the more useful members, and no deduction is made for incapacity or absence of any one. The venture is made to reach general results, and nothing more is contemplated. Failure in duty may be a cause of dissolution, but it is no ground of compensation to the diligent.

In the present case the partnership differs in some respects from ordinary business. The principal members, that is the Godfreys and White and Amos Rathbone, were engaged in other pursuits and did not expect to make this their personal charge. The work to be done at the mill and quarry was expected to be done by subordinates, subject to at most a very general oversight. The sale of the plaster required no more than some effort to control custom. One of the means of getting custom, as agreed upon, was that Godfrey and Brother should not be publicly known in the business at all, so that to the world at large it would seem that they had a rival business, and through that apparent rivalry the idea would be created that prices would be kept down by competition. It is plain that neither White nor either of the Godfreys was expected to spend very much time in the ordinary management of the business, and that neither of them did so. It is also evident that White was ostensibly the head of the firm, and the Godfreys did not appear in it, and naturally White would have more calls upon him than they would. Freeman Godfrey was, however, regarded as best qualified to get the works in running order, and White—for Rathbone and White—had in the outset a good deal of financial care and management. It would not have been very strange if these things had

led to an agreement to pay each for his special services. But, while the testimony contains more or less to indicate that at the end of the business such a claim was set up in apparent good faith, we cannot satisfy ourselves that any such agreement was ever made. We think the conduct of the parties fails to make it likely. It is not claimed that there was ever any agreement that these persons should perform specific services, or in what way and to what extent allowance should be made for them. It will not do to assume that any partner might, when he saw fit, use his own judgment in performing services, and then charge for it. Neither could such an agreement contemplate any salary to be continuous. It would only cover different and specific acts. We find proof that Freeman Godfrey did some work that no other member of the firm could have done. Had it been done by an architect or foreman, the price paid would have been but a reasonable percentage at best. But no charge was ever made of it, and no attempt was made at the time to keep any account of it. The same is true as to such services as White rendered. Neither of them ever consulted the rest as to whether such work should be regarded as subject to compensation, and neither of them ever kept any data which would enable any one to tell what it was worth. It does not appear clearly, if at all, that what they did for the firm interfered with their outside business. We do not think any such allowances should have been made.

Alfred Rathbone's case is different. There is very little doubt that there was an original understanding, although a vague one, that he was to be steadily employed, and be paid. He was actually so employed, and in the absence of written evidence, the continuous course of business is important in explaining the understanding of the parties. He had no such peculiar knowledge of the business as to show that his personal skill or judgment entered into the reckoning. Upon these matters White and Godfrey were more useful. The duties which

Alfred performed were not such as a partner would have been expected to perform as such, rather than any other person. He was employed, in fact, as no more than a general clerk, and in the absence of any other agreement it cannot be supposed he was to have, beyond his share in the profits, any more than a clerk's wages, which would have been paid to some one else if he had, like the other partners, attended to his own outside affairs. It appears that in their attempt at a settlement before this bill was filed an agreement was provisionally made as to the value of his services, fixing them at $800 a year for the first two years, and $1000 a year thereafter. We have some doubt whether he earned $800 a year at first. But making due allowance for the delays in starting, we think ten years may be regarded as the period of his labor of any value, and that he should be allowed $9600, and no more. There is no satisfactory evidence that this is not full pay for such services as he rendered different from those of the other partners. The court below, we think, allowed too much to Alfred Rathbone, and should have made no allowance for services to the others.

Complainants were allowed by the commissioner but disallowed by the final decree, large items for orders for plaster and plaster contracts which they turned over to the firm instead of filling themselves. These they insist were valuable and profitable, and therefore entitling them to remuneration.

Of their value there is no doubt, and they would have been a good consideration for an agreement to make some compensation. We do not find, however, that any understanding was had to that effect, and we think none can be implied from the mere fact that the services were rendered. There are several things in the case that indicate that without proof of a very clear understanding to that effect, it would be unreasonable to suppose any compensation would be regarded as allowable. A certain mystery was kept up concerning Godfrey and Brother's

connection with the partnership, and business was divided with the evident purpose of keeping up the mystification. There was also as appears from some testimony a fear or jealousy entertained occasionally lest one firm might undersell the other without conciliation. To persons not themselves interested it is not easy to appreciate the hidden purposes which actuated all these parties in their dealings. But a merchant who sends his own customers for a specific purpose to a neighbor, does not thereby get any claim on him.

A claim is made on behalf of White and Amos Rathbone for interest on advances made in 1865, 1866 and 1867 beyond their share in the business. Some items cover still later years, but the sums are less important. The commissioner disallowed the interest. White only excepted on this account. Amos Rathbone excepted on some other questions, but not on this. The exceptions rest on two claims—one for interest at ten per cent, and one for interest generally. Both were disallowed by the Superior Court.

There was no written agreement, and therefore no foundation for any allowance of ten per cent. It is claimed that at the abortive attempt at settlement in 1876 a computation was made at this rate, and received sufficient recognition to make it equivalent to an agreement in writing. Giving that transaction all the force that can be claimed for it, it was never agreed upon as a binding account, and was at most but one of the things considered and passed by without a conclusion. But we do not think there is enough in the case to show that on that occasion there was any understanding whatever concerning the allowance of interest. Some figuring was done, which would have been considered with the other matters if the parties had finally settled. But White himself was active in avoiding a complete arrangement, and nothing done on that occasion amounts to any more than a circumstance bearing with more or less weight on the understanding of the parties. We do not think it

appears that the items of account were at that time so scrutinized as to throw any light on this question.

The allowance of seven per cent would be the proper one, if any allowance at all is made. If any considerable advances were made with the expectation of interest, there could be nothing out the way in having such an understanding. But while there are some circumstances which might make it apparently just to allow interest, we are not satisfied, upon a consideration of the whole case, that any error was committed by the court or commissioner in rejecting it.

It is not claimed, and it is not shown that there was any understanding on the subject when these advances were made. When there is no agreement on the subject, it seems pretty well settled that there must be something in the usages of business, or something in the surroundings of the parties, from which such an intent would naturally be inferred. It would be contrary to equity to lay such a charge on partners, unless they either knew, or ought to have known that it was to be enforced against them. They may not wish to become such borrowers. While interest is incident to a very large class of transactions, it is only chargeable, in very many of them, by way of damages after the debtor is in default for not paying his creditor. The very large amount of money deposited subject to check in our banks represents a quantity of capital which sometimes equals or exceeds the active investments in the same communities for longer or shorter periods. Very few banks allow any interest on deposits subject to call. The same thing is true in regard to a great many dealings in commercial ventures. And the rule which requires something beyond the mere advance by a partner to entitle him to interest is not unreasonable.

The fact that Amos Rathbone, who is equally interested with White, makes no such claim is entitled to some weight in construing the dealings of the partners. But aside from this, the course of book-keeping is not

consistent with it. As already suggested, the large advances were made early. Whether the business was or was not at that time in condition to reimburse them, a period soon arrived when there could have been no such difficulty. It could hardly be assumed that the firm would care to retain a large debt on interest either at seven or ten per cent indefinitely. No attempt was ever made to determine on what sum interest ought to be charged, and no interest account was ever charged or made up. No trace of such a claim is found. If there had been any basis for such a claim, it ought certainly to have been placed where the firm would know it was set up, and could admit or contest it in time to save loss and complication.

The record and the argument on White's behalf give us no satisfactory means of knowing the proper extent of such a claim if valid. The balances as finally struck have rendered an awkward method of accounting harmless, but it seems to us that if the accounts had been correctly drawn out to begin with, this question would appear differently. The charges made by Rathbone & White evidently treat the money paid for the land and not the land itself as the original capital. Many of the payments on which interest is claimed were purchase money payments. We do not see from the record that Godfrey and Brother did not pay at one time or another, the price of their one-third interest. Whether Alfred Rathbone has fully paid for his, concerns the private dealings of the defendants and not the firm. Leaving the land payments out of the question the amount of advances becomes much diminished, and much less likely to have been deemed entitled to interest. But, whatever the amount may have been, the case does not show that any one expected it would be regarded as a loan to the firm for any period, or at any rate of interest. Until some such idea was suggested, or some such claim asserted, it was not incumbent on complainants or Alfred Rathbone to suppose the advances were made except to

suit Rathbone & White's convenience. They never asked to have the money refunded, and they never made interest claims, and they do not bring themselves within any doctrine which would put the other partners in the wrong for objecting to the allowance of interest.

White also complains because he was charged individually with a purchase of plaster which he paid for out of firm money, amounting to $1429. We think this was clearly shown to have been a private speculation. And upon a few other items brought out on the argument, but not very earnestly urged, we are not disposed to disturb the conclusions, which we think were warranted by the testimony.

An item disallowed by the Superior Court for $125 paid by complainants to Mr. Goldsbury for examining the books and getting balances should we think have been allowed. This was done in 1875 and the beginning of 1876 partly in concert with Alfred Rathbone. It is evident that from the manner in which the books were kept—although no doubt fairly kept—there was a good deal of difficulty in knowing just how matters stood. The balances had not been made up at all in the usual business way for about nine years. It was perfectly reasonable that any partner should desire an adjustment, and it was also reasonable that complainants should have some voice in procuring a competent accountant to do it. The work was done openly and not clandestinely, and the assistance of Alfred Rathbone was asked and given, and the results were of utility to all the firm. The preparation was necessary, and some one else would have been employed to do it if Goldsbury had not been. If not, we think some confusion would have been created. We think the expenditure may justly be considered as a common charge.

We do not think it necessary to change the decree upon amounts and balances except as indicated heretofore.

But we do not think the decree for partition can be sus-

tained. If all the parties had consented to it, the decree might not be objectionable, because partition can be made by consent. But partition is not an incident to a suit for accounting, and the partners have a right usually to have the assets disposed of, if they choose. If not disposed of, all that could be done would be to leave the land as a distinct tenancy in common, so that the tenants could have it partitioned in a separate suit if they should see fit. It is difficult to maintain a partition in such a case as this, unless on the theory that the court having an equitable jurisdiction to give partition generally, it may be done to avoid circuity of action.

Supposing such a practice permissible, upon which we need not decide, the Superior Court of Grand Rapids has no separate and original jurisdiction in partition outside of the city. Partition is unquestionably a local proceeding, and the circuit court is the only court of equity able to enforce it.

The land should be sold and the proceeds divided.

There is one matter to which we feel constrained to refer with surprise. Several witnesses, and among them several of the parties, are stated by the commissioner to have waived the reading of their depositions before signing them. The integrity of these gentlemen is not denied, and both commissioner and counsel seem to have supposed the practice correct. Except for the failure of any one to move to suppress, all this testimony must have been rejected. It is in no sense sworn testimony, any more than if they had signed affidavits in blank. It is merely the certificate of the commissioner that so far as he remembers, they swore as he has certified. Where it appears on the face of a deposition that the party signing it does not know its contents, it exhibits a degree of carelessness in regard to the solemn obligation of an oath which has been, with how much truth we do not know, attributed to custom-house oaths, but which we never saw before, and hope never to see again in the course of justice.

The reductions in the allowances will take from complainants $5875; from White $4800, and from Alfred Rathbone $3900.

This will leave their respective claims against the firm as follows: Complainants $7996.40; Amos Rathbone $5412.94; White $3983.94; Alfred Rathbone $7111.57.

The Superior Court, in order to avoid confusion, reduced the cash payments to each partner on his indebtedness against the firm by deducting $24,000 from the aggregate as made up, and scaling down each share by its ratable proportion. The decree thus distributed actually about $15,000 on debts before dividing the balance. Under the present reduction a similar scaling may be made by deducting $1000 for each twelfth share, so that complainants will be paid in cash in the first instance by the receiver $3996.40; Amos Rathbone $2912.94; White $1483.94; and Alfred Rathbone $4111.57.

The decree must therefore be modified so as to require the payment of these sums in the first instance, and the distribution of the remaining assets must be made as soon as practicable in the proportion of each partner's interest in the firm. The lands must be sold by the receiver at public auction on a notice of not less than six weeks in a Grand Rapids newspaper, and the sale must be in parcels, according to the same division attempted to be made by the original decree by partition. Any partner bidding may pay for land struck off to him by allowing on the purchase so much of the proceeds of the aggregate sales as would fall to him on distribution.

As the changes in the decree operate so as to make it impossible to say that one appellant had prevailed rather than another, the costs of printing the record will be apportioned according to the interests of the partners in the firm, each party in other respects to pay his own costs.

The decree will be modified accordingly.

The other Justices concurred.

Caroline L. Cameron v. Timothy Calkins.

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Dismissal of appeal.

An appeal will not be dismissed where the case was not settled within the time limited by law, if the appellant used due diligence to obtain a settlement and was prevented by causes beyond his control, such as the court stenographer's inability through sickness to finish a transcript of the testimony.

Motion to dismiss appeal. Submitted and denied April 7.

Brown & Patterson for the motion.

J. H. Campbell against.

Marston, C. J. A motion was made in this case to dismiss the appeal because the case was not settled within three months from and after the date of the entry of the decree under Act No. 26, Public Acts 1877, p. 17.

The witnesses were examined in open court, and the appellant shows that he applied to and used due diligence to obtain from the official stenographer a copy of the testimony, but was unable so to do within the period named. We are of opinion that the limitation of time fixed by this statute cannot be applied to a case like the present. Cases must frequently arise where, owing to sickness or inability of the circuit judge or stenographer, the appellant would be wholly unable to have his case settled within the period fixed, and we cannot think the Legislature intended to deprive a party of his right to an appeal because not taken within a time fixed from circumstances beyond his control. Where it is within the power of a party to have his case settled, and he does not do so, he may well be held bound thereby; but where the delay is caused by officers of the court over whom he has no control, and without fault or want of due diligence on his part, we are of opinion that a settlement made after the period of three months will be good.

The motion must be denied.

The other Justices concurred.

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ZIBA B. RUGGLES v. THE FIRST NATIONAL BANK OF CENTREVILLE.

Removal of growing crops after foreclosure—Irregularities.

An order for the amendment of pleadings will not sustain an exception if both parties conformed to its terms.

Where the record shows that exceptions were taken to a commissioner's report, but does not show what they were, it cannot be assumed, for the purpose of finding error, that they were of any force.

An error in reciting the date of a foreclosure decree in the commissioner's report of sale is immaterial where the record furnishes the means of correcting it.

It is not good practice, in directing the correction of a commissioner's report of a foreclosure sale, to order that on filing the corrected report "the said sale be and the same is hereby in all respects confirmed." But it does not make the proceedings void.

Regularity is presumed in foreclosure proceedings, if the reverse is not shown.

A court of law will not in a collateral case review irregularities in the procedure of a court of equity, if they were not jurisdictional.

A foreclosure deed to the mortgagee gives him the same estate as a foreclosure of the equity of redemption, and is as effective as against the owner of the equity as if executed by such owner.

Growing crops pass with the soil under foreclosure deed, and on proper application the court may perhaps provide for their preservation until possession is given to the purchaser.

The title of a purchaser on valid foreclosure of a mortgage regularly recorded, relates back to the delivery of the mortgage as against all intervening purchasers and incumbrancers who are made parties or who become interested *pendente lite.*

The confirmation of a foreclosure sale covering growing crops relates back to the sale, and entitles the purchaser to control the crops from that time if no equities prevent, and after due notice to interested parties.

Error to St. Joseph. Submitted Jan. 8. Decided April 8.

TROVER. Defendant brings error.

R. R. Pealer for plaintiff in error. A foreclosure sale

does not become absolute until confirmed (*Demaray v. Little* 17 Mich. 386) and an assignee of the mortgager is entitled until then to possession and the income from the land, *Wagar v. Stone* 36 Mich. 366; *Newton v. McKay*, 30 Mich. 380; *Howard v. Bond* 42 Mich. 131.

John B. Shipman for defendant in error. Crops pass on foreclosure with the land, *Vanderkarr v. Thompson* 19 Mich. 82; *Tripp v. Hasceig* 20 Mich., 254; *Scriven v. Moote* 36 Mich. 64; on confirmation of a foreclosure sale, the purchaser's title relates back to the time of delivery of the deed, *Fuller v. Van Geesen* 4 Hill 171; 2 Jones' Mortgages §§ 1637-58.

GRAVES, J. In November, 1878, the bank brought trover against Ruggles for the conversion of six hundred bushels of oats and two hundred pounds of peppermint oil. He pleaded the general issue, and gave notice of special matter of defense. In the course of the trial, which occurred in March, 1879, the counsel for the bank, after the testimony was closed, asked leave to amend the declaration so as to count for the conversion of a specified crop of peppermint herbs instead of two hundred pounds of peppermint oil. An objection being made, the court observed that if the amendment was permitted it would be upon the terms of opening the case for further defense, if desired, and if not prepared, then upon the further terms of allowing a continuance for preparation. No answer being given to the court's suggestion, and counsel proceeding to agree upon the proof of the value of the property in question, and plainly disclosing a purpose to complete the trial without delay or further showing notwithstanding the amendment, the court overruled the objection and permitted the change in the declaration upon the terms of payment by the bank of an attorney fee of five dollars. The condition was complied with. The terms were tendered and accepted. In view of the circumstances of the case it is

not admitted that if the court had allowed the amendment without terms it would have been an error for which a reversal must have been ordered. But as both parties conformed to the order and virtually assented to the condition, all right to base an exception upon it was foreclosed.

The mint and oats in controversy were produced on certain premises which were owned and occupied by one Jones on the 27th of May, 1876, and which on that day he mortgaged to the bank. April 10, 1877, the mortgage was placed on record, and on the 28th of May ensuing the bank filed a bill to foreclose it. A month later notice of pendency of suit was filed. The parties made defendants were the mortgagor and wife, the First National Bank of Sturgis, Fred Wolf and Edgar A. Jones. Subsequent to this, and in September, 1877, Ruggles obtained from defendant Wolf a leasehold interest which was subject to the mortgage, and by its own terms to expire in March, 1878, and he immediately took possession under this interest. In December, 1877, at assignee's sale in bankruptcy proceedings against Jones, the mortgagor, he purchased the equity of redemption.

These interests, it will be noticed, which Ruggles acquired, were under the mortgagor and subject to the mortgage, and were obtained by Ruggles subsequent to the commencement of the foreclosure, and after the filing of the notice of the pendency of that case, and if the suit in equity is to be considered as having effectuated foreclosure his rights were cut off by it. The mint and oats were the growth of 1878, and the bank grounds its right and title on the purchase made by it of the premises under a decree of sale granted in the foreclosure suit. The decree was allowed February 7, 1878, in the usual form. It required payment on or before May 29, 1878, and authorized a sale thereafter in case of default.

It is admitted that all the proceedings up to and including the decree were regular. The debt not being paid, the commissioner advertised the premises for sale

under the decree, and on the 15th of July, 1878, being the time appointed, sold them to the bank at a price very much less than the sum called for by the decree. On the same day the report of sale was filed and the usual order of confirmation entered. The fund was also applied and the costs satisfied, and the proper deed executed and acknowledged, and on or before the 25th of July the deed was delivered, and on the last named day the bank caused it to be placed on record.

August 6th, on the motion of the solicitor for the bank the commissioner was ordered to amend his report. The nature of the amendment ordered is not explained by the record. But the commissioner, it appears, assumed to comply and on the same day filed what he denominated an amended report. It misstated, however, the date of the decree, and gave it as *July* 7 instead of *February* 7. On the filing of this report a new order of confirmation was entered under the rule. Meanwhile, and after July 31st and before August 6th, Ruggles, although notified by the bank that it claimed the property under the purchase on foreclosure, proceeded to appropriate it to his own use.

On August 20th it appears there was a hearing on exceptions to the report. What they were is not shown, and we cannot assume for the purpose of finding error, that they were of any force. The only defect apparent is the mistake made in reciting the date of the decree.

The circuit judge directed the commissioner to "correct" his report in ten days, and ordered that "upon filing the said corrected report the said sale be and the same is hereby in all respects confirmed." The nature of the required correction is not expressed, and the only thing to which the requirement can be referred is the mistaken date just mentioned. This defect was of no importance. It was a mere clerical inaccuracy which the record obviated. That the judge approved the sale is manifest, because he ordered it confirmed. No new proceedings were contemplated. Nothing more was

sought than an actual correction of the mistaken date, and it appears from the bill of exceptions that the commissioner, in the course of a day or two after the order, inserted the proper date in the report on file.

The court below overruled the objections urged against the equity proceedings, and directed the jury to find in favor of the bank.

No fault has been charged against the actual sale made by the commissioner, and none is discovered. That must be deemed valid. It is of the later practice that exception is taken. But we find no evidence in the record of any impropriety more serious than irregularity of practice. If there was greater cause for complaint than that, it should have been disclosed, and in such manner as to be passed upon. So far as the contrary is not apparent, regularity is presumed.

The course taken to reform the report and confirm the sale was not good practice. The proceedings were not void, however. If properly applied to, the court in charge of the foreclosure would have allowed the deviations from strict procedure to be corrected. It is not the province of a court of law to review them, nor of any jurisdiction to do so in a collateral case. *Torrans v. Hicks* 32 Mich. 307; *Clason v. Corley* 5 Sandf. (S. C.) 454; *Dorsey v. Kendall* 8 Bush 294; *Lynch v. Bernal* 9 Wall. 315, 322; *Lasell v. Powell*, 7 Cold. 278; *Cockey v. Cole* 28 Md. 276; *Wilson v. Miller* 30 Md. 82. Jurisdictional defects are subject to different considerations.

It was contended in the court below that the foreclosure sale had never been confirmed at all, and that notwithstanding the sale itself had taken place, the want of confirmation left the growing crops subject to Ruggles' disposal. The view already explained of the objections to the foreclosure proceedings affords an answer to this claim. Notwithstanding the departures from accurate practice, there were in substance the steps essential to work confirmation, and we think that the order of August 20th, and especially after the correction directed

by the court, operated to confirm the sale of the 15th of July. But as the conversion, although subsequent to the sale, was yet prior to the confirmation, the further claim is made that Ruggles, who was in actual possession, was entitled to appropriate during that interval such crops as were then growing. His right was that of holder of the equity of redemption and nothing else, and this interest he had obtained during the pendency of the suit. Being mortgagee, the bank acquired the same estate by the commissioner's deed as it would have held in case of foreclosure of the equity of redemption; and it was just as effectual against Ruggles as if he as owner of the equity of redemption had executed it. Comp. L. § 5154; *Tilton v. Cofield* 93 U. S. 163.

The crops in controversy were growing at the time of the sale, and they passed by it with the soil to which they were united. *Scriven v. Moote* 36 Mich. 64; *Jones v. Thomas* 8 Blackf. 428; *Lane v. King* 8 Wend. 584; *Aldrich v. Reynolds* 1 Barb. Ch. 613; *Gray v. Brignardello* 1 Wall. 634; *Bank of United States v. Voorhees* 1 McLean 221; *Gossom v. Donaldson* 18 B. Mon. 230; *Irwin v. Jeffers* 3 Ohio St. 389.

The methods which chancery has recognized for completing proceedings and putting the purchaser in possession by its own authority had not yet been carried out, and the power of the court over the sale had not ceased. But the bank as purchaser had acquired rights which applied as fully to the growing crops as to the soil, and the proceeding giving rise to these rights was the main one in the case to invest the bank with an unqualified title. Ruggles could not take upon himself the right to step in and dispose of the crops covered by the sale and purchase except at his own peril. He had no more power to detach them from the operation of the mortgage and foreclosure sale than he had to detach the land. Undoubtedly the court, on proper application and on failure of the parties to arrange amicably, might have provided for the temporary preservation and pro-

tection of the crops. The principle seems to be recognized in the case of *Mutual Life Ins. Co. v. Bigler* 79 N. Y. 568, just decided by the Court of Appeals. But that is not now important. Whenever the proceedings are not void and the record of the mortgage is regular, the title of the purchaser in these sales in equity under foreclosure decrees takes effect by relation to the delivery of the mortgage as against all intervening purchasers and encumbrancers who are made parties or who become interested *pendente lite*. *Osterberg v. Union Trust Co.* 93 U. S. 424; Rorer Judicial Sales § 53; 5 Cruise R. P. 510, 511.

The same principle operates to connect the confirmation of the sale as to the growing crops with the sale itself, and to satisfy the sort of condition subsequent to which, by virtue of the practice of the court, the sale is made subject. And where there is no unreasonable or misleading conduct or delay, and no equities will be infringed, the confirmation is entitled to operate in favor of the purchaser's right from the time of the sale itself, as respects the crops which were not then severed. To preclude misapprehension, it may be added that there may be cases where the purchaser's conduct would require the court to consider him as having waived or abandoned all right to the crops, or as having estopped himself against asserting any. Such cases must be disposed of as they arise. Here there was no delay of which Ruggles can complain, nor any misleading conduct. He received no prejudice. The proceedings to confirm were commenced on the very day of the sale, and we are not informed that there was any objection which was not frivolous; and as we have seen, Ruggles was seasonably notified that the bank claimed these crops under its purchase, and that he must not appropriate them. This purpose was never departed from.

No error is shown, and the judgment should be affirmed with costs.

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

COOLEY, J., dissenting. Ruggles was sued in the court below in trover for oats and peppermint grown upon a certain farm in St. Joseph county in the year 1877. Ruggles had bought the farm at a sale in bankruptcy made December 18, 1877. The plaintiff below at that time had a mortgage upon it, which was in process of foreclosure, and the purchase of Ruggles was made subject to it. The oats were sown by him in the spring of 1878, and both crops were harvested and removed by him from the farm August 5, 1878. The questions in the case arise chiefly on the foreclosure of the mortgage, which took place in chancery. The decree bore date February 7, 1878, and authorized a sale at any time after May 29, 1878, and after due notice. It also provided that "the purchaser or purchasers of said mortgaged premises at such sale be let into possession thereof, and that any of the parties to this cause who may be in possession of said premises or any part thereof, and any person who, since the commencement of this suit, has come into possession under them or either of them, deliver possession thereof to such purchaser or purchasers on production of the commissioner's deed for such premises, and a certified copy of the order confirming the report of such sale after such order has become absolute."

No question is made of the validity of the decree. Sale was made under it July 15, 1878, and the commissioner's report of sale was filed the same day. Two of the defendants in the suit filed exceptions July 19th, and on August 6 complainant applied for leave to the commissioner to file an amended report, which was given. The amended report was filed the same day, and exceptions were also filed thereto. These last exceptions were brought to a hearing August 20, whereupon the court made the following order:

"The exceptions to the commissioner's report of sale in this cause coming on to be heard, and having been argued by counsel for the respective parties; it is hereby ordered that said commissioner correct his said report and file the same with the register within ten days, and upon filing the said corrected report the said sale be and the same is hereby in all respects confirmed. And it is further ordered that the complainant pay to the

defendants five dollars as an attorney's fee upon said hearing."

It will be noted that this order does not specify in what particular the report shall be amended, nor is there anything in the record to show what correction the court had in mind. The order plainly does contemplate, however, that the report will be taken from the files for the purpose of correction, and after being corrected, refiled, within ten days, whereupon it shall stand confirmed. On the trial of this cause the plaintiff was allowed to put in parol evidence in explanation of this order, but no one seemed to be able to state with certainty what correction was intended. The commissioner who made the sale seems to have had his attention called to the matter by the acting register within two or three days after the making of the order, but the register did not know what correction was required. The commissioner took the report and looked it over, and finding an error in a date, corrected that, assuming that nothing more was requisite. There does not appear to have been any refiling, and if the defendant, or any other person, had desired information respecting the time when the report became confirmed, he would have searched the records for it in vain. Indeed, the defendant offered to show that he examined the files from time to time afterwards, in order to ascertain if any further report was filed, but the offer was overruled. No further action of the court in the premises appears. The defendant remained in possession of the land some two months after taking off the crops, but under what circumstances he then surrendered possession does not appear, and perhaps is not important. The usual commissioner's deed on chancery sales was executed and delivered to the plaintiff, and probably possession was taken under it as soon as defendant left.

The plaintiff's case rests upon two propositions: *first*, that the sale was confirmed; and *second*, that on confirmation his title related back to the time of the sale,

and made the crops his which were taken off subsequently. It is not claimed the crops would have been his in the absence of a confirmation.

The confirmation is said to have been complete, because no correction of the report was required, except the mere alteration of a date, and that might properly be corrected in the mode the commissioner adopted. But in saying this, the facts upon which it rests are assumed: nothing in the record supplies or suggests them. Whether it was the date the court had in mind, or something else, or many things else, we do not know. It seems hardly necessary to say that the evidences of that judicial intent which is to extinguish rights and transfer titles must appear of record, and cannot be left to rest on the mere understanding of parties who may have heard what the judge said. Still less can it be effective when only guessed at by persons to whom it was never communicated, and who have no better means of arriving at it than by applying their own judgment to the facts which they supposed were before the judge, and inferring therefrom the judgment he should have pronounced. A solemn judgment, which is to have faith and credit, and be undisputed and undisputable everywhere cannot be left to stand partly upon writings and partly upon the surmises and suppositions of parties or officers as to what the court intended. It must speak for itself and in no uncertain language.

No confirmation of the sale being shown, it follows that the plaintiff has shown no title to the specific chattels for the conversion of which the suit is brought. The case of *Wœhler v. Endter* 46 Wis. 304, in which a careful opinion was delivered by Mr. Justice Cole, fully covers the case. *Giles v. Comstock* 4 N. Y. 270 is also in point. That was a suit brought by a party defendant in a foreclosure suit to recover a quarter's rent falling due in advance, April 1, 1845, upon a lease by himself to the occupant. The premises were actually sold on the decree three days before the rent fell due, but the sale was

not confirmed until two months afterwards. The tenant attorned to the purchaser, but was sued by his landlord for the rent. The court sustained the action, affirming that the purchaser under the decree had no right whatever to the rent which had become payable by the terms of the lease after the sale, but previous to the confirmation, and that the tenant wrongfully attorned to him. Says Mr. Justice Taylor, speaking for the whole court: "According to the terms of the decree under which the purchaser claimed, the parties to that foreclosure suit, who might be in possession of the premises sold, were ordered to deliver possession to the purchaser on production of the master's deed and a certified copy of the order confirming the report of sale after the same should have become absolute. Under this decree, it seems to me that the defendant, being a party to that suit, and representing the owner of the equity of redemption, was entitled to hold possession, until by the terms of the decree he was ordered to surrender it, and although an eviction by process of law is not necessary to justify an attornment of the tenant, yet for his justification he must be able to show that the claimant by paramount title has a legal and equitable right to the possession of the premises *in præsenti*." Because the purchaser had no such paramount title before confirmation of his purchase, the court found the attornment unauthorized. I agree with the court fully to this extent, and express no opinion on the further conclusion that the confirmation could not relate back so as to give the purchaser rights from the date of the sale as against any one standing in the right of the mortgagor. I do not think that question is before us.

The necessary conclusion is that the circuit court erred in giving judgment for the plaintiff for the value of the crops removed, and that the judgment should be set aside with costs and a new trial awarded.

HENRY DOTY v. JASON GILLETT AND ROBERT EALES.

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Rent—Action against strangers to lease.

Recovery for the use and occupation of leased premises cannot be had against others than the lessees during the term of the lease if it has not been assigned or the lessees discharged from liability, or if they have not surrendered their interest or known or assented to any new lease that may have been made to the others.

Abandonment or surrender of interests in real estate cannot be inferred from non-user alone.

A witness may be contradicted by showing that he gave materially different testimony on a former trial or did not testify at all to matters to which he did testify at the later one. But the witness may explain the variance and omissions.

Where an action for use and occupation was brought against one of the original lessees and a stranger to the lease, and supported by evidence that the defendants acted as co-partners, the latter may show their actual relation, and the contract between them may be put in evidence. They may also show that the stranger had agreed to pay what would have been his proportion of the rent under the lease to his co-defendant.

Judgment will not be reversed for the omission to charge on a question fairly within the issue but not raised on the trial.

Error to Alpena. Submitted January 9 and 13. Decided April 8.

ASSUMPSIT. Plaintiff brings error.

Kelley & Clayberg for plaintiff in error. An occupant of land already leased, but who has entered under an independent agreement, or by permission, without reference to the old lease, or objection by the first lessee, cannot set up the former lease in defense to an action for use and occupation (*Phipps v. Sculthorpe* 1 B. & Ald. 50; *Prevot v. Lawrence* 51 N. Y. 222; *Scott v. Hawsman* 2 McL. 180) so, if the second lease recites the existence of the first, *Duke v. Ashby* 7 H. & N. 600; *Cuthbertson v. Irving* 4 id. 742: 6 id. 135; *Holt v. Martin* 51 Penn. St. 499; *Jolly v. Arbuthnot* 4 DeG. & J. 224; *Dancer v.*

Hastings 12 Moore 34; *Morton v. Woods* L. R. 4 Q. B. 293; *Cornish v. Searell* 8 B. & C. 471; *Ryerson v. Eldred* 18 Mich. 12; a lessee may surrender his interest by abandonment if the lessor acquiesces or takes possession of the premises or lets them to or receives rent from another person, *Baker v. Pratt* 15 Ill. 568; *Talbot v. Whipple* 14 Allen 180; *Amory v. Kannoffsky* 117 Mass. 351; *McKinney v. Reader* 7 Watts 123; *Thomas v. Cook* 2 B. & Ald. 119; *Walker v. Richardson* 2 M. & W. 882; *Nickels v. Atherstone* 10 Q. B. 944; *Davison v. Gent* 1 H. & N. 744; *Phene v. Popplewell* 12 C. B. (N. S.) 334; *Grimman v. Legge* 8 B. & C. 324; *Hill v. Robinson* 23 Mich. 24; *Logan v. Anderson* 2 Doug. (Mich.) 101; *Beall v. White* 94 U. S. 382; *Nelson v. Thompson* 23 Minn. 508; *Witman v. Watry* 31 Wis. 638; *Donkersley v. Levy* 38 Mich. 54; 1 Washb. R. P. 552; a new agreement with the lessor, or permission to occupy may be implied from acts of the parties (*White v. Walker* 31 Ill. 422; *Fry v. Patridge* 73 Ill. 51) independently of their intention, *Lyon v. Reed* 13 M. & W. 306.

Turnbull & McDonald for defendants in error. A lessor cannot recover for use and occupation when there is an outstanding lease to other parties, unless it has been surrendered or assigned, *Bedford v. Terhune* 30 N. Y. 453; the owner of premises cannot recover rent from one who has entered under an express promise to pay rent to another, *Shumake v. Nelm* 25 Ala. 26; *Carver v. Palmer* 33 Mich. 342; *Austin v. Thomson* 45 N. H. 113; evidence of what a witness has sworn to in a previous trial is admissible for impeachment, *Fisher v. Kyle* 27 Mich. 455; a surrender of a lease must be in writing or the tenant must actually surrender and the lessor accept possession, 1 Washb. R. P. § 353; Taylor's L. & T. § 515; *Brewer v. Dyer* 7 Cush. 337; *Bailey v. Wells* 8 Wis. 141; if instructions are desired on a special point, they must be asked, *Platt v. Brand* 26 Mich. 174; a point cannot be first raised on appeal, *Emerson v. Booth* 51 Barb. 40.

MARSTON, C. J. This action was brought to recover for the use and occupation of a shingle mill, and evidence was introduced on the part of the plaintiff tending to prove that defendants were copartners in the business of manufacturing shingles in that mill, and that they occupied the same during the year 1874 and a part of 1875 under an express agreement made with the agent of the plaintiff, and under which they were to pay rent at the rate of $750 per year.

The defendants did not deny such copartnership or occupancy of the mill, but denied holding it under any such agreement.

They introduced evidence, which was not disputed, that June 16th, 1873, the plaintiff by his agent, by an instrument in writing, leased the premises for the sawing season of 1873 and 1874 to Robert Eales, one of the above defendants, and F. D. Spratt, for a yearly rental of $750. The defendants also introduced evidence tending to show that Eales and Spratt entered into possession of the premises under this lease; that a new arrangement was entered into between Eales and Spratt under which the former operated the mill during the season of 1873; that in the fall of that year Eales offered to surrender up possession of the mill to plaintiff's agent, which was not accepted; that in 1874 Eales and defendant Gillett entered into an agreement under which they were to operate the mill as copartners, and under which Gillett was to pay or be responsible to Eales for one-half the rent as fixed by the Eales-Spratt lease. There was no evidence that such agreement was fully brought to the notice of plaintiff or his agent, or that he, or any person representing him, had at any time released Spratt, or that the latter had assigned his rights under the lease of June 16th. Upon this branch of the case the court charged the jury as to the right of Eales and Spratt under their lease, and that if the same remained in full force, and had not been assigned by Spratt, or his interest and right thereunder terminated by operation of law, the defendants would not be liable in this action.

The court also charged the jury in substance that to constitute a surrender by Spratt there must be some act of the parties—some positive, some affirmative act; that mere non-occupancy by remaining from day to day merely passive and doing nothing under the actual occupancy of a building, would not amount to a surrender of a lease; that if the plaintiff executed a new lease to Spratt and Eales or to their assignees they could find a surrender by operation of law, but if they found a new lease to one of them only, and that the other had not altered or interfered with the estate in any way, or his title to it,—in other words, if the jury should find that "Spratt's interest has alone remained the same all the way through—that there was no positive act on his part throwing it up or giving it away—then in that case this plaintiff cannot recover."

There can be no question but that if the lease to Spratt and Eales remained in force and had not been assigned, the plaintiff could not recover from these defendants for use and occupation of the premises during such period. *Carver v. Palmer* 33 Mich. 342; *Donkersley v. Levy* 38 Mich. 59.

While we may assume that there was competent testimony tending to show an oral lease of these premises by the plaintiff to the defendants, and an occupancy thereunder, yet there was no evidence whatever that Spratt had ever formally withdrawn or surrendered up his interest under the written lease, or had at any time been discharged from his liability to the plaintiff thereunder, or that the new lease to these defendants was with his knowledge or assent.

The facts, therefore, do not bring this case within *Logan v. Anderson* 2 Doug. (Mich.) 102 and *Donkersley v. Levy* supra. Nor was there any evidence from which the jury would have been at liberty to have found a surrender by Spratt of his interest under the lease. Rights and interests in real estate cannot, by inference from non-user alone, safely be considered as having been

abandoned or surrendered. The fact that Eales, under an agreement with Spratt, occupied the premises and conducted the business, either alone or with a partner, would not be at all inconsistent with the fact that Spratt still retained his interest in the lease, and that he was still liable thereunder to pay rent. Even a recognition of the parties in possession by the landlord would not cut off Spratt's rights under the lease, unless he assented to the new arrangement, and in this case no such assent, either express or to be implied from the facts, was shown. 1 Washburn on Real Pr. 477–8–9.

Error is also alleged in that the court permitted evidence given by one of plaintiff's witnesses on a former trial of this cause, to be shown for the purpose of contradicting the testimony given by the witness on the present trial. We had supposed that there could be no question as to the admissibility and competency of such testimony for such purpose where the proper foundation was laid therefor, as was done in this case. It is proper to show that the evidence given by the witness on the previous trial was materially different, or that he did not then testify at all concerning matters of which he has testified on the subsequent trial. All these contradictions and omissions are open to explanation by the witness, but the opposite party has a right to inquire into the same.

The agreement between the defendants was properly received in evidence. The plaintiff had introduced evidence tending to prove that the defendants occupied the mill and carried on business as copartners. They had a right, therefore, to show the relation existing between them. We think it was competent for another purpose also to show that defendant Gillett had agreed to pay his proportion of the rent to his copartner Eales, under the Eales and Spratt lease, as a recognition of such lease by Gillett, and in support of his theory and denial of any agreement to lease from or pay rent to the plaintiff.

It is also claimed that admitting the Eales and Spratt

lease to have remained in full force, yet as that lease expired in 1874 the plaintiff was entitled to recover for the time occupied by defendants in 1875. Conceding this position to be correct, yet the attention of the court was not called thereto, and no request was made to charge upon that theory. The plaintiff claimed to recover for the entire time which the defendants used and occupied the premises. The whole case turned upon the continuing validity of the Eales and Spratt lease, and the short period during which the premises were occupied after the expiration of that lease was apparently lost sight of except as included in the whole claim made.

We cannot reverse because of an omission to charge upon a question which might have been raised, but was not, on the trial, even although the same was fairly covered by or included in the issue.

The judgment must be affirmed with costs.

The other Justices concurred.

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JAMES C. JOHNSON v. LEON D. VAN VELSOR, BY HIS GUARDIAN AD LITEM, AND ELIZA A. VAN VELSOR, PRESTON HART AND SAMUEL BRANDT.

Foreclosure of entire mortgage for overdue instalment—Homestead and dower barred—Proof of allegation in cross-bill—Certificates of acknowledgment.

Where a wife has joined with her husband in an absolute deed of property which her husband had already mortgaged, a subsequent purchase of the property by her cannot revive her original rights so as to enable her, in resisting foreclosure of the mortgage, to claim homestead and dower in the lands.

Parol evidence that a deed *prima facie* absolute was only meant as a mortgage, must be explicit; mere general declarations to that effect by a party claiming the benefit of such a construction are not enough.

An order *pro confesso* is practically waived in so far as it might estop the defendant from maintaining a cross-bill, if the cross-bill is really filed and both cases are argued together and treated as a single litigation.

It seems that formal notice of an election to foreclose for the whole debt, if an instalment is overdue, is unnecessary, and a declaration in the bill, of such an election, is enough.

Foreclosure decree is given for everything due when it is granted, though suit was begun when only an instalment of the debt had matured.

Where a foreclosure case is tried on a bill and cross-bill, and the defendant, on information and belief, alleges in the cross-bill that the amount called for in the original bill is too much, it is for the defense to prove the allegation if opportunity is given. If no proof is offered, the complainant is not obliged to tender evidence to disprove it.

A signature to a mortgage is binding if made at the proper time and duly acknowledged, whether signed by the person owning the name, or by some one else with his consent.

Certificates of acknowledgment may be impugned by proof of fraud or duress, but not by a mere denial of the facts certified, made on oath by the party purporting to make the acknowledgment and opposed by equally strong evidence in support of such certificate.

Appeal from Barry. Submitted Jan. 16. Decided April 8.

FORECLOSURE. Bill and cross-bill. Complainant appeals.

L. E. & C. M. Knappen for complainants. It is unimportant whether a party to an instrument actually signs it if he assents to its being signed for him and acknowledges the signature, *Kerr v. Russell* 69 Ill. 666; *Tunison v. Chamblin* 88 Ill. 389; the mere testimony of a party who purports to have acknowledged an instrument cannot overcome the certificate of acknowledgment, *Russell v. Baptist Theol. Union* 73 Ill. 337; *Lickmon v. Harding* 65 Ill. 505; a wife who seeks to avoid a mortgage on her homestead on the ground that she never knowingly signed it, must make out a clear case, *Heeter v. Glasgow* 79 Penn. St. 83; *Jourdan v. Jourdan* 9 S. & R. 268; *Graham v. Anderson* 42 Ill. 518; *Monroe v. Poorman* 62 Ill. 523; *Jamison v. Jamison* 3 Whart. 457.

C. G. Holbrook and *James Clark* for defendants.

GRAVES, J. This is a litigation by bill and cross-bill growing out of a mortgage transaction. Some explanation from the record is necessary. May 6, 1871, one John R. Van Velsor mortgaged to Johnson city lots 1, 2, 3, 4 and 5 of Grant's addition in Hastings and forty acres of section 27 in Irving and thirty acres of section 8 in Castleton, all in Barry county, for an expressed consideration of $1500. The mortgage was accompanied by Van Velsor's bond. By the terms of the papers, which bore date May 5th, the principal was to be paid in five years, with interest at ten per cent, payable semi-annually, and all payments were required to be made at the First National Bank of Marshall, with current rates of exchange on New York. Both bond and mortgage contained the common interest clause giving the mortgagee an option to consider the whole due in case of a continuing default for thirty days, and the mortgage further contained what is called the insurance clause and the clause in regard to taxes, and there was also a provision for an attorney's fee of $50.

The mortgage purported to be executed by Mrs. Van Velsor, the wife of the mortgagor, and was signed by James Cloes and H. W. Rolfe as attesting witnesses, and its execution by both Van Velsor and wife was authenticated by the formal certificate of acknowledgment made by Rolfe as notary public. The instrument was recorded May 6, 1871. January, 1874, Van Velsor died, leaving Eliza A. Van Velsor, his widow, and two infant children, Leon D., of the age of about six years, and Wendell P., of about two years. From a time prior to the mortgage the city lots have been occupied together, and until his death Van Velsor so occupied them with his family as his homestead, and since that event his widow has continued the homestead occupation. The dwelling and other buildings appear to stand on the line between lots one and two.

July 18, 1874, Johnson filed the original bill to foreclose the mortgage, and he charged, among other things, that a considerable amount of interest had accrued and fallen due, and had remained due and unpaid for more than thirty days, and that pursuant to the provisions of the mortgage he elected to consider the whole amount due and payable, and so declared. Mrs. Van Velsor and her two children were made defendants, and one Preston Hart and Samuel Brandt were joined as subsequent purchasers or encumbrancers. There were no representatives of the estate.

December 28, 1874, the infants by their guardian *ad litem* answered the bill. They alleged on information and belief that the expressed consideration in the bond and mortgage, in so much as it exceeded $1000, was false and usurious. They further claimed that there had been no valid election to cause the whole amount to be immediately due and payable, and that not to exceed $150 was actually due. They also set up, as I think, in substance, that the city lots were exempt. About the time of this answer the infant Wendell P. died, and some time later his death was suggested and an order to revive was entered. Mrs. Van Velsor abstained from answering, and December 2, 1876, the bill was taken as confessed by her. March 5, 1877, she filed her petition to vacate the order *pro confesso* and for leave to answer, but the petition appears to have been allowed to drop. There is no evidence of any attempt to have it heard, and there is nothing to show that its existence was ever actually made known to the court.

March 10, 1877, the surviving infant, by his guardian *ad litem*, united with Mrs. Van Velsor in a cross-bill, but making no one defendant except the complainant in the original bill. October 14, 1878, he answered, and the cross cause was put at issue.

This bill set up that the the two complainants therein were *equitable owners* and *actual* occupants of the mort-

gaged premises; that Van Velsor at his death occupied the city lots as a homestead, and that his wife and family have occupied it since in the same way; that he died intestate, and she thereupon as his widow became tenant in dower in the mortgaged premises, and the children became seized of the fee-simple as his heirs-at-law, and that by the subsequent decease of the younger his interest had passed to his brother, the surviving infant. Mrs. Van Velsor then denies having joined in the mortgage, and avers that she never signed it or acknowledged it. She insists upon a right of homestead during the minority of the remaining child, and full right of dower in all the premises. The cross-bill has some grave formal defects at least, but it is not important to dwell upon them.

March 24, 1879, an interlocutory decree was made, finding the whole amount due and specifying the same, and allowing Mrs. Van Velsor to select a homestead on the parcel embracing the city lots, and requiring payment of the mortgage debt within a time given, and in case of default referring it to a commissioner to inquire into the value of the premises and their situation in regard to deeds and encumbrances later than the mortgage, and to take necessary proofs and report the same with his opinion.

May 10, 1879, the commissioner made his report, from which it appeared that Mrs. Van Velsor had selected her homestead, and it further appeared that on October 5, 1872, she had joined with her husband, the mortgagor, in an absolute deed of the entire mortgaged premises to one Samuel Brandt; that Brandt and wife had deeded absolutely, on the 10th of August, 1875, to one William Becker; and that Becker and wife had recently, and on the 22d of October, 1877, deeded in the same way to Mrs. Van Velsor. It also appeared that she swore before the commissioner that the deed to Brandt was given simply as security, and that the conveyance to herself from Becker was brought about by means of a suit in

chancery, instituted by herself and child, to recover the property. The proceedings in that case do not appear, and there is nothing else to show that the deed to Brandt did not pass the equity of redemption. The commissioner expressed no opinion about it.

June 17, 1879, the court allowed a rehearing on the application of Johnson, and afterwards, and on the 22d of November, 1879, made a final decree. It confirmed the report of May 10th, and sanctioned Mrs. Van Velsor's claim and selection of homestead, and her claim of dower. It also allowed the whole mortgage debt except small items of interest which had been credited, and provided for a sale of the unexcepted interests. It is too long to be noticed in detail. No attempt was made to distinguish between the original and cross causes. The complainant Johnson appealed. The other parties acquiesced.

There is room for argument on this record that the absolute conveyance to Brandt put an end to the legal title in Van Velsor, and extinguished whatever groundwork of title there may have been for a right of homestead or of dower against the mortgage. It is not to be assumed that there is anything here which ascertains and settles that the transaction with Brandt was a mere mortgage, and that accordingly there remained an equity, which can be made available in this litigation to support a right of homestead or of dower against the mortgage.

Granting that the deed to Brandt was, as it appears, an absolute conveyance, and it follows that the old estate was entirely divested, and Becker's deed to Mrs. Van Velsor, during the suit, did not operate by relation to the time of the deed to Brandt, and do away with the intervening want of title.

The legal connection with the ownership, and all right of homestead incident to ownership, was severed and gone, and the effect of the deed from Becker was to institute a new ownership and confer it on Mrs. Van Velsor. It did not revive and restore any former right

of homestead. Mrs. Van Velsor became and remains a holder, not as the widow of John R. Van Velsor, nor as proprietor of a homestead right incident to any title which was in him at his death, but simply as grantee of Becker.

Wherever the controversy allows a party to control by parol evidence the operation of an instrument which is made and held out as an absolute conveyance, and to show the transaction to have been only a mortgage, the court will require the proof to be clear and convincing, and will not be satisfied with mere general declarations by the party setting up the claim. *Thornbrough v. Baker: Howard v. Harris* and notes, 2 Lead. Cas. in Equity, [part 2] pp. 741, 752; *Campbell v. Dearborn* 109 Mass. 130

The showing in this record is exceedingly meagre. But as the case was not argued on this theory, and it may be disposed of consistently on another ground, the subject will not be discussed. The practice in the case has not been neat and accurate, and the printed record is not well prepared. But no defects are noticed of sufficient moment to prevent the court from entertaining the cause of action, or from considering the defense. The circumstance that the original bill was taken as confessed by Mrs. Van Velsor is of no special importance. The parties did not permit it to affect their dealing with the merits. They proceeded in the cross cause, and mutually produced such evidence as they chose relative to every part of the controversy. They argued both cases together, and in fact jumbled them into a single contention. The course pursued was tantamount to a waiver of the order *pro confesso*, in so far as it might have operated, by way of admission or estoppel, in relation to the cross cause.

The objection that only a small amount had accrued on the mortgage at the time of the filing of the bill, and that no notice of an election had been given to consider the whole debt as due, is of no practical importance. According to the weight of authority a declaration in the

bill itself is sufficient, and formal notice of an election prior to the suit is unnecessary, and as we have seen, the bill contained an explicit declaration. But there is no occasion to rule expressly on this question now. There was an amount due and in arrear, and the court had jurisdiction, and three years before the decree was pronounced, the whole mortgage debt had matured and become payable, and every part was subject to the same fate. It is only necessary to add that the practice is finally settled "of giving a decree for everything due at the time it is granted." *Vaughn v. Nims* 36 Mich. 297.

A claim is set up that the mortgage debt is not satisfactorily established as against the infant defendant. When the cause and its details are considered, this position is not very intelligible. Although equity extends, according to its own methods, a watchful care over the rights and interests of infants, and will generally put aside all admissions, either actual or constructive, made in their name or on their behalf, still the substantial rules and principles of evidence are never subverted in their favor. They remain and operate with as much force against infants as against adults. A different theory would pervert the end to be accomplished. It would lead towards the suspension of remedies against infants, and instead of favoring their good would tend to debar them from manifold benefits essential to their well-being and advantage.

In the present case there was a reference and proceedings according to Chancery Rule 92. The bond and mortgage were produced, and there was evidence of their execution by Van Velsor, the infant's father, and no evidence to the contrary; and in making proof in the cross cause there was direct and positive evidence on the subject. Mrs. Van Velsor herself swore that her husband executed the mortgage. On proof of the securities they became evidence of the amount, and there was no evidence to reduce it except the undisputed receipts, which were allowed.

It was set up on information and belief, as we have seen, that the papers called for too much. If this allegation was true it was for the defense to show it, and opportunity was given to inquire into it. The gentleman who negotiated the loan on complainant's part, and knew all the facts as to the true consideration, was several times on the stand; but there was no offer to prove the charge, and certainly it was not incumbent on the complainant to tender evidence to disprove it so long as no attempt was intimated to sustain it.

We come now to the main contention. The right to homestead and the right to dower depend on whether Mrs. Van Velsor is bound by the mortgage. If she is, then of course those rights are cut off, and complainant ought to have a decree for foreclosure and sale without reference to them.

There is no basis for imputing anything unfair or inequitable to complainant. So far as appears, the transaction was an honest one on his part. He seems to have advanced his money to Van Velsor in perfect good faith, and in the full and reasonable belief that the mortgage was well executed to conclude Mrs. Van Velsor and cut off all homestead and dower rights; and if the fact was otherwise, and the mortgage was not so given, there is no ground for ascribing any fault to him. It was of some consequence to complainant that the mortgage should be so executed. A fair deduction for dower and homestead might reduce the security much below what would be adequate. The mortgage bore Mrs. Van Velsor's name, and with it a formal certificate by a competent officer of her acknowledgment of execution. She swears, however, as we have noticed, that she never signed the instrument, or authorized any one to sign it for her, and never acknowledged its execution.

A number of witnesses have testified as experts, but their evidence is just as consistent with a theory that it was executed in a way to bind her as the contrary, and

it may be wholly laid aside. An examination and comparison of the whole of this testimony show that neither side is aided by it. The position that her name appearing on the mortgage was not written by her rests almost entirely upon her own testimony. But, on the other hand, what there is to prove the affirmative and establish that she wrote it, is far from being strong evidence. So much depends on circumspection and on fidelity of memory, as well as on candor and veracity, that the appearance of faults in either respect must unavoidably tend to shake confidence, and detract in a greater or less degree from the credit of the witness to whom they are traced. And in case the interests and influences are such as may create a strong personal bias and excite a disposition to see and report matters as they are wished for rather than as they are, and the result is likely to depend much, if not mainly, on the testimony of the particular witness, the appearance of such obstacles to credence may necessitate considerable eliminations.

We pass from these observations to remark that the record shows discrepancies which, as they concern the adequacy of the testimony given by the chief defendant and witness to establish the facts deposed to, it is impossible to overlook. No intent to deviate from truth is imputed, but the want of attention to accuracy, or the want of memory, or both, is so manifest that the mind cannot be brought to rely on the material representations made, where there is a lack of corroboration, and where moreover there exists opposing evidence which is reasonable in itself and is derived from a credible source.

Her petition to vacate the order *pro confesso* and for leave to answer was filed, as we have seen, by Mrs. Van Velsor in March; and yet only three days after she had sworn to that petition she set up in her sworn cross-bill that she had not only obtained leave to answer but had answered and fully denied all the equity of the original bill. This was entirely untrue, and her counsel substantially admits it in her brief, and so far as concerns ex-

planation the case is dumb. On the first occasion of her testifying in open court she swore positively that she recognized her husband's signature to the mortgage, but that she had not the least knowledge who made the other. This testimony was given sometime in 1879. The time is not specified in the record. Now two years earlier she alleged in her sworn petition, just mentioned, that "she *believes* that the same (the signature of her name on the mortgage) is in the handwriting of her said husband;" and further "that she has felt reluctant to interpose such defense against said mortgage, solely on account of the imputation that it might cast upon the memory of her said husband and on account of the surviving children, and to avoid doing so she has earnestly endeavored to compromise the matter." On being recalled to the stand some time after her first examination in open court, she gave evidence that her husband was expert in imitating signatures, and had experimented in her presence, and that he could so well counterfeit her writing as "to fool her on it when he tried to." No one can read these statements with the context and mistake the drift. They are not consistent, and the case contains nothing to modify the disparaging effect. An extension of the analysis to every part of the record would be a waste of time.

The case does not exclude argument that Mrs. Van Velsor's name was written by her own hand, but it is unnecessary to investigate that question, because there is another view which is more acceptable. So far as the effect is concerned, it is of no importance whether she held the pen or whether her husband held it, and certainly it was held by one or the other. If the act of penning her name had her free and complete assent, or her free and complete acceptance, the signature is her signature in substance and effect. And it is fully proved that her name was affixed at the proper time, and the weight of evidence is in favor of the truth of the certificate of her acknowledgment of having executed the mort-

gage, and against her denial. And if she freely and fully acknowledged the mortgage so signed, to be her free act and deed, as the certificate imports, then whether the physical act of writing was performed by herself or her husband, the signature was completely accepted as her own, and it has the force of her signature.

The authorities are in general very decided in ascribing weight to certificates of acknowledgment, and in disallowing attempts to impugn them. *Kerr v. Russell* 69 Ill. 666; *Heeter v. Glasgow* 79 Penn. St. 79; *Singer Manfg. Co. v. Rook* 84 id. 442; *Johnston v. Wallace* 53 Miss. 331; *Hartley v. Frosh* 6 Tex. 208; *Baldwin v. Snowden* 11 Ohio St. 203; *Bissett v. Bissett* 1 Har. & McH. 211; *Ridgely v. Howard* 3 id. 321; *Moore v. Fuller* 6 Oregon 272; *Thurman v. Cameron* 24 Wend. 87; 1 Jones on Mortgages (2d ed.) § 538 and cases.

Of course they may be overthrown by cogent proof of fraud or duress. All the cases so hold. But it has never been supposed that the bare oath of the party, in contradiction of the facts certified, would be sufficient, and we have nothing more against this certificate, of any substance than the oath of Mrs. Van Velsor, and the oath of the notary on the stand is oppposed to her oath. If it be objected that he has a strong motive to support his official certificate, the reply is that she must have an equally strong, if not stronger, to defeat or impeach it. In *Hourtienne v. Schnoor* a married woman filed a bill to avoid a mortgage given on the homestead by her husband, on the ground that she never knowingly signed or acknowledged it, and we held that "all presumptions in cases of this kind must be treated with reasonable respect to the improbability of misconduct in a reputable officer, or of forgery which he ought to have discovered if it existed; and [that] the burden of proof was on complainant to make out a plain case." 33 Mich. 274; and see *Matter of Wool* 36 Mich. 299.

The rule stated in the first of these cases is strictly pertinent, and some of the observations in the last one,

and especially those in regard to explanations by an acknowledging officer on the stand as to precisely what occurred on a particular occasion, are quite apposite to the testimony of the notary here. In some particulars he was not fluent or lucid, but there is nothing to convict him of being a falsifier. He had been a student with Van Velsor, and seems to have been his friend and to have remained a friend of the family. He swore positively that he recollected that Van Velsor gave him the mortgage, and told him to go and get Mrs. Van Velsor's acknowledgment; that he went to the house and told her what his business was, and that she acknowledged to him that she had executed the instrument. He also swore that he supposed the legal forms were gone through with.

The result is that the decree below must be reversed, and one entered here allowing foreclosure and sale; and defendants will be given until the 8th day of July next next in which to pay the mortgage debt, being $2332.53, with interest at the rate of ten per cent from December 12, 1876, the date of the report, together with the costs; and complainant will recover his costs of both courts.

The other Justices concurred.

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ALBERT H. HUBBARD v. JOHN P. MCNAUGHTON, WILLIAM A. BLAKE AND WILLIAM BLASS.

General assignment—Stipulation for release.

Where a bill in aid of execution alleges fraud, and has been answered, and the parties have been sworn, the objection that the allegations of fraud are too general cannot be raised.

Whether an answer can be used in place of a special demurrer for the lack of specific averments of facts that have been broadly enough averred—*Q.*

Bills complaining of fraudulent intent can hardly contain very special averments.

Evidence is not to be set out in a bill.

Bills of discovery may lie to draw out matters that must necessarily be confined to the knowledge of defendants.

Mere inquiry by a creditor to ascertain whether it would be more for his advantage to approve or contest an assignment made by the debtor, is not dishonest or unreasonable, and is not in itself equivalent to an inducement to others to act upon it.

The fraudulent character of an assignment does not depend on the assignor's opinion that what he does is not fraud in law.

An assignment for the benefit of creditors is fraudulent if property is withheld that should be put into it, and if the assignors give away or place excessive liens on property that should not be so disposed of.

A general assignment is invalidated by a clause purporting to bind the creditors to agree to it and to release their claims in full and discharge the assignor from all liabilities as soon as their just proportion of the proceeds is paid to them.—COOLEY, J. dissents.

An insolvent debtor cannot dictate to his creditors terms that shall make him independent of his legal obligations.

Appeal from Kalamazoo. Submitted January 16. Decided April 8.

BILL in aid of execution. Dismissed. Complainant appeals.

Dallas Boudeman for complainant. A clause in a general assignment whereby the debtors are bound to release the assignor is evidence of a fraudulent intent to delay, and invalidates the assignment, *Grover v. Wakeman* 11 Wend. 189; *Henderson v. Bliss* 8 Ind. 100; *Butler v. Jaffray* 12 Ind. 504; *McFarland v. Birdsall* 14 Ind. 126; *Ingraham v. Wheeler* 6 Conn. 281; *Armstrong v. Byrne* 1 Edw. Ch. 79; *Atkinson v. Jordan* 5 Ohio 293; *Hoffman v. Mackall* 5 Ohio St. 124; *Brown v. Knox* 6 Mo. 302; *Swearingen v. Slicer* 5 Mo. 241; *Drake v. Rogers* 6 Mo. 317; *West v. Snodgrass* 17 Ala. 549; Burrell on Assignments (Bish. ed.) §§ 192–6, 331–43; see *Brashear v. West* 7 Pet. 608; *Howell v. Edgar* 3 Scam. 417; *Ramsdell v.*

Sigerson 2 Gilm. 78, 83; *Marsh v. Gilbert* 5 McL. 117; *Pierson v. Manning* 2 Mich. 447; *Goodrich v. Downs* 6 Hill 438.

E. M. Irish for defendants. A bill for relief, based on a charge of fraud, is demurrable if the allegations are so general as not to show on what the charge of fraud is based, 1 Dan. Ch. Pr. 335; *Cresset v. Mitton* 1 Ves. Jr. 449; *Marr's Appeal* 78 Penn. St. 66; *Page v. Olcott* 28 Vt. 465; *Pendleton v. Galloway* 9 Hammond (O.) 178: *Conway v. Ellison* 14 Ark. 361; *Blakeney v. Ferguson* 3 Eng. (Ark.) 275; *Talbott v. Tarlton* 5 J. J. Marsh. 641.

CAMPBELL, J. Complainant filed her bill as an execution creditor in aid of a levy upon lands. McNaughton and Blass were the judgment debtors against whose property the execution was directed, and Blake is assignee under a general assignment dated February 2, 1878, which is attacked as fraudulent against creditors.

The bill avers a fraudulent intent and also sets up as a specific objection to the assignment that it imposes a release from creditors as a condition of receiving dividends.

Before considering the merits it is proper to notice two objections—one to the sufficiency of the bill and its averments, and the other in the nature of a waiver of objection to the assignment.

It is claimed that the allegations of fraud are too general, and that this defect has been properly demurred to in the answer. The answer, however, has been put in denying fraud and raising all necessary issues, and testimony has been taken. It is very questionable whether an answer can be made use of in lieu of a special demurrer for lack of specific averments of that which is averred broadly enough if too generally. But there are difficulties in requiring very special averments in cases of fraudulent intent, and the rules of pleading do not contemplate that evidence shall be set out in a bill.

Tong v. Marvin 15 Mich. 60. No universal rule can be laid down where most of the facts must necessarily be within the knowledge of defendants. Under the old practice, before parties became competent as witnesses it was often necessary to draw out such matter by discovery, and it is still competent, although not common, to do so. We are not satisfied that the bill before us is open to serious criticism, but where it has been answered, and the parties themselves have been sworn, there would be no propriety in listening to such an objection now.

We do not find any satisfactory evidence that complainant ever induced the assignee or any other person to act upon the understanding that he was willing to accept the assignment as valid. Mere inquiry to ascertain whether it would be profitable for him to do so is not in any way equivalent to inducing others to act upon it, and no one was misled by him. It was not dishonest or unreasonable to make such inquiry, or to consider whether he could do better by approving than by contesting it.

The defects relied on are acts in fraud of creditors, and fraudulent provisions in the assignment.

It appears affirmatively that lands which should have been included were not included, and that no transfer was made to the assignee of this excepted property until April 11th, 1878, something more than two months after the assignment, and—unless the judgment was more speedily obtained than usual,—after the complainant's suit was commenced. It also appears pretty clearly that chattel mortgages were given on the partnership stock on the day or next day but one preceding the assignment, to relatives or near friends of the mortgagors for amounts exceeding the debts due them. It also appears that a large quantity of notes belonging to the firm was paid over at that time to the wife of one of the firm, at not far from $300 less than their face upon an old note held by her which was in part without consideration.

This note does not seem, however, to have been a dishonest transaction, but it was not a partnership liability, but, if valid at all, a private note of the husband, Mr. Blass.

The fraudulent character of an assignment cannot depend upon the opinions of the assignors that what they do is not legally fraudulent. If they withhold from the assignment what should be put into it, and if they make gifts or excessive liens on property which should not be thus encumbered or given away, it is a fraud, and their belief that it is not will not save it from the consequences of fraud. See *Price v. Haynes* 37 Mich. 487; *Smith v. Mitchell* 12 Mich. 180.

The amounts thus withheld or encumbered made up a large percentage of the assets, and materially cut down the probable dividends. But beyond this we think the assignment contains a provision which cannot be sustained. After providing in a proper manner for paying over the proceeds to creditors ratably in certain classes, it ends with this clause:

"And the creditors of the said parties of the first part agree to their said assignment, and that they will, as soon as their just proportion of the proceeds of said property shall be paid to them, release their claims in full and discharge said parties from all liabilities to them."

We cannot accede to the correctness of the suggestion that this clause is surplusage and not intended to bind the creditors. The assignment must be taken together, and we think the only reasonable construction it will bear is that every creditor by accepting his dividends releases the debtors.

Such a condition has been maintained in some States. But it seems to us to be entirely repugnant to the whole theory of general assignments. While a debtor at the common law, and until restrained by statute, could pay creditors in such order of preference as he chose, he was nevertheless bound to devote all his unexempted property unreservedly to the payment of his debts. Under this

assignment, if all the creditors should decline giving releases, the whole trust would fail, if this condition were enforced. An insolvent debtor has no right to dictate terms which shall make him independent of his legal obligations. It may be that this is not technically a trust for his own benefit,—which would be in plain violation of law,—but it is practically so, and accomplishes more sweeping results. If the property were not assigned, creditors could by legal process exhaust it and still leave him liable on all debts not fully satisfied. A general assignment can only change the method of applying property in payment, by what ought to be a fairer and less wasteful division. But it is contrary to justice and against public policy to allow debtors to coerce their creditors into releasing their debts.

The New York doctrine, which is set out in the cases collected in Burrill on Assignments, 331, 343, appears to us the sound rule on this subject, and most in harmony with our own decisions on the general subject of assignments. This particular question has not been formally before us. See also *Spencer v. Slater* 4 Q. B. Div. 13.

The decree below dismissing the bill must be reversed with costs of both courts and a decree entered holding the assignment void as against complainant's levy.

MARSTON, C. J., and GRAVES, J., concurred.

COOLEY, J. (dissenting). I have not found in the proofs in this case any evidence of the frauds charged in the bill. Neither do I think that the assignment is void on its face. The clause supposed to invalidate it is the following: "And the creditors of said party of the first part agree to their said assignment, and that they will as soon as their just proportion of the proceeds of said property shall be paid to them, release their said claim in full and discharge said parties from all liability to them." This clause is inserted in an assignment not signed or intended to be signed by the creditors, and

which contains no provision depriving creditors of dividends under the assignment in case they refuse to assent. On the contrary the assignee is to pay to the several creditors equally in proportion to their several demands, and the creditors may demand and recover their proportions, without entering into any stipulations or submitting to any conditions whatsoever. If any consent to a discharge of the assignors is to be implied as against the creditors, it must spring from the fact that they accept dividends under the assignment: but when it is made the imperative duty of the assignee to pay these without exacting conditions, and when no trust is reserved in favor of the assignors until all debts are paid in full, there seems to be no foundation whatever for an implied release. Any creditor whom the assignee should refuse to pay ratably would be entitled to call him to account in equity, and it could be no defense that the creditor refused to release, so long as the assignees have required payment to all unconditionally. And surely the receipt of that which the law entitles one to demand as of right cannot be construed into an acceptance of conditions.

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HARRY SPENCER, IMPLEADED WITH JONATHAN SPRAGUE v. PAUL FISH FOR THE USE OF HENRY E. SMITH.

Dismissal of writ of error—Settlement of bill of exceptions—Certificate of acknowledgment.

A writ of error to bring up a judgment against joint parties should be taken out in the name of all, and if any do not wish to prosecute it, a severance may be had under Supreme Court Rule 35. But a writ taken out in the name of only one is amendable, if it identifies the judgment; and if the party who was not joined afterwards files his election not to proceed, the writ will not be dismissed for the non-joinder, but the other may be allowed to proceed separately.

The clerk's neglect to enter an oral order extending the time to settle a bill of exceptions is not ground for striking out a bill settled in pursuance of it; and the omission may be cured by an order for extension made *nunc pro tunc* at the next term.

All objections to a record as it stands at the beginning of the term should be made then, and not by separate motions, made on different motion days, to dismiss the writ and strike out the bill of exceptions.

The certificate of the county clerk to the acknowledgment of a recognizance of bail is not a record made in open court and may be impeached by testimony in denial of the execution of the bond; and it is error to charge as matter of law that the certificate is entitled to more weight than the unsupported oath of the defendant in an action against the bail.

In an action on a recognizance of bail the jury must determine whether to believe the certificate of acknowledgment thereto, or the testimony of the defendant denying the execution of the bond.

Error to Oakland. Submitted Jan. 21. Decided April 8.

ACTION on recognizance. Defendant Spencer brings error.

C. & W. N. Draper and *Cowles & Cahill* for plaintiff in error.

A. L. Millard for defendant in error. The county clerk's official certificate of the acknowledgment of a recognizance of bail before him is entitled to belief rather than the unsupported oath of the party who purported to acknowledge it, *Graham v. Anderson* 42 Ill. 514; *Lickmon v. Harding* 65 Ill. 505; *Canal & Dock Co. v. Russell* 68 Ill. 426; *McPherson v. Sanborn* 88 Ill. 150; *Hartley v. Frosh* 6 Tex. 208; *Jamison v. Jamison* 3 Whart. 457; *Ridgely v. Howard* 3 Har. & McH. 321.

Motion to dismiss writ. Submitted January 6. Decided January 9.

PER CURIAM. The writ of error in this case should have been sued out in the name of both the defendants below; and a severance effected afterwards under the rules.

But as the writ actually issued identifies the judgment, it would be amendable, and as the defendant who was not joined has now filed his election not to unite in prosecuting the writ, the substantial purpose of the proceedings under the rules has been accomplished, and instead of dismissing the writ, we think it competent and proper that an order be entered that Spencer be at liberty to proceed in the case separately. It will be ordered accordingly.

Motion to strike out bill of exceptions. Submitted January 20. Decided January 21.

PER CURIAM. Motion to strike out bill of exceptions on the ground that the exceptions were not settled during the term at which the trial took place, nor was any order made during the term extending the time for the settlement of exceptions.

It is conceded that no order appears extending the time for settlement of exceptions, but it was shown in the court below that the judge made an oral order giving time, which the clerk neglected to enter: thereupon at a subsequent term the judge made an order *nunc pro tunc*, as of the proper time, giving time for the purpose. We think this was a proper method of correcting the neglect of the clerk, and that the judge had full power to do what he did.

We deem it proper also to note the fact that a motion was made on the first day of this term to dismiss the writ of error. All objections to the record as it then stood in this court ought to have been made at that time: it is not advisable to take up objections separately on distinct motions and on different days.

MARSTON, C. J. Plaintiff in error was sued upon a recognizance of bail. He pleaded the general issue and

filed an affidavit denying his execution thereof, and evidence was given by him on the trial tending to show that he did not execute the instrument sued on.

The court instructed the jury that the recognizance taken and acknowledged before the county clerk was *prima facie* evidence against the defendant, and that the burthen of proof was upon the defendant to show that the clerk's certificate thereon was false, and that "notwithstanding the defendant swears that the instrument is a forgery, the certificate of the county clerk, being in due form and by the proper officer, in the absence of fraud and conspiracy, is entitled to more weight than the unsupported oath of the defendant." This was excepted to and is assigned as error.

We are of opinion that the court erred in thus instructing the jury. The recognizance and certificate of the clerk thereto did not import absolute verity, and could not be considered as a record made in open court. Under the issue in this case the defendant was at liberty to impeach it, and having introduced testimony having that tendency, it became a question of fact for the jury. It was their province to pass upon the testimony, and to determine therefrom whether the defendant had executed the recognizance. They might have considered the official certificate of the clerk the better evidence, but the court could not properly instruct them that it was such as matter of law.

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

The other Justices concurred.

PRUDENCE A. LOCKWOOD v. JOSEPH LOCKWOOD.

Divorce for cruelty.

A decree dismissing a bill praying for divorce on the ground of extreme cruelty in the use of abusive language, was properly dismissed where the proofs, which were taken in open court, failed to make out a case.

Appeal from Eaton. Submitted Jan. 21. Decided April 8.

DIVORCE. The bill claimed that the parties had been married nearly three years; that defendant was inordinately passionate; that complainant's health broke down in consequence and she had to leave him, and that he used abusive language to and about her, such as that he wished lightning would strike her, etc. The proofs did not show that complainant's illness was caused by her husband's conduct towards her, or that she was seriously ill at any time. The bill was dismissed. Complainant appeals.

D. P. Sagendorph for complainant. Cruelty that will justify a divorce is not limited to physical violence, *Cooper v. Cooper* 17 Mich. 210; *Briggs v. Briggs* 20 Mich. 45; *Goodman v. Goodman* 26 Mich. 417; *Bennett v. Bennett* 24 Mich. 484; separate maintenance should be granted where the husband's conduct justifies the wife in leaving, *Randall v. Randall* 37 Mich. 574.

John M. Corbin for defendant.

GRAVES, J. This bill was filed by complainant to obtain a decree divorcing her forever from the bed and board of her husband, the defendant, and prescribing suitable provision for her support and maintenance; and it set up for cause that the defendant had practiced extreme cruelty against her in certain ways specified.

The proofs were taken in open court, and the circuit judge found that they failed to make out a case, and we agree with him.

It is not expedient to dilate upon the controversy, or even to recall its repulsive features.

The dismissal is affirmed.

The other Justices concurred.

JOHN MILROY v. THE SPURR MOUNTAIN IRON MINING COMPANY AND WILLIAM G. THOMPSON.

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Actions for labor debts against stockholders.

A perfected claim for labor will not support separate actions for the different amounts into which it may be divided, even though portions of it have been assigned and the division of the claim corresponds to the periods for which the laborer was hired.

An action on a labor debt may be brought in a justice's court against a corporation and stockholders jointly under Act 113 of 1877, § 35.

The Legislature is not forbidden by the Constitution to give jurisdiction to the circuit courts in cases where the amount claimed is less than $100.

Act 113 of 1877, § 35, provides that in actions on labor debts the clerk of the court shall indorse directions on the execution. *Held* to refer to the officer issuing the execution and not to exclude the justices' courts, in which the justice is his own clerk, from jurisdiction of such actions.

A Michigan court may well take judicial notice that stockholders in the mining corporations of the State are largely non-residents and beyond their jurisdiction for rendering personal judgments.

The individual liability for labor debts imposed on stockholders by the Constitution means a liability beyond that of members of the corporation and does not refer to their several liabilities.

The Legislature may prescribe the means of enforcing the Constitutional liability of stockholders for labor debts.

Act 113 of 1877 authorizes suits for labor debts to be brought against a corporation alone or jointly with one or more of the stock-

holders. *Held* that where a claimant has elected to sue the corporation alone and has recovered judgment, he cannot afterwards bring his action on the same debt or upon a claim including it, against the corporation and stockholders jointly, or conversely.

Under Act 113 of 1877 the property of a corporation is made primarily liable for labor debts, and the individual property of stockholders secondarily liable, and the stockholder's property cannot be taken until the corporate property is exhausted.

Error to the Superior Court of Detroit. Submitted January 22. Decided April 8.

ASSUMPSIT. Plaintiff brings error.

Moore, Canfield & Warner for plaintiff in error. Judgment against joint debtors, only one of whom has been served with process, is no bar to a new suit against all, on the original demand, *Bonesteel v. Todd* 9 Mich. 371; *Mason v. Eldred* 6 Wall. 231; *Oakley v. Aspinwall* 4 Comst. 514; nor is a foreign action a bar to an action on the original demand, Freeman on Judgments, §§ 220, 605; a judgment on a note given by one of several persons jointly indebted on book account is no bar to an action against all on the original demand, *Fairchild v. Holly* 10 Conn. 474; a judgment against both contractors on a contract that is both joint and several, is not a bar to an action against either, and a several judgment against either is not a bar to a joint judgment against both, *Trafton v. U. S.* 3 Story 646; *Charles v. Haskins* 11 Ia. 329; judgment is no bar nor merger of the demand as against a party beyond the jurisdiction and not served with process, *Brown v. Birdsall* 29 Barb. 549; judgment against a corporation does not prevent plaintiff's afterward suing the corporation and a stockholder jointly, *Hoard v. Wilcox* 47 Penn. St. 51; *Dodge v. Minnesota Plastic Slate Roofing Co.* 16 Minn. 368; *Vincent v. Sands* 42 How. Pr. 231; *Young v. Rosenbaum* 39 Cal. 646; *White v. Smith* 33 Penn. St. 186; judgment for so much of a claim for wages as has been assigned is not a bar to a

suit for so much as was not assigned, *Stickel v. Steele* 41 Mich. 350; *Huntington v. O. & L. C. R. R. Co.* 7 Am. L. Reg. 143; *Morgan v. Rowlands* 7 Q. B. 493: 2 Eng. 611.

F. A. Baker and *Ashley Pond* for defendant in error. A cause of action is merged when it has been prosecuted to a judgment which has not been reversed, *Sweet v. Brackley* 53 Me. 346; *West Feliciana R. R. Co. v. Thornton* 12 La. Ann. 736; and privileges or disabilities incidental to the judgment disappear thereby, *Sampson v. Clark* 2 Cush. 173; *Woodbury v. Perkins* 5 Cush. 86; *Kellogg v. Schuyler* 2 Den. 73; *Thompson v. Hewitt* 6 Hill 254; *Bangs v. Watson* 9 Gray 211; *Temple v. Scott* 3 Minn. 419; *Mallory v. Norton* 21 Barb. 424; *Beckman v. Manlove* 18 Cal. 389; *Stowers v. Barnard* 15 Pick. 221; *Andrews v. Varrell* 46 N. H. 17; *Mizell v. Moore* 7 Ired. 255; *Lowell v. Lane* 33 Barb. 292; judgment for fraud merges the original ground of action, so that in an action on the judgment defendant cannot be arrested as in actions for tort, *Mallory v. Leach* 14 Abb. Pr. 449; a judgment against some only of several joint obligors extinguishes the debt as against all, *Mason v. Eldred* 6 Wall. 231, overruling *Sheehy v. Mandeville* 6 Cr. 253; see *Robertson v. Smith* 18 Johns. 459; *Ward v. Johnson* 13 Mass. 148; *Wann v. McNuly* 2 Gilm. 359; *King v. Hoare* 13 M. & W. 495; *Smith v. Black* 9 S. & R. 142; *Candee v. Clark* 2 Mich. 255; *Sloo v. Lea* 18 Ohio 279; *Clinton Bank v. Hart* 5 Ohio St. 33; *Nichols v. Burton* 5 Bush 320; *Moale v. Hollins* 11 Gill. & J. 11; *Willings v. Consequa* 1 Pet. C. C. 301; *Ward v. Motter* 2 Rob. (Va.) 536; *Beltzhoover v. Com.* 1 Watts 126; *Williams v. McFall* 2 S. & R. 280; *Shively v. U. S.* 5 Watts 332; judgment against a corporation discharges the liability of the stockholders, *Handrahan v. Cheshire Iron Works* 4 Allen 396; *Mason v. Cheshire Iron Works* id. 398; a partial assignment cannot split a cause of action, *Ingraham v. Hall* 11 S. & R. 78; *Mandeville v. Welch* 5 Wh. 277; *Chapman v.*

Shattuck 3 Gilm. 49; *Fairgrieves v. Lehigh Co.* 2 Phil. (Pa.) 182; *Gibson v. Cooke* 20 Pick. 15; though a cause of action may be split with the debtor's consent, *Carrington v. Crocker* 37 N. Y. 336; a judgment is conclusive even though the defendant did not recover all he was entitled to, or did not include all the items of his demand, and this rule binds even where the moneys to be recovered belong to different persons in severalty and the action is in the name of the nominal plaintiff for the benefit of one only, *Pinney v. Barnes* 17 Conn. 420; nor need the plaintiff's claim in both suits be identical, if the defense is applicable to both suits, *Bouchaud v. Dias* 3 Den. 238.

MARSTON, C. J. This action was brought against the corporation and one of its stockholders under section 35 of Act No. 113 of the Session Laws of 1877, p. 95.

It appeared upon the trial and was not disputed, that the plaintiff and his son, a minor, performed labor for the corporation in 1877 and 1878; that they worked six months, commencing September 1st, 1877, and that plaintiff was to receive eighty dollars per month, and for his son's labor thirty-five dollars per month. It was admitted that the value of the services of the plaintiff and his son for the six months ending March 1st, 1878, was six hundred and seventy-six dollars.

Early in February, 1878—the exact date does not appear—the plaintiff assigned to Bigelow, Dousman & Co., merchants at Michigamme, of his claim against the corporation, one hundred dollars and eleven cents. On the 13th of February, 1878, suit was commenced in justice's court to recover the amount so assigned, in the name of the plaintiff herein, for the use and benefit of Bigelow, Dousman & Co., and judgment was rendered therein February 27th for the amount assigned and costs. This judgment not having been satisfied, this action was brought to recover the entire amount that the plaintiff would have been entitled to from September 1st, 1877,

when he and his son commenced work, to March 1st, 1878.

The judgment rendered in justice's court was introduced by the defendants, who claimed, 1st, that such action having been brought against the corporation alone, the labor debt became merged in the judgment therein rendered, and that an action on the claim for labor could not afterwards be maintained against the corporation, or the stockholders, or both jointly; and 2d, that the assignment to Bigelow, Dousman & Co. of a part of plaintiff's claim, action brought and judgment recovered t. ɐrefor, would prevent the plaintiff from afterwards maintaining any action for that portion of his claim which had accrued at the time such action was commenced and not included therein.

To meet in part this second position the plaintiff claimed that the corporation had assented to the assignment, and that this would operate as a waiver of the objection. The plaintiff was permitted to recover for the services of himself and son which accrued subsequent to the date of the assignment, but not for any portion accruing previous thereto, and he now assigns error.

There was no evidence in the case tending to show any assent by the company which would prevent or preclude it from making this defense. There was evidence of negotiations between Bigelow, Dousman & Co. whereby they were to take assignments from the laborers of the amount of their respective accounts, give them credit for a specified time thereafter, and take the paper of the corporation, payable in three months, for the amounts assigned; but this was not consummated, they, Bigelow, Dousman & Co., giving notice of the assignments and commencing suit to recover the amount thereof immediately thereafter.

There can be no question, either upon reason or authority, that a claim like the present cannot be split and cut up into separate causes of action to suit the convenience or whim of the plaintiff. If so he could

assign, after working six months, a month's wages to an individual or firm, and so of each and every month, and thus have six separate suits commenced; or he might commence six separate actions in his own name. The assignment, and the fact that the suit was commenced in the assignor's name for the use and benefit of the assignees, can in law make no difference; the suit must be treated precisely as though the assignees had no interest whatever therein, so far as this question is involved. The fact that he was hired by the month, and that his wages were payable monthly, cannot make any difference. A man may be hired by the day, and at the close thereof a cause of action would accrue to him for his wages, and so for each day that he would work under such an agreement, he could quit work at any time and maintain an action for his unpaid wages. He could not, however, work thirty days or for any other period, then quit, and commence a separate action for each day's wages. In such a case, although the contract of hiring was by the day, and the parties may not have contemplated or provided for any additional labor, yet if they did silently proceed, the one to work and the other to receive his labor, at the expiration thereof the entire amount unpaid would constitute but one cause of action. To permit separate causes under such circumstances would be to subject the debtor to costs and expenses far in excess of the principal debt, besides the annoyance and injury which so many suits would necessarily be to him. This the law will not tolerate or permit. It gives the creditor a remedy against his debtor to enable him to collect his demand and the whole thereof, and it at the same time protects the debtor against needless and vexatious causes of action.

Can this action be maintained against the corporation and a stockholder, for the amount of the judgment recovered in the justice's court?

It was argued that the assignees had a right to sue

in the assignor's name for that part of the claim assigned to them, and that the Constitution and laws gave them the right to bring their action in justice's court; that the process of a justice would not extend and could not be served beyond the bounds of his county, and the stockholders who did not reside in the county could not therefore be reached, and that the remedy given by section 35 of the act of 1877 by its language was applicable only to courts of record.

The Constitution does not prohibit the Legislature from giving the circuit courts jurisdiction in cases where the amount claimed is less than one hundred dollars. The Constitution, art. vi., § 18, gives to justices of the peace in civil cases exclusive jurisdiction to the amount of one hundred dollars, "*with such exceptions and restrictions as may be provided by law.*" In suits between copartners and for the foreclosure of mortgages, the circuit courts in chancery are given jurisdiction by statute although the amount in dispute is less than one hundred dollars. 2 Comp. L. § 5059. So the circuit courts were given jurisdiction in claims against boats and vessels irrespective of the amount claimed, and other instances might be given.

Nor do we think that the language of section 35 will bear the construction contended for by counsel for plaintiff. The section does not in terms exclude justices' courts, but it requires the *clerk of the court* to indorse certain directions to the officer, upon the execution. And it is said that "clerk of the court" here means the circuit court, as there is no clerk in justices' court. This reference to or mention of the clerk is merely to the person issuing the execution, which in the circuit would be the clerk. In justices' court the execution is issued by the justice who acts as his own clerk and who under this statute would be the proper person to make the required indorsement, and we should require much clearer language than this to warrant us in saying that a justice of the peace would have no jurisdiction in actions sought to be commenced under this statute. The mere fact

that the process issued by the justice could not be served upon all the stockholders is an argument equally pertinent to many cases in the circuit. It is a fact of which this court may well take judicial notice, that very many of the stockholders in our mining corporations are non-residents of this State, and therefore beyond the jurisdiction of the circuit court, in so far as rendering a personal judgment against them is involved. But whether the remedy is ample or not, we are of opinion that justices' courts have jurisdiction in cases commenced under this section; and if anything is lacking to afford parties sufficient relief therein, another department of the government must be resorted to.

Section 35 makes the stockholders individually liable for all labor performed for such corporation, and specifies when and how the liability may be enforced. Suits against the stockholders must be brought within two years from the time when payment for such labor became due, and against the corporation alone at any time within six years. "Suit for such labor may be commenced against any or all the stockholders and the corporation jointly."

In *Hanson v. Donkersley* 37 Mich. 184 it was held that under the Constitution and statute then in force the stockholders were not primarily liable for corporation debts for labor.

The individual liability of the stockholders under the Constitution means a liability beyond that of members of the corporation, and has no reference to a mere separate or several one. While therefore the Legislature cannot relieve the stockholder from the liability imposed by the Constitution, yet it may point out and regulate the manner or method of enforcing the same. Prior to the act of 1877, with certain exceptions, the stockholder could only be held liable after a judgment had been obtained against the corporation, and an execution returned unsatisfied. In other words, the remedy against the corporation must have been first exhausted. Under the present statute a remedy is given against any

or all of the stockholders and the corporation jointly, to be commenced within two years, or against the corporation alone at any time within six years. The creditor or laborer has here an option given him to pursue either the corporation alone, or join one or more of the stockholders with the corporation. Should he sue the corporation and one of the stockholders and recover a judgment, clearly we think he could not afterwards commence and maintain an action against the corporation alone, or against it and some other of the stockholders jointly. Having once elected, by action and judgment, the party would be bound thereby. Under the old statute two actions were given—first, one against the corporation; then, under certain circumstances, one against the stockholders. Under the present statute a choice of remedies is given: the creditor may elect to pursue the corporation alone, or he may join as defendants with the corporation any or all of the stockholders; but he cannot even then proceed against their property by levy and sale upon his execution until the property of the corporation shall have been exhausted. The property of the corporation is made primarily liable for the labor debts; the individual property of the stockholder secondarily. The policy of the statute can be as effectively carried out against the property of the corporation where the stockholders are joined as where they are not, and the corporation should not be put to the expense of a suit against it alone, and then of a second where joined with one or more of its stockholders.

We are of opinion that where a creditor sues the corporation alone and recovers a judgment against it, he cannot afterwards maintain an action against the corporation and the stockholder for the same cause of action. The judgment in the first case, although unsatisfied, would be a bar in the second.

The judgment must be affirmed with costs.

GRAVES and CAMPBELL, JJ., concurred.

COOLEY, J. I concur in the result.

W. G. Thompson and Henry N. Walker v. John Jewell.

Stockholders joined with corporation in suits for labor debts.

An action for labor debts brought under Act 113 of 1877 cannot be maintained against stockholders unless joined with the corporation as defendants.

Error to Wayne. Submitted Jan. 22. Decided April 8.

Assumpsit. Defendants bring error.

F. A. Baker and *William P. Wells* for plaintiff in error.

Moore, Canfield & Warner for defendants in error.

Marston, C. J. Several of the questions raised in this case were considered in *Milroy v. Spurr Mountain etc. Co.* ante, p. 231 decided at the present term.

The remaining question must be answered in the negative. Can an action be maintained against the stockholders of a mining company, when not joined with the corporation, for a labor debt, under the act of 1877?

The remedy given under the act of 1877 is purely statutory and must be followed. The language of the act that "suit for such labor may be commenced against any or all the stockholders and the corporation jointly" is permissive and optional as to whether any, and if so, how many of the stockholders shall be included, but is imperative in that they must be joined with the corporation. The levy is not to be made upon the stockholder's property until that of the corporation shall first be exhausted, and a direction to that effect is required to be indorsed upon the execution. This contemplates an execution against the corporation and stockholders jointly. In *Milroy v. Spurr Mountain Co.* we held that an action commenced and judgment recovered against the corporation alone would be a bar to any subsequent action against the stockholders. The same reasons would

prevent an action first against the stockholders to be followed by one against the corporation; and certainly a judgment must be recovered against both, and an effort made to collect from the corporation, before the stockholder's property can be resorted to.

The judgment must be reversed with costs of both courts.

The other Justices concurred.

SAMUEL CARSON v. GEORGE EDGEWORTH.

Malicious prosecution.

An unfounded prosecution cannot be justified, or the prosecutor's malice disproved, by evidence of offenses committed by the plaintiff other than those for which he was prosecuted by the defendant.

Malice is not implied from an unfounded prosecution, but it may be inferred from the want of probable cause for it.

Error to Saginaw. Submitted Jan. 23. Decided April 8.

TRESPASS ON THE CASE. Defendant brings error.

Albert Trask and *Wm. H. Sweet* for plaintiff in error.

Albert R. McBride for defendant in error. Evidence of matters outside of the complaint on which a prosecution is based is inadmissible in an action for malicious prosecution, *Josselyn v. McAllister* 25 Mich. 45; Cooley on Torts 183; 4 Wait's Actions 344.

COOLEY, J. Carson brought suit against Edgeworth for prosecuting him maliciously on two unfounded charges; the one for breaking down Edgeworth's shade trees, April 13, 1879, and the other for disturbing a religious meeting

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on the same day. On the trial the plaintiff, as a witness on his own behalf, gave evidence tending to prove that he was twenty-one years of age and upwards; that one James Tuttle was fifteen years old; that together they went from their homes in Corunna to Chesaning, April 12, 1879, stopping there over night; that on the next day, which was Sunday, they left Chesaning about nine o'clock in the morning to go about ten miles northwest, their road passing by a school-house where a Methodist quarterly meeting was carried on by the presiding elder and three preachers. Plaintiff, by himself and persons at the meeting, gave evidence tending to prove that plaintiff and Tuttle made no noise or disturbance at or in passing the school-house, and that the religious performance thereat was not disturbed by any noise whatever from without. Plaintiff also gave evidence tending to prove that in passing defendant's house Tuttle stepped to the outside of the road and broke down two small shade trees, the plaintiff then being ten or twelve feet beyond, walking in the road; that he looked around as Tuttle was breaking the trees and remonstrated with him, telling Tuttle to come along and mind his business; that the next day he and Tuttle were arrested near St. Charles by officer Thayer, defendant being with him; that Thayer refused to tell what it was for; that the officer and defendant then took plaintiff to defendant's house and there locked him up in a room all night. Plaintiff further gave evidence tending to prove that while so confined in defendant's house Thayer advised them to settle with defendant, who wanted $25, and they gave him their watches in pledge for the sum the next morning, and were released by the officer by defendant's order without being taken before the justice who issued the warrant, which the officer left with the defendant, they being there told by the defendant that he wanted that sum to settle for the shade trees and a buggy spring broken in going to arrest them; that Carson demanded his watch, and that defendant then told

plaintiff that he knew Tuttle broke the trees, and that plaintiff had done nothing for which he could be arrested, but that he had been in bad company.

Plaintiff further gave evidence tending to prove that the next day he went to defendant and demanded his watch; that defendant told plaintiff to go to Chesaning and he would meet him there and let him have the watch; that plaintiff did as requested, and while waiting for defendant at Chesaning was arrested on complaint of defendant for disturbing a religious meeting the previous Sunday. That plaintiff was taken before a justice of the peace, the trial continued for a week, and plaintiff by the magistrate (who refused the plaintiff's father as bail) was committed to Saginaw county jail where he was imprisoned for about a week, and from its uncleanliness was covered with vermin; that he was taken back to the justice's office, tried and acquitted. Plaintiff also gave evidence tending to show the actual damage sustained by his arrest and imprisonment, and also by persons living near him in Corunna that his general character was always good, and that he was a respectable, church-going man. Also that until the second complaint and arrest defendant had made no pretense that the meeting had been disturbed. He also gave evidence tending to prove that the defendant, previous to taking out the warrant for plaintiff and Tuttle, and on April 14, 1879, went to Justice Dredge at Chesaning and wanted a warrant for two men, meaning the plaintiff and Tuttle, and on being asked by the justice what they had done, replied that they passed his house the day before and one of them broke down two shade trees; that on being advised by the justice that both could not be held, and he had better have but one arrested, defendant replied he would have both arrested; thereupon the justice refused to draw the complaint; that defendant left and returned with complaint, and Dredge issued the warrant and gave it to defendant, and it was never returned; that a few days after defendant came to Jus-

tice Dredge and told him the parties had settled, leaving their watches; that Dredge told him the boys, if they had friends, might make him trouble for the way he had treated them; that during all the time defendant said nothing to Dredge about the boys disturbing the meeting, or any meeting being disturbed. Plaintiff further gave evidence, by one Garrett Post, that defendant, April 15th last, told witness that he had plaintiff and one Tuttle arrested; that witness told him that plaintiff was a quiet and peaceable young man, who never drank a drop of liquor or did anything out of the way; that defendant said plaintiff Edgeworth had done nothing, but the boys had settled the matter and he let them go; that on the seventeenth of April one of the boys was arrested at his house on the second warrant; that defendant was there, and pointing to the boy who was arrested said, "I will send them where the dogs won't bite them." Plaintiff gave further evidence of persons at said religious meeting that there was no noise or disturbance at it, and that after it was out the presiding elder and two other preachers talked about what a quiet, orderly meeting it had been, and no reference was made to any disturbance. Plaintiff gave further evidence tending to prove that when Tuttle and plaintiff got one mile and thirty rods west of the school-house that morning, about 11:30 o'clock, they were conducting themselves in an orderly manner.

The defendant, on his part, gave evidence tending to show that he did not know when he took out the warrant for the destruction of the shade trees, that the act was that of Tuttle alone; that the conduct of both plaintiff and Tuttle was disorderly when they were approaching and passing the place where the religious meeting was being held, and that it attracted the attention of those who were taking part in the meeting; that after the first prosecution was settled up, defendant for the first time learned from his daughters and a niece then at his house, the full extent of the misconduct of plain-

tiff and Tuttle at the time when the shade trees were destroyed. One of the daughters was then called as a witness on his behalf, and was asked what the young men did when passing the house? The question was objected to, and counsel for defendant explained that it was proposed to show by this witness that plaintiff was an indecent and obscene person, and that both he and Tuttle made an indecent exposure of their persons, and used insulting language to the girls in passing the house, and presented a pistol. The judge ruled out the evidence, at the same time stating that he thought the defendant had made out his justification so far as concerned the prosecution for destroying the shade trees, and he should consider that part of the plaintiff's declaration as out of the case. The defendant excepted to this ruling.

When the evidence was concluded the defendant requested the court to instruct the jury that "to maintain this action plaintiff must prove that defendant was actuated by malice. There is no such thing as a legal presumption of malice in this class of cases, and the jury must find the malice, if at all, from the facts proven; and the facts ought to be such as will satisfy any reasonable mind that the prosecution had no ground for the proceeding but his desire to injure the accused. Unless the jury find the defendant acted from motives of malice in his prosecution, and not from a disposition to punish and repress crime, plaintiff cannot recover." This request was refused, and on this branch of the case the judge charged as follows: "The second count charges the defendant with having made a complaint against the plaintiff falsely, without probable cause, and from malice and improper motives. It is very important to be determined by you whether there was in fact a disturbance, and whether there was any reason on the part of the defendant to believe that there was a disturbance, he being present at the time. The complaint was made on the 17th, four days after the occurrence, and after a settlement had been had between the parties on the first complaint. The plaintiff says from wicked and malicious motives, without probable cause to believe the

truth of the complaint, this defendant caused his arrest. Is this true? If so, then he is liable to the plaintiff for all damages which the plaintiff has sustained thereby,—such sum as you may find the plaintiff ought to recover under the instructions of the court. If he made this complaint against the plaintiff without probable cause to believe him guilty and from malicious and improper motives—if for the purpose of compelling him to settle a suit, or extort money from him, or prevent any proceeding being brought against him to recover the watch —then the plaintiff ought to recover. This, then, is the question of fact submitted to you. Determine first whether there was a disturbance or not. Secondly, whether defendant had reasonable cause to believe that such disturbance had been caused by plaintiff. If you believe the contrary and that he had no such reason to believe the plaintiff guilty, and that he instituted the complaint from improper, wicked and malicious motive, then they must recover. By malicious it is not necessary that it should be revengeful. Any wicked, malevolent purpose is malicious. It may be to avoid prosecution, or it may be to compel a settlement or extort money or any other purpose which in law is unlawful, and if so, it is malicious."

The jury returned a verdict for the plaintiff.

I. In my opinion no error was committed by the court in excluding evidence that the plaintiff and his companion behaved with indecency in passing the defendant's house. This evidence could have no tendency to show that the plaintiff was guilty of disturbing a religious meeting, and that was the only offense which was in question when the evidence was rejected. Neither, as I think, could it have any legitimate bearing on the question of the defendant's malice in instituting the second prosecution. It would rather tend to prove malice, by showing animosity, than to disprove it. The defendant finds that his family has been abused, and he thereupon proceeds to institute a criminal prosecution against the parties guilty of the abuse, for an offense alleged to have been committed at another time and place, but which as it turns out was never committed at all. Now if the immediate instigation to the prosecution was the abuse of the family, the prosecution may be referred to

the party's anger and animosity rather than to any desire to accomplish the ends of justice; but the fact that he had occasion to be angry could furnish no legitimate evidence that he instituted from proper motives an unfounded prosecution against the party who had angered him. Neither could the fact that plaintiff misbehaved at one place furnish a motive for charging him with crime at another. Indeed if we may wander from the immediate transaction which would come under examination in the second prosecution, and take into account the conduct of the accused party on other occasions, as furnishing ground for suspecting his guilt, it would be difficult, if not impossible, to set any bounds to the inquiry, and the arrest of a man on a baseless charge may be excused on showing that his previous behavior has at some time furnished reason for believing that he would commit the crime of which he is accused if the opportunity were afforded. No one could be safe under such a rule, and no one could know what he would be called upon to meet when he complained of malicious prosecution. *Oliver v. Pate* 43 Ind. 132.

II. I am also of opinion that the charge of the court on the subject of malice was open to no well founded objection. The charge as given required the jury to find the existence of malice as a fact; and while it is perfectly true that the law does not imply malice from an unfounded prosecution (*Dietz v. Langfitt* 63 Penn. St. 234), yet the jury may infer it as a deduction of fact from the want of probable cause. *Burhans v. Sanford* 19 Wend. 417; *McKown v. Hunter* 30 N. Y. 625; *Green v. Cochran* 43 Iowa 544; *Flickinger v. Wagner* 46 Md. 580. But the jury in this case had abundant evidence before them from which actual malice might be inferred.

The foregoing are the only points in the case which require attention, and I think the judgment should be affirmed.

The other Justices concurred.

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HENRY BARBER v. ER MILNER ET AL.

Deed absolute as security—Validity of parol trust in lands.

Parol evidence is admissible to show that a deed absolute on its face was intended as a mortgage.

A voluntary conveyance deliberately made and delivered without mistake or contrivance or any understanding for a reconveyance, and on which the grantor receives the consideration, is binding on him.

Where a wife signs a deed given as security, only on condition that on payment of the amount secured, the grantee shall convey the premises to a third person, the grantee cannot dispose of the property otherwise; and after he has conveyed as agreed, the validity of the trust to him cannot be questioned on the ground that it was not in writing.

Appeal from Genesee. Submitted February 11. Decided April 8.

BILL to set aside a deed. Complainant appeals.

E. M. Thayer and *Newton & Howard* for complainant.

George H. Durand for defendant.

MARSTON, C. J. We have no doubt whatever but that defendant's version of the facts in this case is correct.

The complainant being indebted to the Citizens' National Bank of Flint, in order to secure payment thereof executed and delivered to William L. Gibson, the cashier, a warranty deed of the premises in question. The complainant had accumulated considerable property, but because of a habit he had acquired of using intoxicating liquors to excess, he had lost portions thereof and become somewhat involved financially. In consequence thereof his wife, Phebe Barber, refused to join in the conveyance to Gibson until complainant agreed that on payment of the indebtedness to the bank, Gibson should convey the property to her or to any person to whom she should direct. Under this agreement and in pursu-

ance thereof she joined in the conveyance, and afterwards directed Mr. Gibson to convey to Milner, who was her son-in-law. Milner paid the bank $1500, which was in excess of the amount due the bank, which surplus was placed to the credit of complainant and afterwards drawn out by him, and thereupon the property was conveyed to Milner. He afterwards conveyed to defendant Phebe Barber, receiving from her a mortgage to secure him for the amount he had paid the bank, and for sums advanced by him for insurance and taxes upon the property.

Such are the facts as we find them. In complainant's behalf it is claimed—*First*, that the conveyance to Gibson was intended to be but a mere security, and that parol evidence is admissible to show that a deed absolute on its face was intended as a mortgage. The correctness of this position need not be questioned. *Second*, that the farther parol agreement to convey to Mrs. Barber would create an express trust in her favor, and that such a trust cannot thus be created under our statute. 2 Comp. L. §§ 4124, 4692. Two answers may be given to this position, either one of which may be sufficient to dispose of the present case.

The conveyance to Gibson was freely and voluntarily made and delivered. Although given to secure the bank, yet the consideration received by the grantor was something more than the amount due the bank, and this he received and retained. It was neither the agreement nor the understanding at the time this conveyance was made, that the grantee Gibson should reconvey upon payment of the amount due the bank, or of any other sum, or at any time, or upon any terms. The conveyance was a voluntary one, made with deliberation, without mistake or contrivance by any one, and binding upon the grantor. *Jackson v. Cleveland* 15 Mich. 94.

In the second place Mrs. Barber refused to join in the conveyance until it was agreed, upon payment to the bank of the consideration of $1500, the property should be conveyed to her or to such person as she should

direct. She had a valuable interest in the premises, and if she declined to convey the same until such an agreement was made, and in reliance thereon joined in the conveyance to Gibson, a refusal by the latter to convey upon payment or tender of the amount would be a fraud upon her rights, and a court of equity would interfere to prevent the consummation thereof. Gibson could not under any circumstances be considered the absolute owner of the property, and having obtained the title as security upon an agreement to convey to a third party, the law would not permit him to claim or dispose of the property contrary to such agreement. *Abbott v. Gregory* 39 Mich. 70. No such question properly arises in the present case. Here he has conveyed as he agreed, the trust has been executed, and whether valid because not in writing, or not, is no longer an open question.

The decree must be affirmed with costs.

The other Justices concurred.

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The Hale Manufacturing Company v. The American Saw Company.

Waiver—Questions of fact.

An action for the price of goods sold involved the construction of an expression in the order given for them, unless the goods were accepted and the question of construction thereby waived. *Held* that the question of waiver was for the jury.

Error to St. Clair. Submitted April 7. Decided April 14.

Assumpsit. Defendant brings error.

O'Brien J. Atkinson and *Elliott G. Stevenson* for plaintiff in error.

Whipple & Voorheis for defendant in error.

GRAVES, J. The defendant in error, being a company carrying on business in New Jersey, sued the plaintiff in error, a company doing business in this State, to recover the alleged contract price of twenty circular saws which the latter ordered of the former, and the court directed a finding for the amount sued for. Complaint is made of this ruling. The record contains exceptions also to the admission of a deposition, but the case is not so framed as to support them. The allegations of error are numerous, but they will not be separately noticed. Many of them are unimportant.

The bargain for the saws was by correspondence. They were sent by the seller and tried by the buyer, and payment is refused on the ground that they were not such saws as were ordered, and were not accepted.

The general question is whether these were not matters to be decided by the jury. The negotiation was opened by a letter from the plaintiffs in error dated June 3, 1875, and the defendant in error forwarded an answer under date of June 5th. In this communication the secretary of the company wrote: "We have no doubt that for your work the saws should be of same thickness at eye and edge," and in giving its order on the 28th of June the Hale Company made it for "20 36-inch saws, 8 gauge straight." The saws sent and experimented with were found to be thicker at the eye than the rim to the extent of one gauge or more. This fact has never been questioned. The plaintiff in error insisted that this was directly contrary to the order, which specified "8 gauge straight," whereas the defendant in error claimed that the expression "8 gauge straight" did not mean that the saws should be all the way of the same thickness, but that the metal should be equally distributed on each side of a line through the center, and that the plaintiff in error left it to the saw company whether the saws should be tapering or not. It was consequently made a material question at the trial whether or not the expression "8 gauge straight," in the order given by the plaintiff in

error, was to be understood as meaning that the saws were to have the same thickness at the eye and rim, and considerable parol testimony was given upon it. This testimony was not harmonious. The circuit judge, however, expressed the opinion that the point was for the court, and that the construction of plaintiff in error was correct.

It is not necessary to decide whether the judge was right in holding this question to be exclusively for the court, because the plaintiff in error was not prejudiced. It was contended for defendant in error that the plaintiff in error waived all objection based on the irregularity of thickness of the saws, and in fact accepted them. This position was controverted, and the question was material. The court, in directing the jury how to find, expressed the opinion that the view of the defendant in error was right. Upon consideration of the circumstances it appears clear to the court that the case, in this aspect of it, was for the jury, and that the court erred in declining to take their sense of the weight and significance of the evidence.

It is not needful to go further and discuss the case at large. The judgment must be reversed with costs, and a new trial granted.

The other Justices concurred.

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The Roger Williams Insurance Company v. Mark Carrington.

Insurance—Assignment of policy after loss—Parol change in policy.

The right to assign an accrued cause of action is statutory in Michigan and cannot be defeated.

A clause in an insurance policy providing for its forfeiture if assigned without the company's consent, cannot in Michigan prevent its assignment after the loss.

The finding of a jury cannot be disturbed if there was evidence to justify it, unless the jury were allowed to find under improper directions.

Insurance policies are not required by law to be in writing, and outside of the statute of frauds there is no rule of law which prevents written contracts from being changed by parol.

Error to St. Clair. Submitted April 7. Decided April 14.

ACTION on insurance policy. Defendant brings error.

Whipple & Voorhies for plaintiff in error.

O'Brien J. Atkinson and *Elliott G. Stevenson* for defendant in error. An insurance policy can be changed or enlarged by parol, *Seaman v. O'Hara* 29 Mich. 66; *Kennebec Co. v. Augusta Ins. Co.* 6 Gray 209; *First Baptist Church v. Brooklyn Ins. Co.* 19 N. Y. 305.

CAMPBELL, J. Action was brought in the circuit court for the county of St. Clair by Carrington as assignee of a policy of insurance originally issued by plaintiff in error to Angeline James on a livery stable stock in Port Huron. The policy bore date October 16, 1876, and was assigned after the property insured was burned up. The fire which destroyed the property was in September, 1877. The policy was by its terms made payable to Carrington as his interest should appear. It was thus arranged to secure a debt due him from Mrs. James and secured.

At the time of the fire the horses and carriages and other livery property destroyed were in a livery stable at Lexington, to which place the business had been removed in November, 1876, and one of the questions presented related to the effect of this removal.

The company after the loss repudiated any liability on the ground that no such policy was in force.

There is some difficulty in applying the assignments of error in this case, but perhaps they present sufficiently the more important issues.

Proof of loss was made in final shape about three months after the fire. It was not objected to for delay,

but for want of any insurance. There was evidence bearing very plainly on difficulties of proof caused by this dispute as to the existence of the policy, and we do not think there was anything which, as matter of law, made the delay sufficient for a forfeiture.

The assignment having been made after the loss, did not require consent of the company. The provision of the policy forfeiting it for an assignment without the company's consent is invalid, so far as it applies to the transfer of an accrued cause of action. It is the absolute right of every person—secured in this State by statute—to assign such claims, and such a right cannot be thus prevented. It cannot concern the debtor, and it is against public policy.

Two principal questions arose on the trial, *first*, whether the policy was originally valid and continued uncanceled; and *second*, whether the removal to Lexington put an end to its force if otherwise in existence.

The original execution of the policy was admitted, but it was claimed to have been canceled for non-payment of premium. It is not claimed that notice of cancellation was given to the insured, and the verdict negatives it. But it is claimed that Linnæus Noble, the insurance agent who issued the policy, was acting in the capacity of agent for Mrs. James, and that the company by notifying him sufficiently notified her.

Upon most of the leading facts Noble's testimony is contradicted, and it was a question of fact for the jury what transactions really occurred throughout.

There was a conflict as to the precise relations of the parties concerning the obtaining of this particular policy, and how far Noble acted for Mrs. James concerning it. There was evidence of a particular bargain made about it. There was evidence that the premium was actually paid by a note, which was taken up after renewal. There was evidence that the company drew for and obtained the amount of this premium from Noble, and while he testifies it was afterwards made up to him, he does not

show how or why, and he does not show that the payment to the company was after the pretended cancellation, which was for non-payment of premium.

Upon all of these questions the jury have found in favor of the insured, and there was evidence to justify the finding. Unless they were allowed to do this under improper directions their finding cannot be disturbed.

The charges asked, which called for instructions that Noble was agent for Mrs. James, were all too broad. Upon the testimony it cannot properly be said that there was anything more than an open question of fact. The court could not be asked to charge either that he was her agent or that a partial detail of facts would make him such, when there were other facts explaining them, besides many contradicting them. The charges asked were not so drawn as to leave the jury any discretion upon matters of dispute. And we are strongly inclined to think that there was no testimony which fairly tended to show that in this particular transaction Noble could have been found by the jury to have acted for any material purpose as agent for any but the company, whatever may have been his position in regard to other transactions.

Upon the question of assent to the transfer of the insured property to Lexington there is also some conflict of testimony. There was positive testimony that before the removal the agent was notified of the desire to remove it, and that it would not be removed until provision was made to keep it protected by the insurance, and that Noble told James, the husband and agent of the insured, before the removal that the proper steps had been taken. There was also evidence, which though objected to was clearly relevant, that shortly before the loss Noble was written to for the purpose of having the policy renewed when it should run out, and answered promising to attend to it. There was also other evidence on the same subject. The agent's own books showed a memorandum purporting to be a new insurance for a year from the

time of the removal, covering the property at Lexington, but claimed it was a mere memorandum of a proposed insurance that was never made. Upon all these facts the jury certainly had a right to believe the agent had done what James said he had, and that there had been an absolute representation of insurance and an agreement to that effect. The policy contained an express authority in the insured to surrender the policy and get back a part of the premium, and no return of premium was pretended to have been made, while the jury must have found it had all been paid.

The objection that such change in the policy was void unless in writing, is disposed of by our own previous decisions. There is no rule of law which, in cases outside of the Statute of Frauds, prevents written contracts from being changed by parol, or which requires insurance contracts to be in writing. The subject was fully considered in *Westchester Fire Ins. Co. v. Earle* 33 Mich. 143, where the cases are cited and commented on. We think there is no difficulty in the way of the contract relied on.

Some question arose whether a certain stallion was properly included among the stock. There was testimony that except at certain seasons he was used as a livery horse, and we think he was properly so found by the jury.

We do not discover anything in the record indicating that any action has been had of which plaintiff in error can complain.

The judgment must be affirmed with costs.

The other Justices concurred.

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WILLIAM STEWART, IMPLEADED, ETC. v. THE FIRST NATIONAL BANK OF PORT HURON.

Testimony of absent witness.

Stenographer's minutes of the the testimony given upon a former trial by a party who has since left the jurisdiction, are admissible; and if the effect of such evidence is so confined as to affect only the liability of the party who gave it, a joint party cannot complain of its admission.

Error to St. Clair. Submitted April 7. Decided April 14.

ASSUMPSIT. Defendant Stewart brings error.

Whipple & Voorheis for plaintiff in error. Testimony given by a party is not admissible on new trial as against a joint party, *Kellogg v. Secord* 42 Mich. 318.

Elliott G. Stevenson and *O'Brien J. Atkinson* for defendant in error.

MARSTON, C. J. This case was before this court at the January term, 1879, and was then reversed and a new trial ordered, because the court charged that the defendants were liable as makers, and there was no evidence of notice of dishonor to charge them as indorsers. *Stewart v. First National Bank* 40 Mich. 349. The facts are substantially the same in the present as on the former hearing, with the omitted proofs to charge the defendant as an indorser, supplied.

We are of opinion that every question fairly arising in the case was submitted to the jury under proper instructions and in accordance with the opinion of this court in the case when here before. There most clearly was evidence tending to show a ratification by this defendant of the discharge of his co-indorsers.

An objection was taken to the ruling of the court in admitting the stenographer's minutes of the testimony

of Wallace Ames as given on the former trial of this cause. In this there was no error. It was conceded that the witness was at this time beyond the jurisdiction of the court. This would bring the ruling within *Howard v. Patrick* 38 Mich. 795. Farther than this, counsel in offering the same, did so "for the sole purpose, and for no other than to establish Mr. Ames' liability upon the notes in suit;" and the court in charging the jury in like manner confined its effect to Mr. Ames, and that it should not affect Mr. Stewart. The evidence was clearly admissible as against the defendant Ames, and under the offer and purpose for which it was received and used, this party has no right to complain.

The judgment must be affirmed with costs.

The other Justices concurred.

STEWART A. VAN DEUSEN v. ROBERT CATHCART.

Witness—Hypothetical statements—Refusal of instructions.

In an action on a note which a third party had either bought or made payment on, the latter was asked if there had been any talk in his presence as to whether the party indebted was to pay anything more, and answered "not the slightest. I would not have taken it under any such circumstances." *Held* proper to strike out the latter clause, as it was inadmissible for the witness to tell what he would have done under circumstances that did not happen.

Refusal of an instruction is not error where it is asked without reference to any particular circumstances and there is no testimony on either side of any such state of things as it contemplates.

Error to Bay. Submitted April 7–8. Decided April 14.

ASSUMPSIT. Defendant brings error.

Collins & Stoddard for plaintiff in error.

Thomas A. E. Weadock for defendant in error.

CAMPBELL, J. Cathcart recovered judgment in the circuit court for Bay county, for the balance unpaid on a promissory note. The defense was that the note had been sold at a discount to Sidney T. Holmes. The original note was dated September 14, 1874, for $315 and interest, at six months.

On the 26th day of November, 1875, Cathcart applied to Van Deusen for a payment or partial payment on it. Cathcart's representation is that Van Deusen stated that in order to avoid some unfair debts he had placed his affairs where payment could not be coerced; but that this was an honest debt, which should be paid in full; that Holmes was buying his paper for him at fifty cents, and that whatever Holmes should give Cathcart, Van Deusen would give a new note for the balance. Van Deusen promised to see Holmes, and left word for Cathcart to meet him at Holmes' office the next morning. At that time Holmes took the note and figured up the interest and gave Cathcart a check for $100, and told him to return in about two weeks and he would give him $71.28 more. These two payments made up fifty cents on the dollar. Cathcart relates his subsequent efforts to get Van Deusen to give him a new note, and various offers of Van Deusen to turn in a safe and hotel board in payment and some small cash payments.

The testimony for the defense from both Holmes and Van Deusen was positive that Holmes bought the note on his own account, and Van Deusen denied any promise to pay the deficiency.

The court below charged that if there was a sale to Holmes on his own account there could be no recovery under any circumstances. The record presents several questions which are in our opinion in no way involved in the cause, because the jury must have found that Holmes made the payments on Van Deusen's account and not on his own; and if he did we cannot conceive what possible defense Van Deusen had to the action.

Holmes in his testimony was asked whether there was any talk in his presence that Van Deusen was to pay anything more. In reply he said "Not the slightest. I would not have taken it under any such circumstances." The last clause was stricken out. We do not think this was error. It was not admissible for him to tell what he would have done under circumstances that did not happen. It would probably have made no difference if left in, because it could not have any material bearing on the issue, but it was entirely proper to strike it out.

It is alleged as error that the court refused to charge that an agreement between Cathcart and Van Deusen for further payment was a fraud on Holmes if not made known to him. Possibly it might have been under some circumstances, if Cathcart knew that Holmes was advancing money on the faith that the whole debt was settled, and was so situated that he might be injured by it.

But the charge was asked without reference to any particular circumstances, and there was no testimony on either side of any such state of things. If Cathcart was believed, Holmes was in no way concerned with the dealings of the debtor and creditor, and was acting for Van Deusen, and entirely in his interest, so far as Cathcart had any reason to know. If Holmes and Van Deusen were believed, Holmes was equally unconcerned, as he owned the whole claim, and no payments to Cathcart thereafter would reduce it.

The remaining errors assigned are, in our opinion, foreign to the issue. The jury must, under the charge, have found that Holmes did not pay the note on his own account, and did not purchase it at all. There is no testimony tending to show any middle arrangement between an absolute sale and a payment on account. The testimony was directly opposed, and there was no room for any third or mixed theory. The jury had to choose between the only two theories sworn to, and they accepted the showing of Cathcart. While, therefore, the charge

put before them some hypotheses under which a new promise would or would not be valid, the only one which was important was that, if there was an actual sale of the note to Holmes, a new promise would be void. This was a charge in favor of Van Deusen. As already suggested, if Holmes did not purchase there is no evidence that he acted in any other capacity than as Van Deusen's agent, and with no notice to Cathcart that he had any personal interests which would interfere with arrangements between Cathcart and Van Deusen.

There is no error in the record and the judgment must be affirmed with costs.

The other Justices concurred.

WALDO M. JOHNSON v. JAMES CRISPELL AND MYRA CRISPELL.

Question of fact—Fraud of debtor—Findings of fact.

Judgment for defendant in a finding in ejectment cannot be disturbed unless the facts found would warrant judgment for plaintiff.

Fraud as against creditors in a deed by the debtor is a question of fact, and if not explicitly found cannot be reviewed on error.

The finding of a trial judge as to the weight of evidence in law cases cannot be reviewed, nor can the Supreme Court supplement it by a finding of facts.

Error to Gratiot. Submitted April 8. Decided April 14.

EJECTMENT. Two cases. Plaintiff brings error.

O. L. Spaulding for plaintiff in error.

GRAVES, J. Johnson sued in ejectment, and the court sitting without a jury found the facts and gave judgment for defendant. The plaintiff claimed as purchaser on execution sale against John A. Crispell. The land was

conveyed by the judgment debtor about three months before the suit was commenced, to his daughter Myra Crispell, and she conveyed it to defendant sometime after judgment. Unless the facts found are sufficient to warrant judgment for the plaintiff, it is a necessary consequence that the judgment for defendant cannot be disturbed. The ground on which a reversal is asked is that the debtor's conveyance to his daughter was in fraud of creditors, and that defendant had notice and was not a *bona fide* purchaser.

There is no occasion to go beyond these questions. The claim set up is not justified by the finding. Whether the debtor's deed to his daughter was fraudulent against creditors was a question of fact, and the judge has not found it. *Oliver v. Eaton* 7 Mich. 108; *State Bank v. Chapelle* 40 Mich. 447; *Fearey v. Cummings* 41 Mich. 376. There are facts in the finding which bear as matter of evidence on the question of fraud, but it is easy to see the judge did not regard them as sufficient to establish the fact itself. Whether he was right or wrong about it is now immaterial. Sitting in place of a jury, it was for him to settle. We have no jurisdiction to review his opinion on the weight of evidence in law cases, or to find facts where he has not found them.

The judgment must be affirmed with costs, but the case will be remanded for such further proceedings as may be proper.

The other Justices concurred.

WALDO M. JOHNSON v. MYRA CRISPELL.

GRAVES, J. This case is governed by *Johnson v. Crispell*, just decided, and the same judgment will be entered.

The other Justices concurred.

ANNIE CLARK v. BENJAMIN FREDENBURG ET AL.

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c128 28

Executor's bond—Liability for proceeds of executor's sale.

A probate court in passing upon an executor's account can decree that all debts and claims and administration charges on the estate have been satisfied, and determine the executor's liability to the estate and the amount left to a specified devisee. Such a decree, if no appeal is taken, is binding upon the executor, the devisee and all parties in interest, and cannot be attacked collaterally; and under it the executor must pay over to the devisee the legacy with accumulated interest, and if he does not, the sureties become liable on the executor's bond.

After an executor's sale of realty, made by order of the probate court, has been confirmed without opposition, the executor cannot refuse to obey its order to distribute the proceeds to the devisees on the ground that the sale was irregular; and in an action on his bond for such refusal this defense is not open to the executor or to his sureties.

An executor's bond covers all moneys received by him under color of his official authority.

Where the sureties on an executor's bond have been cited to appear and show cause why suit should not be brought upon the bond, and have acquiesced in the decision on the hearing, they are bound by it.

Appeal from Calhoun. Submitted April 8. Decided April 14.

BILL to enforce the payment of a legacy. Dismissed. Complainant appeals.

George W. Lawton for complainant.

Wm. H. Porter and *Miner & Stace* for defendants.

MARSTON, C. J. Complainant comes into a court of chancery for relief touching a legacy bequeathed her by her deceased husband. The defendants demurred specially, and upon a hearing thereon the bill was dismissed. Complainant appeals.

We think the present case may be disposed of upon a brief statement of some of the most important facts.

The executor, from the personal property and a sale of a part of the real estate of the deceased under an order of the probate court, received a large amount of money. There were but few claims against the estate, and in obedience to an order of said court he afterwards appeared and rendered his account. December 14, 1878, the court passed upon his account and "did determine and decree in substance that all the debts and claims and charges of administration of said estate had been paid and satisfied, and that there then was in the hands of the said executor, or for which he was liable to said estate, of the assets and avails thereof, the sum of $10,440.70 in money, and that $4000 thereof was given to your oratrix under the will of said deceased." The bill alleges a refusal by the executor to pay over this sum so decreed, to the complainant, and his insolvency; that he and his sureties and the representatives of one of the sureties deceased were cited to appear and show cause why complainant should not have leave to prosecute the executor's bond for said legacy and the accrued interest thereon; that they did appear and oppose the granting of such leave, and that after a full hearing and examination of the matter by the probate court, leave to prosecute the surviving surety was granted; that an action has been commenced against the surety, and a claim filed against the estate of the deceased surety for the amount of complainant's claim.

No appeal has been taken from the order and decree of the probate court of December 14, 1878, or from the order granting leave to sue the surety. Both remain in full force. The decree of December 14th establishes the fact that the executor had received sufficient funds over and above all claims and charges against the estate to pay complainant's legacy in full, and also decreed that $4000 thereof was given to complainant under the will of her deceased husband.

That the probate court had jurisdiction in the prem-

ises there can be no question, and the decree so made is binding upon the executor, the complainant and all parties in interest. If dissatisfied therewith they had a remedy, but not having pursued this, the decree is conclusive and cannot be attacked collaterally. The amount in the executor's hands may have been larger, as now claimed, and the rights of complainant under the will may have been somewhat uncertain, both as to the interest she took and the funds from which it would have been payable (questions we do not pass upon), but all such questions, after the decree was made and permitted to stand, became and were settled thereby, and no longer remained open to controversy. Under this decree it became the clear duty of the executor to pay over to the complainant her legacy, with the interest due thereon, and if he failed so to do, his sureties were liable on his bond.

It is said, however, that there were certain irregularities in the sale of the real estate, and therefore such questions should be settled, and if the sale is found invalid in consequence thereof, then this legacy should be made a charge upon the real estate. We do not see how any such question can arise in any controversy between the complainant and the executor and his sureties. The sale was ordered by the probate court. It was made by the executor under and by virtue of the authority thus conferred, and he received the proceeds of such sale as and in virtue of his position as executor of the estate of the deceased. The sale was confirmed, and no steps have been taken to question the title of the purchasers thereunder, and no claim is made by them; and we do not see how this complainant can be interested in raising any question as to the validity thereof under the facts of the case concerning her rights. Under such circumstances, the executor, when ordered by the probate court to distribute the proceeds, cannot refuse upon the plea that the sale was irregular. Upon such a theory the sheriff, who had collected the amount of a judgment under an execution, could retain the pro-

ceeds if he could but show some irregularity or error, which if properly raised would have reversed the judgment or set aside the sale. The treasurer of a municipality could retain the taxes collected by him because illegally assessed, and so the doctrine might be carried over the entire field where parties have received funds under and by color of their office,—a doctrine which if recognized would open the door to the grossest frauds and abuses and to endless litigation. It would be offering a premium to all such to commit errors in order that they might profit thereby. It does not lie either in the mouth of such persons or officers or their sureties to make any such defense. Their bond covers all moneys received under color of official authority. There may be exceptions to this rule, but the present case does not seem to come within them. *Burk v. Webb* 32 Mich. 178.

There is another answer to any such objection when raised by the sureties. They were cited to appear and show cause why the complainant should not have leave to sue the bond. In obedience thereto they appeared and were heard. If they were not responsible for the acts of their principal, they had an opportunity given them to show such facts; and if the decision of the court was adverse to them they had a remedy. They acquiesced in the decision and are bound thereby. Upon this question they have had their day in court.

All parties interested and who could have questioned the action taken by the probate court have acquiesced therein and are now bound thereby. We are of opinion that the rights and interests of the complainant are clearly defined and protected under the decree and proceedings in the probate court, and that no further or better relief could be given her in this case, and that there is therefore no necessity whatever for the present action.

For these reasons the decree dismissing the bill will be affirmed with costs.

The other Justices concurred.

JOHN R. WHITE v. JOHN G. HAPEMAN ET AL.

43	267
111	83
43	267
127	195

Ejectment—Agreement on boundary.

A declaration in ejectment for "a portion of a strip of land ten rods wide off from the west side" of a designated forty-acre lot, is fatally defective because it neither gives the length or width of the strip, nor so identifies it that possession may be given in case of recovery.

Adjoining owners orally agreed that one of them should keep up a division fence but should keep it entirely within his own bounds. After twenty years the fence was moved to the boundary and ejectment was brought for the strip of land cut off by its removal. *Held* that the action would not lie. As the oral agreement was void and the owner of the strip might have withdrawn from it, the strip was never held adversely to the owner, whose title was recognized in the agreement and always afterward.

One cannot be estopped from asserting a title against one who has always recognized it.

Title to lands cannot pass by estoppel, nor can the right to permanent possession.

Error to Kent. Submitted April 8. Decided April 14.

EJECTMENT. Plaintiff brings error.

M. Barton for plaintiff in error.

E. A. Maher for defendants in error. Possession, in order to settle a disputed boundary, must have been adverse, *Chapman v. Crooks* 41 Mich. 595; and must be shown to have been so for twenty years, *Yelverton v. Steele* 40 Mich. 538; permissive enjoyment of a privilege does not establish adverse user, *Chestnut Hill etc. Co. v. Piper* 77 Penn. St. 432; *Sargent v. Ballard* 9 Pick. 251; *Parker v. Foote* 19 Wend. 309; 1 Washb. R. P. (3d ed.) 299; an oral agreement by an adjacent proprietor to put up a partition fence on his side of the line is void by the statute of frauds, Tyler on Fences, 344; *Hewlins v. Shippam* 5 B. & C. 221; it is at most a license revocable at the will of the grantor (1 Washb. R. P. 545), and

occupation thereunder cannot establish an adverse right, Washb. Easements 164; *Wright v. Wright* 21 Conn. 329; *Felton v. Simpson* 11 Ired. 84; *Wheatley v. Baugh* 25 Penn. St. 528; and even if it were established it would not bind later purchasers, *Adams v. Van Alstyne* 35 Barb. 9; 25 N. Y. 232; *Burrell v. Burrell* 11 Mass. 298.

Cooley, J. This action is ejectment for land described in the declaration as "a portion of a strip of land ten rods wide off from the west side of the southeast quarter of the southwest quarter of section 35," in the township of Grattan. Neither the width nor the length of this strip is given, nor anything else whereby it may be identified and possession given in case the plaintiff should recover. The declaration is therefore fatally defective and no judgment for the plaintiff could be given upon it.

As however the merits of the controversy between the parties have been fully examined in this case, and the result of the case going off on a defect of pleadings would probably be a new suit, it may be proper to examine the exceptions. It appears from the case made by the plaintiff that the parties to the suit own adjoining lands; that some twenty-five years before this suit was instituted it was agreed between the parties then owning these lands respectively, and under whom plaintiff and defendants have derived their titles, that the grantor of defendants, for a sufficient consideration, should maintain a division fence between them, but that he should place and keep it entirely within the bounds of his own land. The agreement was oral, and was observed for more than twenty years, when defendants moved the fence upon the line of division between the respective parcels. This suit was thereupon instituted to recover the narrow strip of land between where the fence formerly was and where it has now been placed.

Confessedly this strip of land belongs to the defendants, unless they have lost it in consequence of the oral arrangement already mentioned, and the long acquies-

cence of their grantor and themselves in the fence being maintained in accordance therewith. It is not claimed that the oral arrangement could of its own force deprive the owner of his title; it was void in law, and the grantor of defendants might at any time have withdrawn from and refused any longer to be bound by it. There is no pretense that the land has at any time been possessed adversely to the true owner: on the contrary the title of defendants and their grantor has always been recognized, and was conceded in the agreement itself. It is urged in the brief of plaintiff that defendants are now estopped from repudiating an arrangement so long observed, but the grounds of estoppel are not very clearly indicated. One certainly cannot be estopped from asserting a title against a party who has always known of and always recognized it. Moreover, as was shown in *Hayes v. Livingston* 34 Mich. 384, the title to lands cannot pass by estoppel, and if the plaintiff claims not the title, but the right to permanent possession, this comes to the same result and is equally admissible. *Nims v. Sherman* ante p. 45.

The plaintiff suggests no other ground of recovery, and it follows that the judgment which was given in the circuit court for the defendants, must be affirmed with costs.

The other Justices concurred.

WILLIAM F. KELLOGG AND OLIVER W. BARRETT (KELLOGG & BARRETT) v. SMILEY W. HAMILTON AND MARTIN MILLER ET AL.

Sufficiency of demurrer—Appeal from proceedings later than decree.

A ground of demurrer should be so stated as to apprise the court of the real objection, and if it is not, the party demurring can claim nothing under it.

A judgment creditor's bill averred that execution had been returned unsatisfied on a specified day. It was demurred to on the ground that it failed to show that the execution was returned as required by law to entitle complainants to maintain the bill. *Held* that the demurrer did not sufficiently present the objection that the date of the return was Sunday.

A point not sufficiently presented by demurrer cannot, on appeal, be raised for the first time.

Proceedings subsequent to the decree appealed from are not reviewable.

Appeal from Berrien. Submitted April 8. Decided April 14.

JUDGMENT CREDITOR'S BILL. Defendants appeal.

W. J. Gilbert and *David Blackman* for complainants.

Potter & Potter for defendants.

GRAVES, J. Complainants being judgment creditors of Miller and Hamilton, filed this bill under the statute to enforce satisfaction from property subject to debts but not liable to execution. The bill made the usual statements, but defendants demurred to it. The court overruled the demurrer and gave time to answer, but no answer being put in, the common decree *pro confesso* was entered. Thereupon the defendants appealed.

The demurrer assumed to allege three causes, but two appear to be abandoned. So far as we can see, there was no color for them. The remaining ground is that the bill fails to show that execution was returned unsatisfied in whole or in part, and also fails to show that it was returned as required by law to entitle complainants to maintain the case.

The statement in the bill is that the execution was returned wholly unsatisfied, on a day specified in November, and the point is now made in this court that the date so expressed was Sunday, and that the proceeding was consequently void.

Whether such would be the effect we shall not inquire.

The return was a step in the case at law and we think no question has been made upon it on the equity side. The terms of the demurrer were not meant to suggest, and did not suggest, the alleged error, and the attention of the court below has never been drawn to it. A cause of demurrer should be so stated as to apprise the court of the real objection, and in case it is not, the party demurring can claim nothing under it. Any other practice would be an obvious affront to common sense as well as justice. *Pratt v. Lewis* 39 Mich. 7, 10, 11.

In this case we should never have suspected that the statement of the cause of demurrer was intended to cover such an objection as is now set up. It has been found necessary for defendants' counsel to translate their demurrer into the particular objection by means of their brief, and it is in that way only that we are made aware of it. As the demurrer did not present the point that the day of return was Sunday, the objection is not tenable on appeal and is not considered. The case stands here as though the defendants had declined to raise it. It seems that defendants petitioned the court *ex parte* to set the decree aside, and that the application was denied; and it also appears in the papers sent up that a second execution was taken out on the judgment and collection of part of the debt made under it. But we have nothing to do with these proceedings. The appeal is against the decree granted for want of answer, and not against the later proceedings, and that is not shown to have been improper.

The decree is affirmed with costs.

The other Justices concurred.

MARY HARRIS v. CHARLES C. HOPKINS, ADM'R OF THE ESTATE OF SYLVIA O. YOURAN.

Gift—Possession.

Evidence that a decedent had stated positively that she had given certain specified property to her sons and had previously declared an intent to give it, and that one of the sons remained at her house until her death, warrants a finding of a complete gift *in præsenti*, and at all events a finding that all parties unterstood that there was a complete gift with no intention of revocation and such possession as was possible.

Error to Wayne. Submitted April 8. Decided April 14.

REPLEVIN. Defendant brings error.

James H. Pound for plaintiff in error. A gift is valid if the intent to make it is clear, and if there is anything from which delivery is inferable, *Ellis v. Secor* 31 Mich. 185; *Wallace v. Harris* 32 Mich. 380; *Latham v. Udell* 38 Mich. 238; *Davis v. Zimmerman* 40 Mich. 24; *Crittenden v. Phœnix Life Ins. Co.* 41 Mich. 442.

George A. Cady for defendant in error.

CAMPBELL, J. Defendant in error sued Mary Harris in replevin before Alexander G. Comstock, a justice of the peace of Wayne county, to recover certain furniture which he claimed as belonging to the estate of decedent, and which Mary Harris claimed as belonging to Myron and Harvey Blaun, by gift from decedent. The justice found there had been a valid gift. The case was taken on certiorari to the Wayne circuit court, where the justice's judgment was reversed. It now comes up on error from the circuit court.

The justice returns that he was satisfied there had been an actual gift and delivery by decedent to Myron and Harvey, who were her sons. The record shows she states positively that she had given the property to them,

and there were previous declarations of an intent to give it. It shows also that one of the sons remained at the house till his mother's death. We think there was enough to justify the justice in coming as he did to the conclusion that all the parties understood there was a complete gift without any intention of revocation, and with such possession as was possible. We think further that the evidence would have justified the finding of a complete gift *in præsenti*, if the justice had so found.

Under circumstances such as appeared in this case it was a very natural and reasonable thing for a mother to desire to have her property go directly to her children without the expense of administration, and the case does not indicate that the suit was brought in furtherance of justice.

We think the circuit court erred in reversing the judgment of the justice. The judgment of the circuit court must be reversed, and that of the justice affirmed, with costs of this court and of the circuit.

The other Justices concurred.

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68 210
68 211

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WILLIAM MILLAR AND ROBERT MILLAR v. WILLIAM CUDDY.

Agreement to pay what services are worth—Computation of amount due.

In a suit for wages a conversation between one of the defendants and a third party is admissible if it belongs to the negotiation which led to hiring the defendant, and tended to show that a fixed amount was to be paid him.

An agreement to pay a servant what the employer thinks he is worth, binds the latter to pay what the services are reasonably worth, and does not leave him to fix his wages at such sum as he sees fit after the services are performed, although such an agreement would be valid if understood.

It is not error and is in accord with established practice to permit a jury to take to the jury room a computation made by the plaintiff's attorney showing the amount claimed to be due; it is not evidence and the jury are not bound thereby.

Error to the Superior Court of Detroit. Submitted April 9. Decided April 14.

ASSUMPSIT. Defendants bring error.

George H. Prentis for plaintiffs in error.

James H. Pound for defendant in error. Verdict will not be set aside merely because the jury were allowed to take to the jury-room a paper setting out a computation of the amount claimed, *Hill v. Robbins* 22 Mich. 475; *Shipman v. Seymour* 40 Mich. 274; *Comstock v. Smith* 20 Mich. 345; *Continental Ins. Co. v. Horton* 28 Mich. 173.

MARSTON, C. J. We have been unable to discover any error in this case. The conversation that took place between Brace and one of the plaintiffs was clearly admissible in evidence. It was the commencement and a part of the conversation or negotiations which led to the employment of the defendant in error. It had a tendency to show that a fixed amount was to be paid, and was admissible in any view of the case. On the other hand the defendants below denied that any sum was agreed upon, but that they were to pay him what they thought he was worth to them. This could not mean that they could, after the services had been performed, fix the compensation at such sum as they pleased. Parties may make such an agreement, but we think this language does not warrant any such view. If no agreement as to compensation was made, then the law would imply that they should pay what his services were reasonably worth, and the court so instructed the jury. There was no error in the court permitting the jury to take to their room the computation made by the plaintiffs' attorney. It was but an aid to the jury in esti-

mating the amount due the plaintiff, if they found his theory of the case to be correct. They were in no way bound by it, and they could not consider it as evidence or be misled thereby. To permit the jury to take such a paper was but in accordance with long, well settled practice, and was unobjectionable.

The judgment must be affirmed with costs.

The other Justices concurred.

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98 651

HENRY SIEVERS AND CHARLES ERDMAN V. THE WOODBURN SARVEN WHEEL COMPANY.

Garnishment of judgment.

A judgment recovered in justice's court is not, under Michigan statutes, subject to garnishment proceedings before another justice.

Garnishment proceedings are purely statutory and cannot be extended to cases not provided for by law.

Funds under the official control of receivers and registers in chancery cannot be reached by garnishment process.

One justice cannot garnish a judgment rendered by another. The judgment may always be paid to the justice who renders it, and he must issue execution on application by the prevailing party, unless he has some excuse for refusing it. No other justice has any statutory right to stay his acts or direct his conduct.

Certiorari to Justice of the peace. Submitted April 9. Decided April 14.

Maybury & Conely for plaintiff in certiorari. Some courts hold that a judgment indebtedness cannot be reached by garnishment proceedings. *Sharp v. Clark* 2 Mass. 91; *Prescott v. Parker* 4 Mass. 170; *Franklin v. Ward* 3 Mas. 136; *Shinn v. Zimmerman* 3 Zab. 150; *Trowbridge v. Means* 5 Ark. 135; *Tunstall v. Means* id. 700; *Norton v. Winter* 1 Oregon 47. Others hold that it can. *Trombly v. Clark* 13 Vt. 118; *Gager v. Watson*

11 Conn. 168; *Crabb v. Jones* 2 Miles 130; *Sweeny v. Allen* 1 Penn. St. 380; *Fithian v. N. Y. & Erie R. R. Co.* 31 id. 114; *Belcher v. Grubb* 4 Harr. 461; *Webster v. McDaniel* 2 Del. Ch. 297; *Skipper v. Foster* 29 Ala. 330; *Gray v. Henby* 1 Sm. & M. 598; *O'Brien v. Liddell* 10 id. 371; *Halbert v. Stinson* 6 Blackf. 398; *Minard v. Lawler* 26 Ill. 301; *Keith v. Harris* 9 Kan. 386. A judgment indebtedness was properly garnished in *Griffin v. Potter* 27 Mich. 168; but where the proceeding is directed to a court of co-ordinate jurisdiction it involves a conflict of jurisdiction that could not be borne, Drake on Attachments (5th ed.) § 625; *Young v. Young* 2 Hill (S. C.) 426; *Burrill v. Letson* 2 Speers 378; *Thomas v. Wooldridge* 2 Woods 667; *Perkins v. Guy* 2 Mont. 16; *American Bank v. Snow* 9 R. I. 11; *Clodfelter v. Cox* 1 Sneed 330; *Wallace v. McConnell* 13 Pet. 136; *American Bank v. Rollins* 99 Mass. 313; but see *Jones v. N. Y. & Erie R. R.* 1 Grant's Cas. 457; *Luton v. Hoehn* 72 Ill. 81.

Joslyn & Freeman and *James H. Pound* for defendant in error. Judgment debtors may be garnished in the same State in courts of the same jurisdiction, *McCarty v. Emlen* 2 Yeates 190; *Hill v. Beach* 12 N. J. Eq. 45; *Ealer v. McAllister* 14 La. Ann. 821; *Stanborough v. McCall* 8 La. Ann. 9; *Price v. Emerson* 7 La. Ann. 237; *Woodworth v. Lemmerman* 9 La. Ann. 524; *State v. Huxley* 4 Harr. Del. 343; *Patterson v. Pratt* 19 Iowa 358, 362; *Arthur v. Hale* 6 Kan. 161.

CAMPBELL, J. This is a certiorari to review proceedings in garnishment had before John Weber, a justice of the peace, whereby defendants in certiorari were allowed to recover against plaintiffs as garnishees, the amount of a judgment against them and in favor of one Michael M. Gisler, rendered by Isaac N. Toll, another justice of the peace. Defendants in certiorari had recovered a judgment against Gisler before Daniel Brown, a justice now out of office, whose docket is in the hands of Weber.

The objection chiefly relied on is that a judgment before one justice cannot be garnished in proceedings before another justice.

It might be sufficient in the present case to say that the garnishee judgment is void for want of jurisdiction over Erdman, who was never legally brought in. But the other question is so presented that we cannot properly disregard it, as it is made the only distinct ground of complaint in the affidavit.

Proceedings in garnishment are purely statutory, and cannot be extended to cases unprovided for, without mischief. The statutes, at best, are imperfect, and any attempt to extend their operation is almost certain to create difficulties in regard to conflicting rights which it is impossible to reconcile.

In the case of *Griffin v. Potter* 27 Mich. 166, we declined to compel a justice of the peace who had collected a judgment in favor of relator to pay over the amount to him, when he had already in good faith applied it in payment of a judgment against relator rendered before himself. He had allowed garnishee process on this adverse judgment, under which the money due relator on the judgment in his favor had been paid by the garnished debtor to the justice. In that case the justice had been authorized by law to receive the money due on any judgment which he rendered. Comp. L. § 5417. He had in his hands money belonging to one judgment creditor, which he applied on a judgment against the same creditor, which he had authority to collect. It was not claimed or shown by relator that any rights or equities existed which stood in the way of such an application. The case presented no complications whatever, and we are not called on to construe or consider the garnishee law in all its bearings, because the remedy by mandamus would not have been allowed to compel a justice to refund money which had been applied by him in payment of a judgment which he had a right to collect, even if we had found there might have been some tech-

nical irregularity in the mode of application. The case, therefore, is not important on any question presented to us by this record.

We have no doubt that the garnishee law does not apply to enable a judgment before one justice to be garnished in proceedings before another. If any such power had been intended to be given, we must assume that the statute would have pointed out in what way it could be carried out without confusion. It would be impossible to have one justice of the peace interfering with the proceedings of another justice in carrying out his own judgments. If the power exists it cannot be confined to one city or one county, but a justice in Detroit could reach or be reached by a justice in the remotest part of the State. As already suggested, a judgment may always be paid to the justice rendering it. He must issue execution on application of the prevailing party, unless he has some legal excuse. The statute contains no provision for enabling one justice to stay the acts of another, or to direct his conduct. The same principle which would allow such a judgment to be garnished, would allow the justice who collected it to be garnished before a brother justice. The consequences would be absurd and dangerous, and would destroy the proper control of magistrates over their own proceedings. If the Legislature should deem it proper to provide for any such anomalous procedure, it could not be carried out in practice without devising some special regulations and safeguards, which nothing but legislative action can provide. We have decided in *Voorhees v. Sessions* 34 Mich. 99, and *Tremper v. Brooks* 40 Mich. 333, that receivers and registers in chancery cannot be interfered with by garnishee process, so as to subject moneys under their official control to the ordinary operation of that action. We think there is a similar impropriety in such attempts as the present, and that the statutes do not permit it.

We express no opinion whether proceedings can be had before the same justice. There is not the same

reason for preventing it, but whether it can be done in ordinary cases, or under what restrictions, if any, it must be done, we have no occasion now to consider.

The judgment must be reversed with costs of both courts.

The other Justices concurred.

IRWIN GREEN, IRA W. MCINTYRE, GEORGE BEARD AND CHARLES BURNHAM v. SAMUEL KINDY.

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Bond in replevin—Conclusiveness of sheriff's return.

The sheriff's return to a writ of replevin, certifying that the plaintiff in replevin had not filed a forthcoming bond, is conclusive upon all the parties to the replevin suit, and defeats an action upon an alleged bond.

A sheriff's return to a writ of replevin may be amended on due notice and proper showing, but if not amended, is conclusive as made.

Delivery of a forthcoming bond in replevin to the defendant's attorney is not an assignment to the defendant, and will not enable him to maintain an action on it.—By two Judges.

Sureties upon a forthcoming bond in replevin will not be bound if the principal's signature was attached without his knowledge or consent, unless they signed with full knowledge of the fact.—By two Judges.

Error to Kalamazoo. Submitted April 9. Decided April 14.

DEBT on bond in replevin. Defendants bring error.

Henry C. Briggs for plaintiff in error Burnham. The sheriff's return to a writ of replevin as to whether the plaintiff had given a bond, is conclusive, *Rowell v. Klein* 44 Ind. 290; *Smith v. Noe* 30 Ind. 117; *Hamilton v. Matlock* 5 Blackf. 421; *Remington v. Henry* 6 id. 63; *Bean v. Parker* 17 Mass. 591; *Slayton v. Chester* 4 Mass.

478; *Phillips v. Harvey* 50 Miss. 489; *Bott v. Burnell* 9 Mass. 96: 11 Mass. 163; *Eastabrook v. Hapgood* 10 Mass. 313; *Russell v. Gray* 11 Barb. 541; *Henderson v. Cairns* 14 Barb. 15; *Johnson v. Jones* 2 Neb. 126; *Putnam v. Man* 3 Wend. 202; *Baker v. McDuffie* 23 Wend. 289; *Boomer v. Laine* 10 Wend. 525; *Miller v. Moses* 56 Me. 128; *Bond v. Wilson* 8 Kan. 228: 11 Am. Law Reg. N. S. 62.

Oscar T. Tuthill for defendants in error. It is a sufficient assignment of a bond in replevin if the retiring sheriff leaves it with the defendant's attorney, *Dorr v. Clark* 7 Mich. 313; *Wilcox v. Ismon* 34 Mich. 268; and possession of the bond for defendant's benefit would entitle him to sue on it, *Logue v. Smith* Wright (O) 10; *Singleton v. Mann* 3 Mo. 464; *Governor v. Evans* 2 Dev. (N. C. Law) 383; and the sureties are estopped from setting up any irregularities in the writ or return in defense to their obligation, *Decker v. Judson* 16 N. Y. 439; *Jennison v. Haire* 29 Mich. 207; *Shaw v. Tobias* 3 Comst. 192; *Moors v. Parker* 3 Mass. 310; *Cox v. Thomas* 9 Gratt. 314; *Meister v. Birney* 24 Mich. 435.

MARSTON, C. J. This action was brought upon what purported to have been a bond dated April 23, 1869, given by the plaintiffs in a replevin suit under Comp. L. § 6735, to obtain a delivery of the property from the sheriff.

There are a number of fatal objections to a recovery in the present case; all need not be noticed.

The return of the sheriff in the replevin suit was dated May 1, 1869, and was filed two days thereafter. In this he certifies and returns that he replevied the property as commanded, April 22d, and that the plaintiffs in the suit failed to give him the required bond within the time required by law, and that the property so replevied was by him returned to the defendant.

This return of the officer is conclusive upon all the parties in that action. The statute, § 6739, requires the

sheriff to make a specific return to the writ. If the return is not correct, on notice given and a proper showing made the court may permit an amendment of the return, but unless this is done, the return must stand as made; it cannot be contradicted. If the return is false, the party injured thereby has a remedy, but not in the present form.

The proceedings in the cause subsequent to the return of the writ are very different where a bond has been given and the property thereon delivered to the plaintiffs, than where no bond has been given. The only consideration for the giving of such a bond is to enable the plaintiffs to obtain possession of the property pending the litigation. If a proper bond is given to and accepted by the sheriff, he must then deliver the property to the plaintiffs, and if not given the property is returned to the defendant.

After the rights of the parties had been determined in the replevin suit, upon a return showing the property in the defendant's possession because no bond was given, it would be productive of serious mischief to permit the defendant, in a subsequent action, to introduce oral evidence to contradict the officer's return. The bond runs to the sheriff, and he is required to assign the same to the defendant or his representatives on their request. § 6764. There was no assignment of the bond to the plaintiff in this case. The sheriff, the finding says, kept it until January 1, 1871, and then delivered it to Kindy's attorney for his use and benefit. This was not sufficient, and would not enable this plaintiff to maintain an action thereon in his own name. An assignment in proper form is essential to the plaintiff's right to recover. *Forrest v. O'Donnell* 42 Mich. 556.

The bond purported to have been signed by both Green and McIntyre, the plaintiffs in the replevin suit. The execution thereof was denied by McIntyre, and the delivery thereof by the sureties. The court was unable to deter-

mine from the testimony whether the bond was signed by McIntyre or by his authority. The suit was discontinued as against all the obligors but Burnham, and judgment was rendered against him.

If this bond was not signed by the principals, although purporting to be executed by them, we do not see how the sureties would be bound unless it clearly appeared that they signed with full knowledge of the facts, and that the bond would, as thus executed, be delivered. We do not say that they would be bound even in such a case. No such question is before us. Nothing short of this would bind them. A surety signs a bond purporting to be signed by the principals, and if it afterwards appears that their signatures thereto, or any one of them, were made or placed there without the knowledge or authority of such person, the surety will not be bound under such circumstances. He has a right to assume that the signatures already upon the bond are genuine, and if, so knowing the responsibility of his principals, he is willing to become a surety thereon, in doing this, and in permitting a delivery of the bond thereafter, he is guilty of no carelessness or negligence. He has no right to assume that a crime has been committed, or that the bond is not what it purports to be. Unlike an indorser upon a negotiable instrument, he does not warrant the previous signatures to be genuine, and if it afterwards appears that his principals did not sign and were not bound, he cannot be held, as he entered into no such obligation. His responsibility cannot thus be enlarged, nor can a new contract obligation be created against him. It has very frequently been held that the delivery of a bond not executed by all those whose names appeared in the body thereof would not bind those who did sign, unless they consented to the delivery in its imperfect condition. They have a right to assume that all mentioned in the body will sign, and that if the instrument purports to have been signed by them the signatures are genuine

The judgment must be reversed with costs of both courts.

CAMPBELL, J., concurred.

COOLEY, J. I agree that the sheriff's return is conclusive that no statutory bond was given.

GRAVES, J., concurred.

THOMAS D. GILBERT v. JOHN HAIRE AND ROBERT A. HAIRE.

Marshaling assets.

The first grantee of a portion of mortgaged property has a right to understand that all the rest stands charged with the payment of the mortgage debt before his portion can be resorted to.

Equity will relieve where a party has so enforced his legal rights as to work injustice to another.

Where a foreclosure sale was so managed that advantage was taken of the absence of one who had a lien on a portion of the land, and who had no notice of the proceedings, and the remainder of the land, though it would have abundantly satisfied the whole debt, was bid in at nominal prices, and the portion on which he had a lien was bid in at its full value in order to cut off his equities, it was *held* that equity would relieve, and that the sale should be reopened on petition of the encumbrancer upon his compliance with proper terms, as by giving security that on a re-sale he would bid for the parcels first charged with the satisfaction of the demand a sum equal to its amount, and repay to the foreclosure purchaser all sums spent by him in improving the land since its purchase, less a reasonable rent for that time.

Appeal from Ottawa. Submitted April 9. Decided April 14.

PETITION to vacate foreclosure sale. The petition avers that on June 24, 1856, John Haire mortgaged certain property to Thomas D. and Francis B. Gilbert; that in 1868 the petitioner Burnham received direct and

mesne conveyance of portions of this property free of incumbrance except the Gilbert mortgage, and that he sold the same to W. Herbert Haire, from whom he took in return a mortgage upon them; that on October 28, 1875, complainant Gilbert obtained a decree of foreclosure upon the mortgage which he held, and afterwards assigned the same to Robert A. Haire, who bid off the lands at the foreclosure sale; that the bids for the various parcels not covered by the Burnham mortgage were wholly inadequate, but that the bid for that parcel was for all it was worth. The petitioner alleges that both parties to the foreclosure knew of the mortgage to him, but that no notice was given him of the suit, and he knew nothing of it until long after the sale; and he charges that the sale was a fraud upon his rights, and had the effect of depriving him of his security, and that Robert A. Haire had caused the sale to be made as stated for the purpose of compelling him to redeem at a high price; and he prays that the sale may be set aside and a new sale ordered in the inverse order of alienation. The court granted the petition on certain terms, and defendant Robert A. Haire appealed.

Godwin & Earle for petitioner Burnham. A motion for a re-sale on foreclosure may be made by any person injured by the sale, though not a party to the suit, Thomas on Mortgages 341; 2 Jones on Mortgages §§ 1668–70; *Collier v. Whipple* 13 Wend. 226; *Gould v. Mortimer* 26 How. Pr. 167; *Hoppock v. Conklin* 4 Sandf. Ch. 582; *Brown v. Frost* 10 Paige 243; *McCotter v. Jay* 30 N. Y. 80; *Smith v. A. M. Life Co.* Clark Ch. 307; *Am. Ins. Co. v. Oakley* 9 Paige 259; *Nicholl v. Nicholl* 8 id. 349; *Savery v. Sypher* 6 Wall. 157; *May v. May* 11 Paige 201; *Fergus v. Woodworth* 44 Ill. 374.

Edwin Baxter for appellant R. A. Haire. A subsequent incumbrancer is not affected by the sale of property on foreclosure if the complainant had notice of his right and did not make him a party, *Frische v. Kramer's Lessee*

16 Ohio 125; *Baker v. Pierson* 6 Mich. 522; *Carpentier v. Brenham* 40 Cal. 221; *State Bank of Wisconsin v. Abbott* 20 Wis. 570; *Goodenow v. Ewer* 16 Cal. 461; *Brainard v. Cooper* 10 N. Y. 356; *Gage v. Brewster* 31 N. Y. 218; a subsequent incumbrancer cannot attack a foreclosure sale until he has exhausted his personal remedy against the debtor(2 Jones Mortgages § 1669) or at least established his claim against him by judgment, *Boggs v. Hargrave* 16 Cal. 559; if a party to a foreclosure seeks to disturb the sale, he must show diligence on his part and fraud upon his rights, *White v. Coulter* 1 Hun 357; *Whitbeck v. Rowe* 25 How. Pr. 403.

COOLEY, J. No one disputes that Mr. Burnham, the petitioner, had a legal right to have all the other lands which were embraced in the Gilbert decree sold for its satisfaction, before resort should be had to the parcel upon which Burnham himself had a lien. This parcel was the first which John Haire, the mortgagor in the Gilbert mortgage, had alienated after that mortgage was given, and by a well-settled principle of equity Burnham had a right to understand that all the remainder stood first charged with the payment of the Gilbert debt. *Cooper v. Bigly* 13 Mich. 463; *McKinney v. Miller* 19 Mich. 142.

It is equally unquestionable that by the management of Robert A. Haire, who had bought the Gilbert decree and directed the sale under it, Burnham has been deprived of the benefit of this equitable principle. The lands were indeed sold under the decree in the proper order; but taking advantage of Burnham's ignorance of the sale and absence from it, all the other parcels were bid in by Robert A. Haire for comparatively insignificant sums, while the parcel which constitutes Burnham's security was sold and bid in for all it was worth. In that way more than one-half the decree was satisfied by the sale of a parcel not worth more than one-fifth as

much as the remainder, and this the very parcel that should not have been sold at all until all the rest had been fairly applied. It is impossible to doubt that this arrangement was deliberately planned in order to cut off equities which were well known and understood; and it was peculiarly unjust, since Burnham had not been made a party defendant to the Gilbert foreclosure, and had no reason to expect that his just right to redeem would be cut off under that decree, when the property chargeable in advance of his for its satisfaction was worth at least three times as much as was due upon it. It is idle to say that Burnham has lost no right by the sale; for though his right to redeem has still a nominal existence, yet unless he can redeem all the lands and be subrogated to the rights of Robert A. Haire, which would be vigorously contested, the right would be merely nominal, and utterly worthless.

Under such circumstances equity would become an instrument of gross oppression should it refuse relief. It is not necessary in giving it that Robert A. Haire should be charged with and convicted of a legal fraud; it is sufficient that he has so enforced his legal rights as to work a gross injustice. The mortgaged lands, which were a security for the payment of the Gilbert decree in advance of the parcel which constituted Burnham's security, were worth from $12,000 to $15,000, and were sold for less than $2500. The inadequacy of price is so great as to shock the moral sense; and the sale should be opened without hesitation on the petitioner complying with suitable terms. *Bullard v. Green* 10 Mich. 268.

The circuit court required Burnham to give ample security that on a resale he would bid for the parcels which were first charged with the satisfaction of the Gilbert decree a sum equal to its amount; and also for the payment to Robert A. Haire of all sums expended by him in improvements on the premises since his pur-

chase, less a reasonable rent for the premises for that time. On these conditions the sale was set aside and a resale ordered.

The order is strictly equitable, and must be affirmed with the costs of this court.

The other Justices concurred.

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HANNAH LAPP v. JACOB LAPP.

Divorce—Unlawful marriage—Alimony.

Alimony is not allowable on a bill for divorce that does not bring the complainant within any recognized equity.

Mistakes of law cannot usually be made a ground of equitable relief when standing alone.

It is not presumable that any person of ordinary intelligence supposes that a marriage can be dissolved by mere consent of parties.

A bill for divorce for cruelty cannot be maintained, where it shows that the complainant had known defendant had a former wife who was living apart from him under an agreement of separation, and does not show that complainant was led to believe there had been any thing equivalent to a divorce, or aver that she believed her own marriage valid.

Costs were denied on reversing an order allowing an execution for alimony, where there was no valid marriage, and both parties had reason to know it.

Appeal from St. Clair. Submitted April 9. Decided April 14.

DIVORCE. Defendant appeals.

W. F. Atkinson for complainant.

Avery Brothers and *John Divine* for defendant. Alimony will not be allowed where there has been no valid marriage, *Brinkley v. Brinkley* 50 N. Y. 184; *McFarland v. McFarland* 51 Iowa 565.

CAMPBELL, J. Defendant appeals from an order allowing an execution against him for an allowance in the nature of temporary alimony.

The bill is an ordinary bill of divorce for cruelty, and contains no prayer for relief except on that account. It shows nevertheless that at the time of complainant's alleged marriage with defendant she knew he had a former wife living, and that they were living apart under an agreement of separation which she saw and had the means of understanding. Taking the whole averments together, they do not really make any showing that she was led to believe there had ever been what was equivalent to a divorce. They show distinctly that she saw the paper and knew its contents, and no fraud was practiced on her by any concealment or misrepresentation of fact. The bill is not filed to avoid the marriage under the statutory provisions for annulling marriages, and the marriage was not only void in fact, but entered into without any excuse which courts can regard as entitling complainants to any consideration whatever. It is not to be presumed that any person of ordinary intelligence supposes marriages can be dissolved by mere consent of parties, and nothing but the strongest proof of deceit and contrivance could make such a transaction beyond the ordinary experience. Mistakes of law cannot usually be a ground of relief when standing alone, and the bill, while it approaches such a representation, does not distinctly aver that she believed her marriage valid.

The bill does not bring complainant within any recognized equity, and on such a bill no provision could properly be made for alimony.

We therefore think the order appealed from was unauthorized, and must be reversed. We do not think it necessary to give costs to either party.

The other Justices concurred.

CHARLES F. COBB, RELATOR V. JUDGE OF THE SUPERIOR COURT OF GRAND RAPIDS.

"Agents" in courts of record must be attorneys.

Disbarred attorneys can no longer appear as attorneys in any court of record in this State, nor represent any person in court as attorney, agent, or otherwise.

A party cannot appear in a court of record by an agent who is not an attorney duly licensed to practice.

MANDAMUS. Submitted April 13. Decided April 14.

Smiley for relator cited Mich. Const., art. vi., § 24, and argued that the only restrictions contemplated by its framers upon license to practice law were that the practitioner should be twenty-one years old and of good moral character, Const. Debates 1850, pp. 812, 817, 822, 843, 894, 896; an agent of any suitor when properly appointed may prosecute or defend the suit of his principal, *McClintock v. Laing* 22 Mich. 220; 1 Green's Pr. 25.

Maher for respondent.

MARSTON, C. J. In a cause pending in the Superior Court of Grand Rapids some of the defendants appeared by an attorney and afterwards, at their request and with the consent of their attorney, a substitution was made under which a third person not an attorney of the court appeared in the cause as their agent. The present motion raises the right of a party to appear in a court of record by an agent who is not an attorney duly licensed to practice as such. It was claimed on the argument that parties have such right under sec. 24, art. vi. of the Constitution.

Under the legislation in force at the time of the adoption of the Constitution no person was permitted to practice as an attorney or counsellor at law, except in

the county court, or as a solicitor or counsellor in chancery, unless approved by the court for his good character and learning, and duly admitted.

The Supreme Court was authorized to grant to any citizen of the State, of good moral character and of the age of twenty-one years, a license to practice as an attorney, upon an examination, if satisfied that the applicant possessed sufficient legal learning and ability to discharge the duties of such office. Such attorney is required to take the constitutional oath of office, and may be removed or suspended by the several courts in which he is authorized to practice. 2 Comp. L. § 5622 et seq. These and other provisions then and still in force show how carefully the right to practice as an attorney was guarded, not in the admission to practice alone, but in regard to their standing and retaining such rights thereafter. This legislation and our entire practice relating to attorneys has always been observed, and was never supposed to conflict in any way with the constitutional provision referred to. Our rules of practice in reference to the service of papers are framed upon the same theory, and do not recognize the right of parties to appear by agents or persons who are not attorneys and solicitors of the court, and we are of opinion that the word "agents" as used in the Constitution does not give the broad authority claimed by the respondent in this case. The Constitutional Debates referred to on the argument throw no real light upon this question.

If the word "agent" as used in the Constitution, is not to be construed as synonymous with the word "attorney," what is to be the result? Parties may appear by agents possessing no legal qualification or even ordinary intelligence, and of the worst possible character; they may be minors, and may even be persons who have been disbarred and removed by this court from practicing as attorneys and solicitors. They could not practice as attorneys, possessing neither the legal nor moral qualifications for such a position, and yet they could appear

as agents. They would possess the rights of attorneys but not be subject to the responsibilities; their removal by the court, if they could be removed, would be a mere idle ceremony. Litigants might again employ them and authorize them to appear and represent their interests, so that persons who could not practice as attorneys could as agents, with equal rights and powers. Such could not have been the intention of the framers of our fundamental law, or of the people in adopting it.

There are still additional reasons for this view. Attorneys are licensed because of their learning and ability, so that they may not only protect the rights and interests of their clients but be able to assist the court in the trial of the cause. Yet what protection to clients or assistance to courts could such agents give? They are required to be of good moral character, so that the agents and officers of the court, which they are, may not bring discredit upon the due administration of the law, and it is of the highest possible consequence that both those who have not such qualifications in the first instance, or who having had them have fallen therefrom, shall not be permitted to appear in courts to aid in the administration of justice. One of the principal powers possessed by courts for the protection of the public, and to maintain the high standing, character and reputation of the bar, is the right to expel members who have been shown guilty of immoral acts thus rendering them unworthy to longer retain their position as officers of the court. This court has had occasion heretofore to disbar attorneys convicted of crime, or shown guilty of some serious offense. Such persons can no longer appear as attorneys in any court of record, and it is equally clear that they would have no right to appear and should not be permitted to represent any person in court, either as attorneys, agents or otherwise. If they have such power or right their position is better than before, and the judgment of this court is practically of but little force or effect. An examination of the opinions of this court

in the *Matter of Mills, an Attorney* 1 Mich. 392, and of the *People v. May* 3 Mich. 598, will show the importance of this question.

The writ must issue as prayed for.

The other Justices concurred.

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MERCHANTS' AND MANUFACTURERS' NATIONAL BANK OF DETROIT, RELATOR v. KENT CIRCUIT JUDGE.

Final orders—Injunction of replevin suit—Receivers—Creation of trust by foreclosure of chattel mortgage.

An order refusing to enjoin a replevin suit, is not final and appealable.

An order enjoining a replevin suit for property to which plaintiff claims title, is in the nature of a final order and is appealable.

An order appointing a receiver when no suit is pending concerning the property of which he is put in charge, is void.

The law-partner of the solicitor for a complainant in foreclosure, cannot, even by consent, be made receiver in the suit.

A receiver cannot employ a solicitor as his own counsel, unless with the consent of all parties concerned in the results of the receivership, which may include persons not parties to the suit.

The power of a court of equity by appointing a receiver to draw to itself the jurisdiction to try disputed titles, is exceptional, and must rest on facts that render common law remedies inadequate or improper in the particular instance.

Where mortgaged property is in foreclosure in a suit in which a receiver had been appointed, a third person who has a right of action in replevin for it, cannot properly be restricted to an action of trover, in which he could only recover the net proceeds after deducting costs of the receivership which he did not desire or assent to, and which would thus compel him to submit to the management and disposition of the property as the receiver might see fit.

A chattel mortgage cannot properly be given under an arrangement by which it is to fall due at once and be foreclosed, and the property is to be placed in charge of a receiver who is to manage it to the exclusion of other creditors. Such a course would amount to creating, by means of the mortgage and a court order, a trust which would be invalid if made by an assignment.

MANDAMUS. Submitted April 13. Decided April 14.

Norris & Uhl for relator. An order enjoining the execution of a writ of replevin and authorizing a receiver to dispose of the property described in the writ, is appealable, *Arnold v. Bright* 41 Mich. 207; *McCombs v. Merryhew* 40 Mich. 721; *Taylor v. Sweet* 40 Mich. 736; *Port Huron v. Jones* 33 Mich. 303; *Port Huron v. St. Clair Circuit Judge* 31 Mich. 456; *People v. Simonson* 10 Mich. 335; *Michigan Ins. Co. v. Whittemore* 12 Mich. 312.

Jacob Ferris and *M. T. Smiley* for respondent.

COOLEY, J. The application for a mandamus in this case brings under review questions of the validity and propriety of the order appointing a receiver.

The bill was filed to foreclose a chattel mortgage. The mortgage was by Hibbard & Graff, merchant millers of Grand Rapids, to Philip M. Graff, and bore date March 17, 1880. The purpose was to secure the mortgagee for having become accommodation endorser for the mortgagors on a large amount of commercial paper. The mortgage covered "all the flour, wheat, corn, oats, bran and feed owned by the parties of the first part, and situated in the city of Grand Rapids, Michigan, whether on the track or in the mills or warehouses, or in the elevator at Berlin, Ottawa county, Michigan; all the barrels, sacks, bags, tools and office furniture and fixtures, including safes, situate in and about, and used in connection with their two mills, being three large teams and larries, two pairs of large sleighs and one light delivery wagon, and the blankets used with said teams. Also the engine and boiler used in the Valley City Mills, and put in by Hibbard & Graff since their lease of the same, and the shafting and pulleys used by them in connecting the engine with the mill and machinery. Also all the wheat, corn and oats which may be purchased by the parties of the first part and delivered to them in the city of Grand Rapids, either on the track, in store, or in their mills, and all flour, feed and bran manufactured by them while any portion of the debts secured by this mortgage remains unpaid."

The mortgage reserved to the mortgagors the privilege of making sales in the ordinary course of their business,

and provided that "in case of the non-payment of the said notes or any of them at maturity by the party of the first part or if the party of the second part shall at any time deem himself insecured, he * * whether the party of the second part shall have paid anything on said notes or not, is hereby authorized to enter upon the premises of the party of the first part, or any place or places where the said goods and chattels or any part or portion thereof may be, and take possession thereof, and sell and dispose of the same at private sale or public auction, * * * whether any of such notes have matured or not, and apply the proceeds thereof to the payment of said notes as fast as they mature."

A bill to foreclose this mortgage was filed the day after its date. It was alleged therein that one of the notes, the payment of which was secured by the mortgage, was long past due, and that another became due March 17, 1880, and another March 18, the day the bill was filed, and both remain unpaid; and that by reason thereof the whole sum secured by the mortgage, amounting to $38,800, has become due and payable immediately; that by reason of disastrous speculations the mortgagors have become insolvent, and have transferred to complainant the mill property whereon they conducted their business; that the wheat and other unground grain described in the mortgage cannot be profitably sold and converted into money except after being ground; that to manufacture said grain into flour, and other proper products, will yield larger returns, and be more for the interest of all parties concerned, than to sell or dispose of the same in an unmanufactured state; that the total value of all the mortgaged property will not exceed $40,000, and if disposed of at forced or auction sale will not yield more than $30,000 or thereabouts. The bill prays for the appointment of a receiver, and nominates the law partner of the solicitor for complainant as a suitable person to be appointed.

No persons were made parties defendant to this bill except the mortgagors. Late in the evening of March 18th, and before the bill had been filed, it was presented to the circuit judge at his dwelling house, and an appli-

cation made for the appointment of a receiver as prayed. The mortgagors appeared at the same time, by a solicitor of the court, and consented to the appointment. The circuit judge, apparently looking upon the case as an amicable proceeding in which all parties concerned were working in harmony to preserve and dispose of the property for the benefit of all, made the appointment prayed for. The appointment purports to be one made in open court, but the court was not in session at the time, and the bill not being then filed, there was no cause pending. The order of appointment directed the receiver to proceed to manufacture the grain mortgaged into flour and other proper products, and to sell in the usual course of trade and on credit.

It soon appeared that the proceeding was far from being an amicable one, except so far as the mortgagors and mortgagee were concerned. At the very time the mortgagee was having his bill for foreclosure prepared and obtaining his order for a receiver, other parties were suing out writs of replevin for some portions of the property. One of these parties was William B. Ledyard, by virtue of whose writ the wheat in the Crescent Mills, previously operated by the mortgagors, was seized an hour or so before the order appointing a receiver was made. Another was by Euphrasia Aldrich, who replevied a quantity of wheat at or about the time when the order was made. Another was by the Merchants' & Manufacturers' Bank of Detroit. The circuit court appears to have come to the conclusion that the writ of this plaintiff was not served until the receiver had become possessed of the property in dispute, which could not have been earlier than about 10 o'clock on the night of March 18th, that being the hour when his bond as receiver was filed.

On March 19, 1880, the receiver petitioned the circuit court in chancery for an order restraining the several plaintiffs in the replevin suits from proceeding further therein. A hearing was had on this petition, and its

prayer was granted so far as the suit by the bank was concerned, and denied as to the other suits. The bank however was granted leave to bring an action of trover to recover the value of the property described in its writs. The receiver was by the same order required to deposit in bank the net proceeds of sales of the property made by him. Both the receiver and the bank appealed from this order.

I. The appeal of the receiver was from those parts of the order which refused an injunction against the Ledyard and Aldrich suits. The order in that regard was not a "final order," and was therefore not appealable under the statute. *Wing v. Warner* 2 Doug. (Mich.) 288; *Caswell v. Comstock* 6 Mich. 391; *Boinay v. Coats* 17 Mich. 411; *Spencer v. Stearns* 28 Mich. 463. These appeals must therefore be dismissed.

II. The order in so far as it enjoined the bank from interfering by suit with the possession of property to which the bank claimed title, inasmuch as it finally took from the bank a legal right, was in the nature of a final order and was appealable. *Lewis v. Campau* 14 Mich. 458; *Barry v. Briggs* 22 Mich. 201.

III. The order appointing a receiver was void, for the reason that it was made when there was no suit pending. It is perhaps fortunate for all parties interested that such was the fact, inasmuch as if it had been legally valid, the appointment, though of a person eminently fit for the position but for his relations to the litigation through his law partner, must necessarily at some time have been set aside, and the longer it should stand the greater must have been the probability of confusion in the rights of the parties growing out of his proceedings, and of unnecessary costs and expenses to be borne by some one or more of the claimants to the property.

In *Ex parte Pincke* 2 Meriv. 452, the Lord Chancellor refused to appoint the solicitor to the commission as receiver of a lunatic's estate, though it was stated that

no one else would accept the office. The ground of the refusal was that it might become the duty of the solicitor himself to call the receiver to account.

So in *Stone v. Wishart* 2 Madd. 63, where the parties united in a request that the next friend of infant complainants be appointed receiver, the Vice Chancellor said: "I cannot accede to this motion, although it is consented to. It is the duty of the next friend of these infants to watch the accounts and the conduct of the receiver, to be control over him. The two characters cannot be united; they are incompatible."

We cannot shut our eyes to the fact that the law partner of the solicitor is presumptively as much interested in the proceedings as the solicitor himself, and it would be peculiarly objectionable that he should act in a position requiring impartiality in a case like this, where the parties to the suit are manifestly acting in concert, and adversely to the interest of other persons who cannot watch their proceedings. The practical results would be that the receiver would supervise his own accounts. *Garland v. Garland* 2 Ves. Jr. 137. The practice in equity does not even permit the receiver to employ a solicitor in the case as his own counsel, lest it might disarm his vigilance in watching the receiver's proceedings. *Ryckman v. Parkins* 5 Paige 543; *Adams v. Woods* 8 Cal. 306. This rule may no doubt be departed from by consent of all parties concerned; but this must mean by consent of all parties concerned in the results of the receivership; and one not a party to the suit may be as much concerned in these as the persons who are parties. The present suit is an illustration.

IV. The order appealed from by the bank was improper in that it forbade a person not a party to the suit from testing in the customary common law method the title which is asserted to specific property, and in so doing stretched unnecessarily, improperly and oppressively, the power of the court of equity in abridgement of the jurisdiction of the court of law. There may be

cases in which it would be proper for a court of equity by means of a receivership to draw to itself the jurisdiction to try disputed titles to property; but the jurisdiction to do so is exceptional and must be supported by circumstances which render the common law remedies inadequate or for some reason unfit and unsuitable in the particular case. No such circumstances appear or are suggested here. It was proper and just that the bank be allowed to go on with the suit in replevin, if that seemed most for its interest, and improper and unjust that it should be restricted to a suit in trover, which would be in effect for net proceeds only after the costs of a receivership, which the bank did not desire or assent to, had been deducted. If the property belonged to the bank, the injustice of requiring the owner to submit to such management, manufacture and sale of it as another person might think expedient, and to recover the net proceeds only after the costs of a receivership in a suit between other parties had been wholly or in part deducted, would be too manifest to require more than mere mention.

V. It cannot escape attention that the whole scheme of giving a chattel mortgage which would be immediately due, filing a bill in equity upon it at once and obtaining the appointment of a receiver who should take possession of the property to the exclusion of other creditors and go on with the business as the mortgagors themselves might have done and as the order in this case contemplated, was an attempt by means of the machinery of the law to accomplish indirectly what, without calling in the aid of the court, could not be legally done at all. We do not enlarge upon this aspect of the case, as it is not necessary here; but it must be manifest that the parties were creating a trust by means of the mortgage and of a consent order which could not stand the test of the law if made by an assignment. It resembles very closely an attempt by circuitous methods to avoid a legal principle.

The order which is appealed from by the bank must be reversed with costs against the complainant in the suit. What has been said will render unnecessary any award of the writ of mandamus.

The other Justices concurred.

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CHARLES H. BOOTH, ASSIGNEE v. CONNECTICUT MUTUAL LIFE INSURANCE COMPANY ET AL.

Promise to pay mortgage—Personal liability on foreclosure—Distribution by assignee.

The mortgagee of land cannot enforce a promise to pay the mortgage, made to the mortgager by the latter's grantee, because it is a promise to a third person.

One who has bought mortgaged property and promised to pay the mortgage, is made a defendant in foreclosure in order to enforce the equity by subrogation, and *it seems* that he is in turn subrogated to any collateral securities held by the mortgagee.

A personal decree cannot be made in one jurisdiction against parties living in another and not personally served or not voluntarily appearing.

One who gives a mortgage to secure the payment of his own liabilities, is personally and directly liable at law, and the demand may be enforced against him by suit in any jurisdiction where service can be had; but one who has only purchased mortgaged land subject to the encumbrance is not personally liable, though if he has promised to pay the mortgage he may be made a defendant in foreclosure if he can be found in the jurisdiction where the land lies, and a decree may be rendered against him for any deficiency after sale.

Where an assignee for the benefit of creditors filed a bill in good faith to settle a question which related to the disposition of the fund in his hands, and fairly admitted of some doubt, he was allowed in making up his accounts to credit himself with the costs and his necessary expenditure in the suit.

The assignee of a debtor should distribute the fund realized from the estate without regard to a claim for which his assignor was not personally liable, such as a debt secured by a mortgage on lands which the assignor had purchased subject to the encumbrance.

Appeal from Kalamazoo. Submitted January 16. Decided April 21.

BILL to determine the amount of defendant's claim against complainant's assignors, Benj. M. Austin and Wm. A. Tomlinson, so that the assignee may pay defendant a dividend out of the funds which he holds. The bill sets forth that James S. Kendell of Chicago having mortgaged certain property in that city, sold it subject to the encumbrances thereon to Benj. M. Austin, who afterwards deeded the premises to his partner Wm. A. Tomlinson, subject to an undivided half of the encumbrances. The firm of Austin & Tomlinson becoming insolvent made a general assignment of their firm and individual property, providing that the firm property should be applied to the payment of partnership debts, and the individual property to the payment of individual debts and of what might be left unpaid of the firm debts, and if there should not be enough to pay both, to the payment pro rata. The bill was dismissed on general demurrer and complainant appeals.

Dallas Boudeman for complainant. A trustee who has a reasonable doubt as to the proper disposition of funds in his hands can apply to a court of equity for directions, making those interested, parties to the proceeding, Burrill on Assignments § 460; *Dimmock v. Bixby* 20 Pick. 368; *Hayden v. Marmaduke* 19 Mo. 403; *Wheeler v. Perry* 18 N. H. 307; *Vanness v. Jacobus* 17 N. J. Eq. 153; *Wiswell v. First Cong. Church* 14 Ohio St. 31; *Trotter v. Blocker* 6 Port. (Ala.) 269; *Jones v. Stockett* 2 Bland (Md.) 409; *Treadwell v. Cordis* 5 Gray 341; the only action which a mortgagee can maintain against a grantee who promises to pay the mortgage is by making him a party to the foreclosure proceedings and obtaining a decree against him for the payment of any deficiency, 1 Jones Mortgages §§ 749–755; *Taylor v. Whitmore* 35 Mich. 97.

Moore, Canfield & Warner for defendants. A trustee

can apply to a court for instructions only by bill of interpleader, Adams Eq. (6th ed.) § 205; *Houghton v. Kendall* 7 Allen 72; 1 Redf. Wills 492; *Lincoln v. Railroad Company* 24 Vt. 639; and he must show the application to be necessary, *Treadwell v. Manufacturing Company* 7 Gray 393; all persons setting up adverse interests should be made parties to the bill, *Barker v. Swain* 4 Jones Eq. 220; 2 Dan. Ch. Pl. 1560-72.

Cooley, J. If Austin & Tomlinson, the assignors of complainant, had themselves mortgaged the lands to defendant to secure the payment of their own liabilities, the questions arising would in our opinion be very different from what they are now. They would then have been liable at law personally and directly, and the demand might have been enforced against them by suit in any jurisdiction where service could have been obtained.

But these assignors have incurred a liability only as purchasers of the mortgaged lands, subject to the payment by them of the encumbrances. They have never assumed any obligation to defendant, and if the implied undertaking arising from the acceptance of their deeds is to be treated as a promise on their part to pay the mortgagee, it is nevertheless a promise on which no suit by defendant can be maintained, because it is a promise not made to defendant but to third persons. *Pipp v. Reynolds* 20 Mich. 88; *Turner v. McCarty* 22 Mich. 265; *Hicks v. McGarry* 38 Mich. 667.

It is nevertheless held that in a suit to foreclose, the party who is chargeable with an implied promise of the sort may be joined as a party defendant, and a decree obtained against him for any deficiency that may exist when the land is sold. *Crawford v. Edwards* 33 Mich. 354; *Miller v. Thompson* 34 Mich. 10; *Higman v. Stewart* 38 Mich. 513. But this is only by way of enforcing an equity by subrogation. *Hicks v. McGarry* 38 Mich. 667. And if the party then made liable is compelled to make payment, he is doubtless entitled to be subrogated

to collateral securities, if any, which the mortgagee may have held.

But in order to enable the mortgagee to enforce any such equity against the purchasers, it is necessary that the purchasers and the land mortgaged be within the same jurisdiction. No personal decree can be made in one jurisdiction against parties not personally served or not submitting voluntarily by appearance. *Lawrence v. Fellows* Walk. Ch. 468; *Outhwite v. Porter* 13 Mich. 533; *McEwan v. Zimmer* 38 Mich. 765. There is therefore in this case, where the purchasers of the land reside in Michigan and the land is in Illinois, neither a direct liability of the purchasers to the defendant, nor a contingent liability, except such as depends upon the voluntary action of the purchasers themselves. Whatever liability they may incur at some future time, when the incumbrances are foreclosed, by voluntarily going into the State of Illinois and submitting to the service of process there, none exists against them now, either presently or contingently, in this State. It follows that the defendant has no claim against the funds in complainant's hands, which complainant would be at liberty to recognize.

This view leads to a dismissal of complainant's bill. He should have distributed the fund without regard to any claim made by defendant, and the decree of the court below will be affirmed with costs. Nevertheless, as the case was one which fairly admitted of some doubt, and complainant has no doubt acted in good faith, it would be proper for him, in making up his own accounts, to credit himself with the costs he is compelled to pay to defendant, and with his own necessary expenditures in the suit.

MARSTON, C. J., and GRAVES, J., concurred.

CAMPBELL, J., did not sit in this case.

THE PEOPLE v. AUGUSTUS ARNOLD, ALIAS GEORGE HOUGHTON.

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Evidence—Prisoner's statement on former trial.

The prisoner's statement in his own defense on a former trial of the same case, may be introduced by the prosecution and shown to be false.

Exceptions to the Recorder's Court of Detroit. Submitted January 22. Decided April 21.

CRIMINAL INFORMATION for larceny from a store in the day time.

Attorney General *Otto Kirchner* for the People.

George H. Penniman for respondent.

COOLEY, J. This case comes up on exceptions to the rulings of the Recorder of Detroit, taken on the second trial of the defendant for the crime of larceny, charged to have been committed October 3, 1878. The firm of A. N. Sabin & Co., produce and commission dealers, were the prosecutors, and the theory of the prosecution was that defendant came to their place of business on pretense of making a purchase of flour, and engaged their attention while a confederate committed the larceny. On the first trial the defendant took the stand in his own behalf, and undertook to account for his presence at Sabin's in the following statement: That he lived in Cleveland, Ohio, and had been engaged there, among other things, in shipping cheese to Chicago; that a few days before the time of the alleged offense a gentleman from Buffalo, named Foster, had come to see him to get him to buy apples in Michigan; that he had gone to Chicago on business there, making inquiries as to apples on the way; that he came to Detroit October 1st, 1878, and on the next day he received a letter from his cousin, who was head book-keeper in the firm of

Chandler & Son, on Ontario street, Cleveland, requesting him to make inquiries as to flour in Detroit, and that it was in pursuance of this request that he went to Sabin's and was there at the time of the alleged larceny.

The defendant was convicted on the first trial, but the verdict was set aside, and on the second trial the above statement was put in evidence by the prosecution, with the avowed purpose of following it with evidence that defendant's pretense of business at Sabin's was wholly false. The defendant objected to its introduction, but the objection was overruled.

William Chandler then testified for the prosecution that he had for years been employed by the firm of Chandler & Son, in Cleveland; that in September and October, 1878, he was the head book-keeper of that firm; that he did not know defendant, nor did he ever see him to his recollection; that defendant was not his cousin; that he had never written to defendant in September or October, 1878, or at any other time or place, to inquire from him the price of flour, and that Chandler & Son never dealt in flour at all.

The only question worthy of notice which the record presents, is whether the court erred in admitting in evidence the statement of the defendant on the former trial, and the evidence of Chandler to contradict it. The defendant, on the second trial, made no statement whatever.

It cannot be claimed with any reason that giving in evidence the defendant's statement violates any privilege which the statute confers upon him. He gives evidence in this manner on his own behalf at his option, and is not to be subjected to unfavorable inferences because he withholds it. But when it is in, it is to be treated like any other evidence, and may be contradicted and shown to be false. Defendant has no claim to be protected against the exposure of this falsehood where he indulges in it for his own exculpation. He runs the risk of this exposure when he invents a false defense.

The peculiarity of this case consists in the defendant's statement being put in on the second trial, not by the defendant himself, but by the prosecution. It is not therefore evidence in the case except as the prosecution makes it so, and the prosecution puts it in, not that reliance may be placed upon it, but for the very purpose of showing its falsity. It is proved as a declaration by the prisoner that it may be followed by evidence that he has attempted to deceive and mislead by it. And the question is whether from the statement itself or from the use which was made of it, inferences unfavorable to the prisoner's innocence might rightly be drawn.

It was never doubted that the conduct of a suspected party when charged with a crime may be put in evidence against him when it is such as an innocent man would not be likely to resort to. Thus, it may be shown that he made false statements for the purpose of misleading or warding off suspicion; though these are by no means conclusive of guilt, they may strengthen the inferences arising from other facts. *State v. Williams* 27 Vt. 724; *Rex v. Higgins* 3 C. & P. 603; *Rex v. Steptoe* 4 C. & P. 397. So it may be shown that the accused fled to escape arrest, or broke jail or attempted to do so (*Whaley v. State* 11 Geo. 123), or offered a bribe for his liberty to his keeper (*People v. Rathbun* 21 Wend. 509). These are familiar cases and rest in sound reason. But the case of deliberate fabrication of evidence, or of attempt in that direction, would seem to be still plainer. In *People v. Marion* 29 Mich. 31, 39, an objection to evidence that the defendant had attempted to tamper with a witness and with the jury was thought so manifestly baseless that it could scarcely be made seriously. In *Commonwealth v. Webster*, Bemis' Report 210, anonymous letters written by defendant to mislead the officers were received as bearing upon his guilt. All these attempts to avoid a trial, to evade conviction by frauds upon the law, or to lead suspicion and investi-

gation in some other direction by false or covert suggestions or insinuations, are so unlike the conduct of innocent men that they are justly regarded as giving some evidence of a consciousness of guilt. They do not prove it, but the jury are entitled to consider and weigh them in connection with the more direct evidence. *Toler v. State* 16 Ohio St. 583, 585.

In this case the prosecution were allowed to show that the defendant had deliberately fabricated a false statement which, if true, would have been sufficient for his full exculpation. What conduct could possibly be more suggestive of guilt? An attempt to escape may be due to fright exclusively; and an effort to direct attention to another may be made in good faith, and in the belief that the other is the guilty person; but this is a deliberate attempt to deceive the court and jury, and while not constituting perjury, because not under oath, it has and was intended to have all the effect of perjury on the case being tried. It betrays a consciousness that unless the jury are made to believe a falsehood, the case against the party is sufficient to convict him, or at least to put him in peril, and it is made when the party has the assistance of counsel, and when he is no longer agitated by the first excitement of the accusation. It presents, therefore, all the evidences which conduct can furnish in any case, that the accused is in a peril from which straightforward and honorable conduct is not likely to relieve him.

Suppose the defendant on the first trial had relied upon an *alibi*, shown by his own evidence, and on the second had gone upon the stand with an admission of his presence, but with some excuse; shall the prosecution be precluded from showing how he has undertaken by his own evidence to prove inconsistent defenses? It seems to me that there can be no just or sensible rule of law that can thus shield falsehood, when it is made use of to mislead justice.

The Recorder should be advised to proceed to judgment.

MARSTON, C. J., and GRAVES, J., concurred.

CAMPBELL, J. (dissenting). I do not think it was competent to introduce the statement of Arnold made on a former trial, for the purpose of contradicting it, in the manner allowed in the present case. The statement contains no admission whatever, and the whole of it was exculpatory. The only possible purpose of it was to prejudice the jury by inducing them to believe that the defendant, on a previous trial, had introduced a defense which did not then prevail, and on one point of which the prosecution now contradicts him.

I do not think this practice is either fair or legal. The jury on a second trial have no concern with what was the testimony acted on in a former one. On every trial it is the business of the prosecution to make out a case independently. The law contemplates that before going to trial the prisoner shall be informed of the names of the witnesses to be produced against him, so as to be prepared to controvert their testimony, as well as to show their character and learn of their standing. And no prisoner can be expected to anticipate that a witness will be introduced of whom he has never heard, or that one will be introduced upon a question which is in itself collateral and irrelevant.

When this case was disposed of before, one of the grounds of reversal was that stress had been allowed in the court below to be laid on the failure of the defendant to back up his statement by corroborating proofs. It cannot be seriously contended that a defendant could introduce testimony independently that some one in Ohio had asked him to inquire into the price of flour in Detroit. That would have no legal tendency to show that he had an honest purpose in visiting Sabin's store, any more than failure to show it would prove a dishonest purpose. It is very questionable how far such testimony standing alone could be introduced at all. But this is not very important in view of the shape the case took on the trial.

The only manner in which the fact came up at all was not from any statements which formed part of the *res gestæ*, and not in connection with any admission of any kind, but in denial of the truth of a collateral fact which was introduced in testimony on the first trial by the defendant as part of his own case. I am unable to see why it would not have been just as competent for the prosecution, as a part of his case, to have shown that on the former trial the defendant introduced this same matter, or any other matter by other witnesses, and then contradict those witnesses. What a party does to get up a false defense is as much his act, when he does it by swearing others, as when he makes proof by his own statement. The whole force of the prosecutor's purpose here is to show that the defense in the former case was untrue. Any one would see the absurdity of attempting such a task by showing what the witnesses swore, and then contradicting them. The statement of the defendant cannot stand on any different footing except so far as it amounts to a confession. The result of any such practice would be clearly illegal, and every jury would be allowed to try cases, not on their merits, but on their conjectures as to what may have operated on a former trial in aid or prejudice of justice.

The prisoner, if this witness had been called on any fact in controversy, and he had been notified that such a witness was in the case, might have been prepared to impeach him, or if informed he might be called concerning the Cleveland business, might have prepared himself with testimony which we have already decided he could not be criticised for not producing. The facts sworn to by the contradicting witness had nothing whatever to do with the affirmative case of the prosecution, and might have been either way without showing that the prisoner had any part with the person who stole the money, if it was stolen at all.

The effect of allowing the course taken was practically to cut off the prisoner from his statutory right of making a statement at all. It is impossible not to see that this

was the very thing the prosecution meant to do. Any one can see how useless it would have been for the prisoner to make a statement of any sort when the prosecution had been allowed to anticipate and contradict it, and assail it as a trumped-up story. No ingenious theory can conceal the contrivance—for in my opinion it is nothing else—to cut off a most valuable right.

Evidence that a prisoner has endeavored to tamper with witnesses or others has sometimes been allowed, and may be admissible. How far it is independently admissible is not now important. But I think it would be difficult to find any reason or principle or authority for holding that a prosecution on one trial can introduce as a part of its own case evidence of the untruth of a defense on a former trial. Such a practice would be a novelty in jurisprudence, and I am not prepared to concur in it.



PETER V. WYCKOFF AND JOHN M. LABERTEAUX V. THE VICTOR SEWING MACHINE COMPANY.

Injunction—Contract given in escrow—Laches—Equitable relief.

Injunction will lie to restrain an action on a contract delivered in violation of an agreement to hold it in escrow until certain changes in it had been made.

Laches alone is not necessarily conclusive against a complainant's equities when he is not of a suspicious nature nor prompt to assert his rights.

Equity gives, in case of fraud, a concurrent remedy to that which may be had at law.

Where the objection to an equitable remedy is one that must be passed upon at the final hearing, after all the evidence is in, it is not to be favored.

Appeal from Calhoun. Submitted April 7. Decided April 21.

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INJUNCTION. Bill to enjoin the prosecution of a suit at law upon a contract of agency made with a sewing machine company, and to avoid the contract and the bond given to secure its enforcement. Relief was given, and defendant appeals.

William H. Porter for complainants.

James H. Campbell for defendant.

COOLEY, J. If it be true, as complainants allege, that at the time Wyckoff signed the agreement of April 1, 1874, whereby he became agent for the sale of machines for defendant, it was agreed between him and Martin by whom the agreement was made on behalf of the company, that the latter should hold the agreement in escrow and not deliver it until a supplemental agreement modifying the third article was entered into, then the complainant should have the relief prayed for. The third article was the one which bore particularly hard upon agents, especially in periods when business was dull and depressed as was then the case; for it made the agents personally responsible to pay for all machines which had been on hand four months and remained unsold; and an agent who was to keep on hand six machines, as the principal agreement provided, ought to be very confident of making satisfactory sales before putting himself under such a responsibility.

Martin denies in the most positive terms that the principal agreement was to be held in escrow at all, or that there was any understanding that the third article was to be modified; and there are some circumstances in the subsequent course of action of Wyckoff that furnish support for his denial. Nevertheless we think the weight of evidence is with the complainants. Wyckoff and his son both testify to the understanding alleged, and these two were the only persons besides Martin who had positive knowledge on the subject. Their testimony may fairly be said to be entitled to a credit equal to

his, notwithstanding their greater interest in the controversy.

But we attach considerable importance to the testimony of Harrington, who had previously been agent for defendant in the same district. Harrington was consulted by Martin about the new appointment, and seems to have conversed with him very freely. Harrington's agreement with the company was such an one as complainant says he was to have, the agent being liable to pay for the machines only as fast as he made sales. If Harrington is to be believed, he was not given to understand that the arrangement with Wyckoff was to be any different, and the inference from the conversation was it was to be the same. But it is a fact of some significance that Harrington advised Martin that Wyckoff had not the qualities which fitted him to be a successful sewing machine agent,—that, to use the words of the witness, "he wasn't much of a sewing machine man." Harrington knew then, what the evidence in the case discloses, that Wyckoff lacked the push and shrewdness for such business, and so informed Martin. It is a little remarkable that under such circumstances Wyckoff should have been accepted as a suitable agent to advance in that district the interests of complainant by means of sales; and the circumstances give support to the charge that Martin was willing to entrap a simple-minded man into a position where the sewing machine company would be able to force upon him a purchase of machines which he understood were entrusted to him merely to sell. It clearly appears that it was a difficult time for any one to make sales, and that machines of equal value to those of defendant were then being sold at lower prices; and it is scarcely credible that Martin then expected that Wyckoff would be able to build up a business in competition with others more shrewd and energetic. It may be that he meant to deal with Wyckoff openly, frankly and fairly, but the evidence supports the charge of underhanded and deceptive conduct.

Had Wyckoff at once repudiated the arrangement when the modifying agreement was not sent on, there would probably have been no serious question made upon the facts. He delayed doing this, however, until some countenance was afforded to the claim of defendant that he had waived his right to take advantage of the fraud. *De Armand v. Phillips* Walk. Ch. 186. But the qualities which Martin was advised of by Harrington will sufficiently explain this. Wyckoff was not a suspicious man, nor a man who moved promptly in the assertion of his rights; in other words, if Martin intended a trick, he was the sort of a man who would be selected as the victim. We do not think the laches in this case are conclusive against complainant's equities.

It is objected that complainant had ample remedy at law; and this is probably true. There has nevertheless always been a concurrent remedy in equity in cases of fraud; *Wheeler v. Clinton Canal Bank* Har. Ch. 449; *Edsell v. Briggs* 20 Mich. 433; and as equity in this case could require the surrender of the agreement and the machines on just terms, its remedies would be more complete and ample than any which a court of law could afford. And where the objection to the equitable remedy must be passed upon at the final hearing, after all the evidence is in, it is not one to be favored.

It results from these views, that the decree must be affirmed with costs.

The other Justices concurred.

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SARAH E. EAMES v. JAMES McGREGOR.

Ejectment—Source of title—Admissions—Record of deed—Identity.

When both plaintiff and defendant in ejectment claim under a particular person, the latter's title is mutually admitted, and plaintiff need not go farther back in the chain of title.

Plaintiff in ejectment must inquire of the defendant in possession as to the nature of his claim, and the latter must truthfully explain it, and his statements and explanations are admissions concerning the nature and extent of his right, which plaintiff may put in evidence to show that both claim from the same source, and that plaintiff has paramount title.

The record of a deed cannot be excluded from evidence in an action of ejectment, for the reason that it had not been recorded until after suit was begun.

Where the parties in ejectment claim under a person of the same name, and there is evidence to support, but none to contradict, the inference of identity, it is reasonable to assume that it was the same individual.

Plaintiff in ejectment showed title from the grantee of one John McGregor, and also offered evidence that the defendant, James McGregor, was in possession before plaintiff's purchase, and had told the latter's agent that he was on the place by the permission of his brother John, and after saying that if he was paid for his crops he would yield possession at once, refused to do so, though he claimed no title. Defendant offered no evidence. *Held* that the case should have gone to the jury on an instruction that if they believed the undisputed evidence, and found that defendant rested on the title held by John before he conveyed, they should find for plaintiff.

Error to St. Clair. Submitted April 7. Decided April 21.

EJECTMENT. Plaintiff brings error.

Avery Brothers for plaintiff in error. In ejectment it is enough to trace title to a common stock, *Johnstone v. Scott* 11 Mich. 243; plaintiff in ejectment can recover on defendant's parol acknowledgment that he has no title and on proof of title in himself from defendant's lessor, *Jackson v. Denison* 4 Wend. 561; the declarations of a party in possession and of those under whom he

claims, as to the nature and extent of their interest, are admissible in evidence, *Jackson v. Cole* 4 Cow. 593.

Elliott G. Stevenson and *O'Brien J. Atkinson* for defendant in error.

GRAVES, J. The plaintiff brought ejectment for an eighty-acre lot in St. Clair county, and on the trial the circuit judge directed a verdict for the defendant. The plaintiff proved the following conveyances: *First*, a warranty deed under date of Septemper 19, 1860, from Lewis Brockway and wife to John McGregor; *second*, a warranty deed from John McGregor to John A. McRae, under date of January 16, 1875; *third*, a warranty deed dated June 14; 1878, from John A. McRae and wife to the plaintiff.

The plaintiff further proved that the defendant was in possession prior to her purchase and her deed from McRae, and had continued in possession uninterruptedly since; that she demanded possession of him both orally and in writing, and gave him ninety days' notice in writing to quit and yield up possession, and that he positively refused.

She also submitted evidence that whilst she was negotiating with McRae for the premises, her husband, as her agent, personally called upon the defendant, who was in possession, and informed him that she was talking about buying the land, and wished to know what claims he had thereto, and that he replied he had no claims except to the crops, which he thought he ought to be paid for, and that if plaintiff bought the place, and he was paid for his crops, he would yield possession at once, and that he was on the place by permission of his brother, John McGregor; that soon after this, which was in June, 1878, she received her deed from McRae, and that her husband, acting as her agent in her behalf, again called on defendant upon the premises and requested possession, and that defendant declined

to yield, and gave as a reason that he had received a letter from his brother John instructing him to hold possession, and added that he should do so.

The plaintiff also gave evidence that during the haying season of 1878, the defendant informed J. W. Avery that he went in under and by permission of his brother, John McGregor, expecting that John would never sell the place, and that he would be permitted to continue in occupation, and that he made no claim of title in himself; that the husband of plaintiff had frequent talks with defendant concerning his occupation, and that he never made any other or different claim than that of holding under his brother, John McGregor.

The defendant offered no evidence.

In directing a finding for defendant the court erred. The case should have been left to the jury with an instruction to the effect that if they believed the undisputed evidence on the part of the plaintiff, and found from it that defendant, holding under his brother John, rested on the ownership John held at and before his deed to McRae, the grantor of plaintiff, and not on some ownership or right of John derived by him subsequently to that deed to McRae, and of force against it, then they should find for the plaintiff. Because if both claimed from the ownership which John McGregor held at the time he deeded to McRae, it was a mutual admission of the sufficiency of the title of John McGregor for the purpose of the suit, and the plaintiff was not required to go further back in the chain of title; and in the absence of proof of any other title in defendant than his permission from John to occupy as stated, the plaintiff's title derived from John's grant was good against it in ejectment.

The defendant being in possession, it was incumbent on the plaintiff to inquire of him respecting his claim, and it was his duty to explain it truthfully, and his statements and explanations were admissions of the

party in possession touching the nature and extent of his right, which the plaintiff was entitled to prove for the purpose of making out that both claimed from the same source, and also that the right of defendant was inferior, and that of plaintiff paramount.

There is no pretense that defendant possessed any paper title to stand in the way and control the question, or that he possessed any other right than that mentioned by the plaintiff's witnesses. In short, the fair and just construction of the evidence respecting defendant's occupancy, and the way the parties on the trial below understood, is that it was under the right granted to his brother John by the Brockway deed, and not under some imaginary later right of John, of which the case affords no pretense of existence. In view of the action and the situation of the parties, it is not perceived that any other course was open to the plaintiff. No right of John McGregor was shown as a basis for defendant's holding except the very ownership which John appears to have alienated to McRae, the plaintiff's grantor, and if there was any other it was for the defendant to show it. The case was therefore brought to the narrow ground whether the jury would believe the evidence for the plaintiff concerning the statements and explanations of defendant. There is no question of estoppel or parol disclaimer, nor any question relative to the admissibility of acts or admissions by a tenant in derogation of the title held by the landlord at the creation of the term, nor any question concerning the allowance of oral proof to contradict a paper title. The objection that the deed from John McGregor to McRae was not recorded until after the commencement of the suit has no force. The record could not be excluded for that reason. *Russell v. Sweezey* 22 Mich. 235. Moreover, the deed itself was produced.

There does not appear to have been any ground for suspecting that the maker of the deed to McRae was not the same John McGregor described as grantee in the

deed from Brockway, and specified by the defendant as his brother under whom he claimed to occupy. Besides the proof arising from the badges of identity in the deed, there was oral evidence not to be disregarded. The plaintiff's husband swore that he showed to defendant the original deed from John McGregor to McRae, and that defendant then said "it was all right." As the defendant offered no evidence, and did not attempt a contradiction or seek to repel the inference of identity arising from the sameness of name and other particulars, I think it was no more than reasonable to assume that the maker of the deed to McRae was the same person the defendant held out as his brother, John McGregor, and under whom he asserted his claim. Hence the argument for defendant on this point appears to me to be not well grounded.

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

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

CAMPBELL, J. I think that the statement by McGregor that he held under his brother, being made some years after the deed from John McGregor, was not an admission that he held under the prior grantee, and that judgment was right.

CHARLES ENDRISS v. COUNTY OF CHIPPEWA.

Claims against county—Supervisors.

The original jurisdiction over claims against counties which belonged to the courts at common law before the adoption of the Constitution was not taken away by the constitutional provision that the board of supervisors should have exclusive power to adjust all claims against their respective counties, and the sums so fixed should be subject to no appeal. The purpose of the provision was to take away the right of appeal.

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A claim against a county for moneys illegally collected by its officers will sustain an action at common law against the county, and such an action is not prohibited by the clause in the Constitution giving the board of supervisors "exclusive power to adjust all claims against their respective counties." Art. x. § 10.

Error to Chippewa. Submitted April 8. Decided April 21.

ASSUMPSIT. Plaintiff brings error.

B. T. Prentis for plaintiff in error. Suit lies against townships (*Marathon v. Oregon* 8 Mich. 372; *Dayton v. Rounds* 27 Mich. 82; *McArthur v. Duncan* 34 Mich. 27) and counties, *Larkin v. Saginaw County* 11 Mich. 88; Comp. L. §§ 433, 457, 463, 529, 531.

Charles S. Cushman for defendant in error.

COOLEY, J. This case is not stated so fully as would have been desirable. It is only said in the record to be brought "for money illegally collected by the officers of said county, and received and receipted for by the treasurer thereof, which said money was paid by said plaintiff under protest." The circuit judge refused to receive any evidence in support of the action, and dismissed it for want of jurisdiction. We are not informed on what ground the money was exacted, but for the purpose of deciding the question of jurisdiction that is not very material.

The case was dismissed on the ground that under section 10 of article 10 of the Constitution the board of supervisors have exclusive jurisdiction to pass upon and adjust the plaintiff's demand. That section is: "The board of supervisors, or in the county of Wayne the board of county auditors, shall have the exclusive power to prescribe and fix the compensation for all services rendered for, and to adjust all claims against their respective counties; and the sum so fixed or defined shall be subject to no appeal." The exact meaning of this provision is the subject of this controversy. There is no doubt that under it the board of supervisors has exclusive jurisdiction of some classes of claims, but whether

a claim for money illegally exacted is within the intent of the section is disputed.

This is not the first time the court has been called upon to put a construction upon this section. In *People v. Auditors of Wayne* 10 Mich. 307, it was held that the decision of the board on all questions of fact involved in claims against the county could not be reviewed by the court directly or indirectly. This view was reaffirmed in *Mixer v. Supervisors of Manistee* 26 Mich. 422, where it was at the same time declared that the board was bound to act fairly, and to pass upon claims on the general principles governing judicial bodies. See also *Videto v. Supervisors of Jackson* 31 Mich. 118; and *People v. Supervisors of Manistee* 33 Mich. 497. But from the very first it has been denied that this section gave to the supervisors an unlimited authority to allow or disallow at will all classes of claims that may be presented to them.

In *People v. Supervisors of Macomb* 3 Mich. 476, it was held that where the statute gave to any other board of officers the authority to incur a liability on behalf of the county, and to adjust the amount of the same, the board of supervisors was not at liberty to refuse to recognize, allow or pay it. If they had the power to do so they would in that regard be above the Legislature itself, and might set at defiance alike justice and the law. This case was followed in *People v. Auditors of Wayne*, 13 Mich. 233, and in *Kennedy v. Gies* 25 Mich. 83, mandamus was refused to compel the county treasurer to pay a demand which the county auditors of Wayne had allowed for services for which the statute itself had established a lower compensation.

None of these cases covers the present. This suit is grounded in common law principles, and there is no statute which provides for or embraces it. The case made is one in which the county has illegally exacted money from the plaintiff, and refuses to restore it. Can the board of supervisors under the Constitution take

from the plaintiff this money, and deprive him of all remedy therefor, by simply refusing to audit his claim? He has not performed services for the county, and thereby submitted himself to the jurisdiction of the board; he has not contracted with the county; he has merely, according to his allegations, had the misfortune to have an illegal claim presented against him by the county. He has submitted to the illegal claim under protest, and the question now is, whether in respect to obtaining redress he is remitted exclusively to the county itself, represented in his official board.

We find nothing to sanction this claim in the meagre reports of debates in the constitutional convention. The section is spoken of as one to confer upon the supervisors exclusive authority to fix the salaries of county officers and to pass upon claims for services rendered to counties. The section as first introduced related to salaries only (Constitutional Debates, 339); and it was made more general so as to cover other services performed for counties, and also those of town officers and other persons when under the law they constitute a proper liability against the counties. Id. 345. No speaker intimated that the provision was broad enough to cover a case like the present.

Under the law in force when the Constitution was adopted, any person whose "claim" against a county was disallowed by the board of supervisors, in whole or in part, might appeal therefrom to the circuit court. Rev. St. 1846, p. 68. In another section the claim of the appellant is spoken of as an "account" (*ibid.*, p. 69); and it is very clear that the statute did not intend to give the supervisors jurisdiction of all possible claims; for in another chapter actions against counties were expressly provided for (ibid. pp. 529, 530). And it was never understood that the courts were ousted of their jurisdiction of common law actions. The boards of supervisors fixed the salaries of county officers and passed upon the accounts of justices and constables in criminal cases, of accounts against their respective coun-

ties under the laws for the support of the poor and those for the protection of the public health, subject in all cases to an appeal to the circuit court; but actions arising at the common law were left to common law remedies. The purpose of the section of the Constitution now under discussion was to take away the right of appeal, but not to deprive the courts of the original jurisdiction before existing. See *McMahon v. Auditors of Wayne County* 41 Mich. 223.

The judgment must be reversed with costs, and the case remanded for trial.

The other Justices concurred.

MARIA REED, RELATOR v. WALTER H. COOTS, SHERIFF.

Attorney's lien on judgment.

A sheriff has no judicial power to fix the amount of an attorney's lien upon a judgment.

MANDAMUS to compel the sheriff to set off against each other certain executions in suits between Frank G. Baker and Maria Reed. Respondent answered that Baker's attorney had served notice upon him claiming a lien on the judgment which Baker had recovered, exceeding it in amount, and that the right under Comp. L., § 6124, to require him to set off the judgment, belonged to Baker exclusively. Submitted April 9. Denied April 21.

Alex. D. Fowler for relator.

William Jennison and *Edwin F. Conely* for respondent, cited as to attorney's liens upon judgments, *Wells v. Elsam* 40 Mich. 218; *Rooney v. Second Avenue R. R.* 18 N. Y. 368; *Ward v. Syme* 9 How. Pr. 24.

MARSTON, C. J. It appears in these proceedings that the attorney of Frank G. Baker claims a lien upon the judgment for services and disbursements, to the amount thereof, and that he had so notified the sheriff. That officer has no judicial power to fix and determine the amount of such lien. The amount may be disputed by Baker, and if the right of set-off existed might also be questioned by Mrs. Reed. If questioned, the matter could only be settled by agreement of the parties in interest or by going into court. Under these circumstances the writ of mandamus should not issue to the sheriff, and must be denied.

The other Justices concurred.

EDMUND F. CULVER v. JOHN MCKEOWN IMPLEADED WITH CAROLINE CROSSMAN.

Time of foreclosure sale—Transfer of bids—Costs.

The one year and six weeks that must elapse before the sale on foreclosure, may be computed from the date of taking out the subpœna, if it is taken out with the intention in good faith of serving it as soon as possible, and there is no laches in obtaining service.

Costs may be denied where a question of practice is involved that is fairly open to question.

Transfer of a bid made on foreclosure sale will not be ground for ordering a new sale.

Appeal from the Superior Court of Detroit. Submitted April 9. Decided April 21.

PETITION by defendant in foreclosure for re-sale of the premises. Denied. Petitioner appeals.

Alex. D. Fowler for petitioner. Commencement of suit may date from the delivery of summons to the sher-

iff, or service of process, *Cornell v. Moulton* 3 Den. 12; *McGraw v. Walker* 2 Hilt. (N. Y.) 404; Comp. L. § 5723.

Maybury & Conely for appellee. When a foreclosure sale has been confirmed, it can be opened only on a showing that the price bid was inadequate, and of some fraud, mistake or accident, 2 Dan. Ch. Pr. 1285-8; but the practice of re-opening for inadequacy of price was disapproved in *White v. Wilson* 14 Ves. 151; *Fergus v. Gore* 1 Sch. & L. 350; *Barlow v. Osborne* 6 H. L. 556; public judicial sales at auction are less public in England than in the United States (*Frazier v. Hall* 2 McCord Ch. 159, n *b*) where mere inadequacy of price, in the absence of fraud, accident, mistake or some similar equitable consideration is not good cause for setting aside public judicial sales, 2 Barb. Ch. Pr. 185, n. 30; *Gardiner v. Schermerhorn* 1 Clark 101; *Lefevre v. Laraway* 22 Barb. 167; *Williamson v. Dale* 3 Johns. Ch. 290; *Duncan v. Dodd* 2 Paige 99; *Requa v. Rea* id. 339: *Post v. Leet* 8 Paige 337; *Amer. Ins. Co. v. Oakley* 9 Paige 259; *Brown v. Frost* 10 Paige 244; *Collier v. Whipple* 13 Wend. 224; *Tripp v. Cook* 26 Wend. 143; *Lansing v. McPherson* 3 Johns. Ch. 425; *Thompson v. Mount* 1 Barb. Ch. 607; *Andrews v. Scotton* 2 Bland 627; *Young v. Teague* Bailey's Eq. 14; *Seaman v. Riggins* 1 Green Ch. 214; *Conover v. Walling* 2 McCarter 173; *Henderson v. Lowry* 5 Yerg. 240; *Houston v. Aycock* 5 Sneed 406; *Penn v. Tolleson* 20 Ark. 652; *Gordon v. Saunders* 2 McCord Ch. 151; *Anderson v. Foulke* 2 Har. & G. 346; *Wood v. Hudson* 5 Munf. 423; *Campbell v. Gardner* 3 Stockt. 423.

GRAVES, J. McKeown made application for resale of mortgaged premises, and the same was denied. He then appealed.

The first ground urged is that the sale was premature, and hence irregular. The bill was filed November 9, 1878, and Caroline Crossman, as prior mortgagee of portions of the premises, was joined as defendant. On

the same day subpœna to answer as to both defendants was taken out and delivered to the sheriff for service, which he effected immediately on defendant Crossman. Failing to get service on McKeown, a second subpœna was sued out December 30, 1878, and served on him the next day. The defendants neglecting to appear, the bill was taken as confessed February 4, 1879. November 18, 1879, publication was commenced of notice that the premises would be sold January 2, 1880, and on that day the sale took place and it left a deficiency of about $800. January 7, 1880, the petition was filed, and on the 17th of the same month the court denied it. The defendant Crossman is satisfied with the sale and does not favor the attempt to disturb it.

The petitioner contends that, under present regulations, it was required by correct practice to allow one year and six weeks between the commencement of the foreclosure and the sale, and that the foreclosure did not commence against McKeown until he was actually served with subpœna on the 31st of December; and therefore that no sale could be regularly held on the second of January, 1880, or earlier than some time in February.

It is not disputed that a year and six weeks must elapse between the commencement of the suit and the sale. The disagreement is in regard to the time when the suit is to be deemed commenced. The counsel resisting the motion denies that in respect to this regulation the suit is to be considered as *not* commenced until actual service of the subpœna. He contends that when there is no unreasonable delay, and the subpœna is seasonably taken out in good faith and with the purpose of having it served as soon as service is fairly practicable, the suit is then regularly commenced within the spirit and intent of the regulation, and that the case shows that this was done on the 9th of November, 1878, and that the sale was therefore not premature.

This position, we think, accords with the import of our previous decisions, and is as strict against complain-

ants as the law will permit. The rule in New York is less favorable to defendants. There the suit is deemed commenced by the filing of the bill. 1 Barb. Ch. 1.

It is not claimed that there was any lack of diligence or want of good faith in the matter of getting service of the subpœna, and hence the first ground of the application is not sustainable.

The case has been carefully considered and with a desire by the court to find some safe basis on which to order a re-sale of at least lot 36, or in lieu of it to give McKeown the benefit of the private bounty Miss Crossman's solicitors took from Scripps. But, taking into account how the interests are separated, and seeing precisely what is shown by the affidavits, it is found to be impracticable.

Lot 75 was sold to Mr. Adams, and the complainant bid off lots 68 and 69. Lot 36 was sold to Miss Crossman, and her bid was transferred at once to Scripps, by direction of her solicitors, on his paying them about $140. All the lots were considerably burdened with back taxes of one kind or another, and the different sales were made subject to them.

It is not proved that any fraud was committed against McKeown, although there is some evidence of practice to mislead him, and no case is made out of any surprise of which he would be entitled to complain. He was fully aware sometime beforehand that the sale was coming off, and he actually attended it with counsel. True, he had received some encouragement from complainant that a postponement might, perhaps, be agreed upon, but no agreement for indulgence was actually reached, and he was not led to understand that he might rely at all on the expectation that one would be made. Whether a postponement would be granted was left uncertain and subject to the notions of others, and when he came to ask for it at the sale it was refused. There was nothing in the state of facts, and nothing had occurred in the antecedent negotiations to entitle him to be unprepared

for this contingency, or to warrant him in neglecting such efforts as his interests required, to be ready on the day appointed for the sale. What is here said is of course based on what appears in the record.

The transfer of the bid of Miss Crossman to Mr. Scripps worked no prejudice to McKeown. It could make no difference to him whether Scripps succeeded to the interest through the transfer of the bid, or by grant from Miss Crossman after conveyance to her by the circuit court commissioner. If the practice was not strictly technical, he was not affected by it.

Scripps swears that he dropped his negotiation with McKeown for lot 36 prior to the sale, and was induced to do so because the price ($800) was too high, and also because of difficulty about getting a good title from McKeown.

It does not appear that he had informed McKeown that the negotiation was abandoned, and on the other hand it is not proved that McKeown considered it pending during the few days immediately preceding the day of sale. Miss Crossman, whose bid of $500 was immediately passed by her solicitors to Scripps for the consideration to them before mentioned, does not complain. Her prior mortgage appears to have been satisfied from the fund produced by the sales of the mortgaged premises in separate parcels to different purchasers, and the case is complicated by means of there having been separate encumbrances and separate sales.

Finally, the showing holds out no prospect that appreciably better terms would be obtained on a resale. The petitioner does not assume to allege his belief even that the premises can be sold to better advantage at another auction, and he offers no kind of assurance that the fund may be increased.

On the other hand, the parties opposing the petition show that the probabilities are decidedly against a result more advantageous to the fund.

So far as the case shows equitable ground for inter-

fering at all, it is confined to lot 36, and the facts seem to forbid a resale of that parcel by itself. It would be attended by considerable expense, and for all that appears it might terminate in leaving the prior mortgage of Miss Crossman partially unsatisfied and do her irreparable injury, and no other mode of relief is apparent on this application. The court certainly has no power to transfer the sum accepted from Scripps by Miss Crossman's solicitors to McKeown's credit, although the circumstances are strong to show that such an appropriation would be abstractly just.

The conclusion is that the order appealed from cannot be disturbed, and must consequently stand affirmed. But the court is of opinion that as a question of practice is involved in respect to which some doubt seems to have been entertained, and upon consideration of all the equities, no costs of this court ought to be allowed.

The other Justices concurred.

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MORGAN AXFORD v. SALMON S. MATHEWS.

Trover for goods seized—Possession by mortgagee.

An assignee cannot bring trover against the United States Marshal for goods taken by him from the possession of mortgagees holding adversely to the assignee, whatever may be the right thereto as between the marshal and the mortgager.

In trover for goods claimed by different persons, it is for the jury to decide from whose possession they were taken.

Possession by a mortgagee of chattels will not be assumed to be unlawful as against the mortgager's assignee, for the purpose of reversing a judgment against the assignee in an action of trover brought by him against an officer who had levied upon them.

Error to Oakland. Submitted April 13. Decided April 21.

TROVER. Plaintiff brings error.

Wisner & Speed for plaintiff in error. The relative rights of the parties to a chattel mortgage before foreclosure, when the mortgagee is in possession, are governed by the law of bailment, *Van Brunt v. Wakelee* 11 Mich. 177; *Flanders v. Chamberlain* 24 Mich. 305; *Lucking v. Wesson* 25 Mich. 445; *Kohl v. Lynn* 34 Mich. 360; *Haynes v. Leppig* 40 Mich. 606; except as against the mortgagee the mortgager has the right of possession, *Cram v. Bailey* 10 Gray 88; a bailee can maintain action against a stranger for injuring or converting the property, Story on Bailments § 352; Edwards on Bailments §§ 38, 104; 2 Greenl. Ev. § 637; *Smith v. Jones* 7 Conn. 378; *Middlesworth v. Robinson*, Wright (O.) 552; and recovery by either bailor or bailee will deprive the other of the right to recover, *Treadwell v. Davis* 34 Cal. 606.

Griffin & Dickinson for defendant in error.

GRAVES, J. As United States marshal the defendant in error seized a quantity of goods under attachments, and the plaintiff in error being assignee of the attachment debtors for the benefit of their creditors, brought trover. The verdict went in favor of the marshal.

It was made a question on the trial whether the plaintiff had such possession or right of possession as entitled him to sue in trover, and the case is now to be decided according to the answer which should be given.

Some time prior to the assignment the assignors had mortgaged their stock, and in the course of a day or two after the assignment the mortgagees took steps to get possession under the mortgages, and to dispossess the plaintiff who was in as assignee. As a consequence, the possession in point of fact became disputed, and each side claimed to be in. During this controversy the marshal levied the attachments. The facts were somewhat equivocal as to whether the agents of the mortgagees or the plaintiff were in possession on these occa-

sions, and the circuit judge very correctly left it to the jury, and in view of the instructions it is a necessary inference that they found the agents of the mortgagees were in. He also instructed the jury to the effect that in case the mortgages were good and valid, and the agents of the mortgagees were in possession and holding the property under the mortgages when the attachments were levied by the marshal, the assignee could not maintain the action.

Under these instructions the jury must have found that the possession was actually in the agents of the owners of valid mortgages made by the assignors prior to the title of the plaintiff, and that such possession was held under such mortgages, and was adverse and not in subordination to the later title conferred on the plaintiff by the assignment.

There is no pretense that the right to seize and hold possession under the mortgages was not complete as against the plaintiff. On the contrary, the bias of the evidence is towards the fact that it was, and the record contains nothing different. But in any event the court would not assume that the taking and holding by virtue of the mortgages were not lawful, in order to make out error in the record. By necessary construction the possession and right of possession, as against the plaintiff, were in the mortgagees, and of course the implication is unavoidable on the facts that the plaintiff was not in actual possession and had no right immediately to take possession. His position did not bring him within the law of trover and the remedy was not applicable. The view taken by the circuit judge of the law arising on the facts was correct. The right as between the marshal and the mortgagees was not involved. Cooley on Torts 445; and see *Grove v. Wise* 39 Mich. 161; *Winship v. Neale* 10 Gray 382; *Lord v. Price* L. R. 9 Exch. 54; 8 Eng. 505. In the last case the plaintiff had bought a quantity of cotton and paid part of the purchase price, but the property remained in the vendor's hands, subject

to his lien for the amount left unpaid, and a wrong-doer converted part of it. In denying the right of the buyer to maintain trover against him, the court observed that the right of possession was in the vendor, so that in case of non-payment, at the proper time, of the amount unpaid, he might re-sell the goods and repay himself for any loss sustained on the resale. That assuming the goods to have been tortiously removed without the assent of the vendor, the latter might have maintained trover for the same things, and "it cannot be that two men can be entitled, at the same time, to maintain an action of trover for the same goods."

No error is shown, and the judgment should be affirmed with costs.

The other Justices concurred.

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CATHARINE BRIGGS v. WILLIAM BRUSHABER AND JOHN BRUSHABER.

Damages for obtaining loan on false security.

One who is defrauded into lending money on inadequate security is damnified as soon as the loan is made, and in an action for the fraud is entitled to recover the difference between the sum lent and the value of the securities at the date of the loan, and interest thereon from that date.

Final judgment cannot be given by the Supreme Court on findings that do not cover the whole case.

Error to Superior Court of Detroit. Submitted April 13. Decided April 21.

TRESPASS ON THE CASE. Plaintiff brings error.

Henry M. Cheever for plaintiff in error.

George Gartner for defendant in error.

COOLEY, J. Plaintiff sued defendant for fraud in inducing her by false representations to make a loan to one Ferchow secured by a mortgage on land which was worth much less than the sum loaned upon it. The case was tried by jury, and special findings are returned. The sum loaned was $450, and for this a mortgage for $500 was taken. The mortgagor was irresponsible.

The jury found that the fraud was made out by the evidence, and that plaintiff was entitled to recover. The mortgage, however, had never been foreclosed, and was still in the hands of the plaintiff as an existing security. Under these circumstances, although the jury found the value of the mortgaged premises to be only $250, the court was of opinion that the plaintiff could recover nominal damages only. The view of the judge seemed to be that no actual damages were sustained by the plaintiff, or would be until an attempt to enforce the mortgage had been made, and in whole or in part had proved unsuccessful.

In support of this ruling the case is likened to an action upon a guaranty of collection; but it has no resemblance to such an action. Before suit can be brought on such a guaranty the plaintiff must exhaust his remedy at law, because that is the import of his contract. *Bosman v. Akeley* 39 Mich. 710. But in this case no claim is made upon contract. The plaintiff claims to be damnified by a fraud, and the right to an action is conceded. Nothing is in dispute but the amount of the recovery. We are also referred to *Freeman v. Venner* 120 Mass. 424, as a case in point. That was an action of tort for inducing the promisee of a note to indorse it in blank, by fraudulent representations as to the legal effect of the indorsements; and it was held that the indorser could not maintain the action until he had been damnified by the indorsement. This case also has no analogy to the present. The indorser might never be charged by demand and notice, and if he was the principal might pay the note, and thereby satisfy the indorser's liability. Mean-

time the indorser could lose nothing: a contingent liability was hanging over him, and that was all.

In this case the plaintiff was damnified as soon as the loan was made. She had been induced to part with her money for something of much less value than that which it was agreed she should receive for it. The mortgage was a marketable commodity, and she lost by the fraud itself the difference between the market value of that which she received and that which she was to have under the arrangement. It is true this could not be definitely fixed by the evidence; witnesses might disagree respecting it; the market value of lands might rise afterwards to an extent that would make the mortgage available to its full amount; but there is nothing unusual in contingencies of this sort being involved in litigation and casting uncertainty upon any attempt to do justice. Had the plaintiff been defrauded in the purchase of a horse, similar questions might arise; the plaintiff might gain or might lose by the evidence convincing the jury that the horse was worth less or more than the real market value, and an unexpected rise in horses might save him from any loss at all. But controversies of the sort can only be determined in one way: the jury must judge of the extent of the damage by such evidence of value as the parties may be able to produce, and to postpone a remedy until the time shall arrive when all possibility of error or mistake is precluded, would be grossly unjust and in many cases equivalent to a denial of remedy. The latter might be the case here if the mortgage had been on long time. We think the court erred in limiting the recovery to nominal damages. The plaintiff was entitled to recover the difference between the $450 loaned by her, and the value of the securities which she received therefor, and to interest upon this sum from the time the loan was made.

The plaintiff moves in this court for final judgment on the findings of the jury, and if these covered the whole case we might award it. Unfortunately it does

not appear that in their estimate of the value of the land the jury had in view the time of the loan. The value may have changed materially since that time, and it is possible, if not probable, that the jury made their estimate as of the time of the trial.

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

The other Justices concurred.

JASON STEBBINS v. ASA H. FIELD, ADMINISTRATOR OF LORENZO E. HURD.

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Administrator's sale—Incumbrances—Statement of consideration—Costs.

In an action for the price of lands sold at an administrator's sale, the probate proceedings and arrangements preliminary to the sale were pertinent in explaining the true state of facts and were admissible in evidence therefor.

The purchaser at an administrator's sale agreed with the administrator that the amount of any encumbrance against the parcels should be deducted from the face of any nominal bid therefor. *Held* that this was in accordance with the statute which requires a purchaser to take the title as it stands, and that a deed stating the consideration to be the unencumbered value having been corrected according to this understanding at the instance of the purchaser's counsel, the purchaser could not object to the deed on the ground that it stated a smaller consideration than the nominal bid.

Questions relating to the taxability of costs cannot be included in the bill of exceptions.

Error to Superior Court of Detroit. Submitted April 13 and 14. Decided April 21.

ASSUMPSIT. Defendant brings error.

Ward & Palmer for plaintiff in error.

Wisner & Speed for defendant in error.

CAMPBELL, J. Suit was brought by defendant in error against Stebbins to recover the price agreed to be paid for an administrator's title to certain lands conveyed to him. Judgment was recovered for this amount in the Detroit Superior Court, and is removed into this court on error.

The facts are partly admitted and partly in dispute. The sale was made November 13, 1874, of four parcels. It having been discovered that the first three parcels made up the amount to be raised, the fourth was treated as not properly sold, and forms no part of this controversy. It was afterwards sold on a guardian's sale.

At the time of the administration sale the lands had been sold on a statutory foreclosure for about $4000, and the redemption would run out in June, 1875. It is claimed to have been understood between the administrator and Stebbins before the sale as well as after, that the amount of the encumbrance against each parcel should be deducted from any nominal bid for the clear value, so that no more should be paid for any parcel than its value subject to the encumbrance. The notice of sale provided for the sale of a clear title. The statutes require every purchaser to take the title as it stands, and this understanding, if made, as the jury found, was in accordance with the statutory intent. There was testimony tending to show that in the actual bidding these parcels were not all bid off in the name of Stebbins, but that there was an understanding he should take them, absolute or qualified. After the sale he was reported as the bidder, and the sale was confirmed.

After the sale the administrator's deed was made out, setting forth as the consideration the unencumbered value of the lots. On the objection of his counsel a new deed was made correcting this and some other matters objected to.

There was a controversy as to whether this deed was actually accepted or not, and also as to whether Stebbins took possession and exercised acts of ownership.

Upon this the jury have found that he did accept the deed. The acts of possession were left to the jury merely as circumstances bearing on the acceptance. There was evidence of a proposed proceeding to set aside a tax-title, with which these matters had also some connection.

It was claimed and shown on one side and disputed on the other, that Stebbins kept up continued promises and representations that he would pay for the land, and made excuses for non-payment until near the time when the redemption ran out. He then purchased the foreclosure title, and has since sold the land at a large advance, and repudiated the bargain made with the administrator.

Objection was made to the admission of the probate proceedings and of the preliminary arrangements before sale. We see no reason why they were not all admissible. Their effect is a question to be disposed of separately, but the whole transactions were pertinent and important in explaining the true state of facts. The only errors that need considering relate to the charge.

We see no reason to doubt the apparent regularity of the probate proceedings down to the execution of the deed. The encumbered character of the estate does not appear in the license, notice or report of sale. The sale on its face was regular. What might have been the effect of not mentioning this encumbrance under other circumstances than those before us, or whether it would affect the validity of a sale actually confirmed, we need not consider. In the present case no demand was made of the purchaser for more than the price deducting the encumbrance, and he could not be injured if that price was accepted. He cannot object that the deed finally agreed upon states the lower and not the higher price, because it was altered at his own request.

It seems to us therefore, that the only question of any importance is whether Stebbins accepted the deed. Upon this the matter was very carefully presented to

the jury, and their finding is that he did. If so, we need not consider whether he would have been bound without acceptance, nor whether the course Stebbins took to delay matters until it was too late to redeem the land might not have worked out a liability on different grounds.

The amount of the recovery, we think, does not vary from the proofs.

A claim was made that there was an arrangement to give time on note and mortgage. Stebbins never completed or acknowledged the mortgage, and we think there is no foundation in the case, as he chose to present it, for postponing the liability.

A question of taxation of costs appears in the bill of exceptions, but there is no practice authorizing such questions to be included in that way.

The judgment must be affirmed with costs.

The other Justices concurred.

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111	573
43	336
155	351
155	352

THE PEOPLE'S ICE COMPANY v. THE STEAMER EXCELSIOR.

Destruction of ice-field—Boat and vessel law—Practice on appeals—Settlement of case.

The Supreme Court cannot act on a mere transcript of the stenographer's notes of the testimony not authenticated by the certificate of the trial judge.

The willful destruction of an ice-field by running a vessel so near it as to break it up gives a cause of action for damages within the Boat and Vessel Law. Comp. L., ch. 210.

On an appeal under the Boat and Vessel Law, the case must be certified by the trial judge, and the Supreme Court cannot act on a mere transcript of the stenographer's notes of the testimony taken on the trial below.

The Supreme Court can modify a decree on proceedings under the Boat and Vessel Law by including the parties to the bonds.

Proceedings under the Boat and Vessel Law are special, and differ from proceedings in either law or equity. Such causes are tried like cases at common law, but on appeal are to be tried over again, and the appellate court is not confined to the evidence taken below.

Where a common law form of reviewing statutory proceedings does not exist, or is not resorted to, the conditions and form of appeal depend entirely upon statute, and cannot be changed or aided by judicial action.

Appeals in equity, under Michigan statutes, must be heard on the identical facts shown in the lower court, and the trial judge must settle the testimony, which he may do with the aid of the stenographer's minutes and on hearing counsel; but the stenographer's notes are not admissible as evidence on the appeal, and the judge must set out his own statement.

Appeals under the Boat and Vessel Law resemble those from probate and justices' courts rather than in equity, and complete provision for obtaining testimony is made to enable the appellate court to determine the rights of the case, and not simply to find whether the judge below had come to a correct conclusion on the facts before him.

Upon appeals under the Boat and Vessel Law the hearing shall be *de novo*, not upon oral testimony but on a transcript of the pleadings and decree below and on any original depositions and testimony taken by either party within sixty days after the appeal unless the time is extended, such testimony being taken by deposition before a judge or circuit court commissioner if the witness is within the State, and by commission if not.

Where an appeal from a decree under the Boat and Vessel Law, was brought to the Supreme Court under a misapprehension as to the requirements regarding the taking of testimony, the court gave them additional time within which it could be taken.

Appeal from Wayne. Submitted April 14. Decided April 21.

COMPLAINT under the Water-Craft Act. Complainant and respondent both appeal.

Geo. H. Lothrop and *G. V. N. Lothrop* for complainant.

Wisner & Speed for respondent.

CAMPBELL, J. This is a proceeding under the Boat and Vessel Law, being found in chapter 210 of the Com-

piled Laws of 1871. The cause of action set up in the complaint was the destruction of ice formed on the premises of the complainant within its boom on Belle Isle. The damage was done by running the vessel rapidly up and down the Detroit river close to the boom, so that the swell thereby created broke up the ice field.

The complaint sets up a cause of damage very clearly within the statute, and the statute itself was enforced in *Brig City of Erie v. Canfield* 27 Mich. 479. The cause was tried without a jury and damages found to the amount of $1000. Both parties appealed. All the testimony appears to have been taken in open court. No new testimony was taken after the appeal. The clerk returns what is supposed to be a copy of the stenographer's notes. No other testimony appears in the record.

There is no testimony on which we can act, as we have nothing certified, and taking the case as it stands we can only modify the decree so as to render it against the parties to the bond, in accordance with section 28 of the statute.

But as this is the first case which has been brought before us under this statute on appeal, we have been called on to consider the requisites for a rehearing on the facts.

The proceedings are special and different in some respects from either legal or equitable cases. Where there is no common law form of review, or where if there is one it is not resorted to, the conditions and form of appeal depend entirely upon statute, and cannot be changed or aided by any judicial action. These causes are tried like common law causes, but on appeal they are to be tried over again. We are therefore compelled to see how far provision is made in that direction.

In equity cases the statutes of this State have always required the appellate court to rehear the appeals on the identical facts brought to the attention of the court from which the appeal is taken. When heard in open court the judge who heard the cause must settle the testimony,

and we have been compelled in all cases where he has not done so to reject it. *Wright v. Dudley* 8 Mich. 74; *Moote v. Scriven* 33 Mich. 500. The statutes have provided very carefully how such cases are to be settled. The stenographer's notes are not admissible for any purpose as evidence on appeal, and until the judge has settled the case with such aid from them as he will usually find, and after such a hearing of counsel for the parties as will enable him to avoid mistakes as to what was really sworn to, there can be nothing for the appellate court to consider. *Moote v. Scriven.* It has also been held that the stenographer's minutes cannot be used to show what occurred on a trial, but the judge must set out his own statement. *Campau v. Judge of Superior Court* 40 Mich. 630.

By an examination of the Boat and Vessel Law, it will be found that appeals from it are more like justice's and probate appeals than equity appeals, and that complete provision has been made for obtaining testimony, not to revise the action of the circuit court to determine whether he came to a right conclusion on the facts before him, but to determine on what is a new trial what the rights are as shown by the testimony presented to the appellate court.

Section 37 makes it the duty of the clerk of the circuit court to send up a transcript of the pleadings and decree, and to send up any original depositions taken in the case. To ascertain in what way any such depositions can get into the case, we must look at section 47, which prescribes in what manner the cause is to be heard originally. That section declares that "the proceedings and practice under this act shall be the same as in personal actions at law, except as herein otherwise provided, so far as the same may be applicable, and the depositions of witnesses may be taken for the same causes, in the same manner, and with the like effect as in personal actions."

By chapter 188 of the Compiled Laws, depositions

may be taken without a commission in this State where a witness is sick, aged or infirm, or about to depart from this State, and therefore there is reason to apprehend he may not be able to attend the trial. Depositions may be taken by commission, outside of the State, if the witness is not within the State.

By section 38 of the Boat and Vessel Law it is declared that the hearing of this court "shall be *de novo* upon such transcript and depositions, and further testimony taken as provided in the next section."

The next section, 39, provides that either party may take testimony within sixty days after the appeal, unless the time is extended, "by deposition or commission, in the mode now provided by law in any case, without regard to the place of residence of the witness."

This section precludes the hearing in this court of oral testimony, and enables depositions to be taken within the State before a judge or circuit court commissioner, and beyond the State by commission, but allows residents as well as non-residents to have their testimony taken, and requires no witness to be produced in open court.

The statute, therefore, has made express provision for all contingencies and has left nothing to be regulated by the courts. It was the duty of the appealing parties to have the depositions of their witnesses regularly taken.

But inasmuch as section 38 allows an extension of time to take such testimony, we think it is within our discretion still to permit it, and as both parties have acted under a misapprehension, we think it only right to give them time. We shall therefore allow testimony to be taken at any time within sixty days. If the parties choose to close it earlier, or to stipulate upon it, of course they can do so.

The other Justices concurred.

FREDERIC W. PAINE v. JOHN RINGOLD.

Construction of note—Record.

The construction of written instruments is for the court to determine, but the identity of words is for the jury who may be aided by parol evidence of facts connected with the giving of the paper. So *held* where a note which purported in the margin to be for $50 was so written in the body that it was uncertain whether it was for fifty or sixty dollars.

Where an instrument disputed for uncertainty in its wording, is not sent up with the bill of exceptions, the existence of a doubt is assumed in support of a charge submitting it to the jury.

Error to Kent. Submitted April 14. Decided April 21.

ASSUMPSIT. Plaintiff brings error.

Simonds & Fletcher for plaintiff in error.

Fred A. Maynard for defendant in error. Where the words of a contract are obscurely written, it is for the jury to determine what they are, 2 Pars. Cont. 639; 1 Greenl. Ev. § 288 *b;* 2 Whart. Ev. § 939; *Armstrong v. Burrows* 6 Watts 266; *Fenderson v. Owen* 54 Me. 372; *Arthur v. Roberts* 60 Barb. 580; *Burnham v. Allen* 1 Gray 499; *Cabarga v. Seeger* 17 Penn. St. 514; *Jackson v. Ransom* 18 Johns. 107; *Sheldon v. Benham* 4 Hill 129; *Dana v. Fiedler* 2 Ker. 40; and it may be read in view of the circumstances and the subject matter, *West v. Smith* 101 U. S. 263; *Stoops v. Smith* 100 Mass. 63; *Knight v. Worsted* 2 Cush. 271; *Herring v. Bost. Iron Co.* 1 Gray 134; *Gerrish v. Towne* 3 Gray 82; *Sutton v. Bowker* 5 Gray 416; *Bradley v. Washington etc. Packet Co.* 13 Pet. 89.

MARSTON, C. J. Action was brought upon a promissory note. According to the figures on the margin the sum for which it was given was $50, but there was a dispute as to whether according to the writing in the

body it was a promise to pay *fifty* or *sixty* dollars. The court admitted oral evidence to be introduced of the facts and circumstances surrounding the transaction out of which the note grew, and submitted the question to the jury as one of fact to find whether the note was one for fifty or sixty dollars.

The legal construction to be placed upon a written instrument is clearly one for the court; but where the words are obscurely written, or partially erased, so as to be uncertain and ambiguous, the question is a proper one for a jury, and they may be aided by parol evidence of the circumstances surrounding the giving of the note.

The original note forms no part of and is not returned with the bill of exceptions, so that we have no opportunity to inspect the same and ascertain whether any doubt or ambiguity existed or not, even if we could examine it for such purpose if here. We must assume in support of the judgment, that such a doubt existed, and that the course adopted by the court was proper.

The judgment must therefore be affirmed with costs.

The other Justices concurred.

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Frederick Raynsford v. Theodore I. Phelps.

Damages for injury from false return by tax-collector.

A public officer is liable to private individuals for injuries resulting to the latter from his failure to perform ministerial duties in which the latter have a special and direct interest. He is also liable for a failure to perform duties of a judicial nature, if he neglects them maliciously.

One who had purchased the equity of redemption of certain mortgaged lands, after a tax had been assessed thereon, had certain personal property on the land, but the tax collector falsely returned *nulla bona*, and the tax became a lien on the land from which the owner of the mortgage had to redeem after foreclosure.

Held that the latter had a right of action at common law against the collector for injury resulting to him in being compelled to redeem from the tax sale.

A law prescribing who shall be liable for the payment of taxes, and whose property may be levied on therefor, impliedly forbids the tax collector to seize the property of others, or by act or omission make the tax a charge on it, and the owner is at liberty to buy and sell in reliance upon the officer's implied duty toward him and to understand that the latter is not protected by his commission unless he keeps within the powers given by it.

Taxes can generally be enforced only by the statutory remedies, and payment made by the mortgagee of land does not necessarily give him a right of action as against the mortgager as for money paid to his use, since the mortgagee would not have been personally liable for the payment of the tax, and the mortgager's failure to pay it would only have rendered the property subject to seizure while the warrant was good for their collection.

Error to Kent. Submitted April 14. Decided April 21.

TRESPASS ON THE CASE. Plaintiff brings error.

C. G. & W. W. Hyde for plaintiff in error. One who is individually injured by a violation of official duty has a remedy concurrent with the public prosecution for such violation, Cooley on Torts 7, 81; *Plumer v. Smith* 5 N. H. 554; *Boston etc. R. R. Co. v. Dana* 1 Gray 83; *Pettingill v. Rideout* 6 N. H. 454; *Cross v. Guthery* 2 Root 90; *Patton v. Freeman* 1 Coxe 113; *Piscataqua Bank v. Turnley* 1 Miles 312; *Story v. Hammond* 4 Hammond 376; *Lofton v. Vogles* 17 Ind. 106: 14 Am. Dec. 245; a ministerial officer charged by statute with the performance of a certain duty in which an individual has a special interest, is liable if he omits it, *Clark v. Miller* 54 N. Y. 534; Cooley's Liability of Public Officers 3 S. L. Rev. 531; Shearman's Redf. Neg. § 156; 1 Addison on Torts 30; *Lane v. Cotton* 1 Salk. 17; *Henly v. Mayor of Lyme* 5 Bing. 91; *Keith v. Howard* 24 Pick. 292; *Adsit v. Brady* 4 Hill 630; *Hutson v. Mayor* 9 N. Y. 169; *Robinson v. Chamberlain* 34 N. Y. 389; *Kendall v. United States* 12 Pet. 524; *Farr v. Thomson* 11 Wall. 139; *Reed v. Conway* 20 Mo. 22; *Kendall v. Stokes* 3 How. 87; a township treas-

urer is liable for a false return, Cooley on Taxation 196; and for taking one's property for another's tax, *Henry v. Gregory* 29 Mich. 69; and for failing to account for the surplus after selling property for more than the tax, *Blanchard v. Dow* 32 Me. 557; an assessor is liable to one injured by an illegal assessment (*Mygatt v. Washburn* 15 N. Y. 316; *Clark v. Norton* 49 N. Y. 246; *Freeman v. Kenney* 15 Pick. 44; *Lyman v. Fiske* 17 Pick. 231) even if he acted by authority, *Stetson v. Kempton* 13 Mass. 272.

Simonds & Fletcher for defendant in error. Townships and township officers are not liable for injury to an individual caused by neglect to keep the highways or other township property in safe condition, *Detroit v. Blackeby* 21 Mich. 24; *Hill v. Boston* 122 Mass. 344; *Young v. Com'rs* 2 N. & McC. 537; *Bartlett v. Crozier* 17 Johns. 439; *Lynn v. Adams* 2 Ind. 143; *Dunlap v. Knapp* 14 Ohio St. 64; a highway commissioner was not accountable for maliciously deciding on the necessity of a highway across a man's premises, *Sage v. Laurain* 19 Mich. 137.

Cooley, J. It was decided in *Rowning v. Goodchild* 2 W. Bl. 906 that a public officer having ministerial duties to perform, in which a private individual has a special and direct interest, is liable to such individual for any injury sustained by him in consequence of the failure to perform such duties. It was an officer connected with the postal service who was held liable in that case, and the decision is followed in this country. *Teall v. Felton* 1 N. Y. 537; s. c. in error, 12 How. 284. Election officers have been held liable on the same ground (*Ashby v. White* Ld. Raym. 938: 1 Salk. 19; *Lincoln v. Hapgood* 11 Mass. 350; *Jeffries v. Ankeny* 11 Ohio 372); and so have commissioners of highways (*Hover v. Barkhoof* 44 N. Y. 113; *Hathaway v. Hinton* 1 Jones N. C. 243); and so have inspectors of provisions (*Hayes v. Porter* 22 Me. 371; *Nickerson v. Thompson* 33 Me. 433; *Tardos v. Bozant* 1 La. Ann. 199); and so have tax and other officers

(*Amy v. Supervisors* 11 Wall. 136; *Tracy v. Swartwout* 10 Pet. 80; *Brown v. Lester* 21 Miss. 392; *Bolan v. Williamson* 1 Brev. 181). It is immaterial that the duty is one primarily imposed on public grounds, and therefore primarily a duty owing to the public: the right of action springs from the fact that the private individual receives a special and peculiar injury from the neglect in performance, which it was in part the purpose of the law to protect him against. It is also immaterial that a failure in performance is made by the law a penal offense. *Hayes v. Porter* 22 Me. 371. The exceptions are of those cases in which the functions of the office are judicial, or partake of the judicial. *Sage v. Laurain* 19 Mich. 137; *Goetcheus v. Matthewson* 61 N. Y. 420; *Bevard v. Hoffman* 18 Md. 479; *Harrington v. Commissioners etc.* 2 McCord 400. But even in these cases the officer is responsible if he acts maliciously. *Gordon v. Farrar* 2 Doug. (Mich.) 411; *Bennett v. Fulmer* 49 Penn. St. 157; *Gregory v. Brooks* 37 Conn. 365; *Strickfaden v. Zipprick* 49 Ill. 286.

The principle is as familiar as it is sound. It is nevertheless insisted that the present case is not within it. Tax collectors, it is truly said, are chosen because the machinery of government must be kept in motion, and to that end it is essential that the public revenue should be collected. They are chosen, therefore, and their duties imposed on public grounds, not on private. If through any negligence on the collector's part the State loses a portion of its dues, the officer is responsible to the State for the loss; but it is denied that he owes any duty to individuals, except to abstain, as every citizen must, from committing trespasses on their rights. The question of negligence in the performance of public duties must always concern the public only.

But conceding that the law creates the office of collector in order that public revenues may be collected, it does not follow that it leaves that officer at liberty to disregard private interests in their collection. When the law prescribes who shall be liable for the payment of

taxes, and whose property may be levied upon therefor, it at the same time by implication forbids the officer to seize upon the property of others, or by act or omission make the tax a charge upon such property. The implied prohibition creates a duty in favor of the person whose property is the subject of it, and he is at liberty to buy and sell in reliance upon the duty being performed. He has a right to understand that the officer is commissioned by the law to act only with due respect to the rights of individuals, and that if he acts otherwise and causes special injury, he disobeys his commission and is not within the protection the commission might otherwise give.

The plaintiff owned a mortgage on lands on which a tax was assessed for the year 1874. A warrant was issued for the collection of this tax, and was placed in the hands of defendant for service. The plaintiff's case is that during the life of this warrant, and while the defendant held it, there was personal property upon the land, belonging to one French, who had purchased the equity of redemption after the first Monday of May and before the first Monday of December of that year, from which it was the duty of defendant under the express provisions of the statute to make collection. Comp. L., § 1006. Instead of performing this duty he falsely made return of no goods, whereby the tax became established as a lien upon the land, and the land was sold for its satisfaction. Meantime the plaintiff had foreclosed his mortgage and become owner of the lands, and was compelled to redeem from the tax sale.

Is the plaintiff wronged by this false return? We think he is. It was his legal right that the goods of French should be sold to satisfy the tax, and the law always intends that legal rights shall be respected. Moreover he alone suffered injury from the false return. The public suffered nothing, for the lien on the land remained and was enforced, and the only injurious consequence of the misfeasance in public office was that the

tax was collected from one man when the command of the law was that it should be collected from another.

If there is no wrong without a remedy, then it would seem that this action should be supported, for the defendant is the only wrong-doer. It may be suggested that the plaintiff might have a cause of action against French for money paid to his use; but this is not clear. The statute does not make the purchaser of land under such circumstances personally liable: it only renders his property subject to seizure during the life of the tax warrant. Payment by defendant did not release the property of French, for it was released by the neglect of the officer which is complained of in this suit. The general rule is that taxes can only be enforced by means of the statutory remedies. *Crapo v. Stetson* 8 Met. 393; *Shaw v. Peckett* 26 Vt. 482; *Camden v. Allen* 26 N. J. L. 399; *Packard v. Tisdale* 50 Me. 376; *Carondelet v. Picot* 38 Mo. 125. But whether or not the rule applies here is immaterial, as this action in either case is well grounded in common law principles.

The judgment must be reversed with costs, and the cause remanded, with leave to defendant to withdraw his demurrer and plead on payment of the costs of demurrer.

The other Justices concurred.

MOSES E. CHANCEY v. FRANK L. SKEELS.

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Justices' courts—Evidence to support declaration.

Pleading to the merits and going to trial before a justice precludes the defendant from objecting to evidence on the ground that the declaration was not specific enough to warrant it, if it sufficiently states a cause of action and he was not misled.

Error to Branch. Submitted April 14. Decided April 21.

TRESPASS ON THE CASE. Defendant brings error.

John W. Turner and *Loveridge & Barlow* for plaintiff in error.

Louis T. N. Wilson and *John B. Shipman* for defendant in error.

GRAVES J. In this action Skeels sued Chancey before a justice for certain injuries on the trotting park at Coldwater, for which he alleged Chancey to be responsible. Several persons were there exercising horses before sulkys, Skeels being one and one Moses Chancey another. The latter was driving a horse called Lexington, which belonged to the plaintiff in error. Skeels was driving at a moderate pace, and Chancey came up behind him at a rapid rate and ran against his sulky, breaking it down and causing Skeels' horse to run and causing Skeels some personal injury. The horse was damaged by fright and by being bruised, strained and heated. The justice heard the case without a jury, and gave judgment in Skeels' favor for $100. The circuit court affirmed it on certiorari and Chancey brought error.

Several objections were made before the justice to the admissibility of certain evidence, on the ground that the declaration did not contain the requisite specifications. It was not claimed that a cause of action was not substantially alleged. But the objection was that the particular facts essential to the introduction of the evidence objected to were not set up, and the character of the objection implied that the declaration was deemed sufficient as a substantial statement of an actionable grievance.

There was no demurrer, and the questions were raised under objections to evidence. Had the party demurred a very different case would have been presented. Where a defendant in justice's court pleads to the merits and goes to trial, we think he ought not to be indulged in objections against evidence based on the want of fullness

of the declaration, in any case where it is apparent that he is not misled, and the rule applies here. The court is satisfied that the nature of the plaintiff's claim was fully understood, and that the defendant in error was not misled.

The important question was whether Moses Chancey, the driver, was at the time the servant of plaintiff in error, and there was evidence both ways in regard to it. It was a disputed question of fact, and the justice decided against the plaintiff in error. His ruling in that regard is conclusive.

The other rulings in regard to evidence, to which there were objections, were not prejudicial. The testimony was immaterial. The showing was conclusive that the injury resulted from the negligence of the driver of Lexington, and that the damage was at least $100.

The judgment is affirmed with costs.

The other Justices concurred.

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ROBERT COOK v. THE DETROIT, GRAND HAVEN & MILWAUKEE RAILWAY COMPANY.

Reorganization by foreclosure purchasers—Liability for debt.

Act 96 of 1859 permits the purchasers on a foreclosure sale of the track and appurtenances of a railway company to exercise the charter powers of the corporation on certain conditions, and frees them from liability for any debts embraced in the foreclosure.

A statute giving clear title to foreclosure purchasers does no injustice to general creditors.

A common law action for the debt of a railway corporation cannot be maintained against those who have obtained control of its franchises by a purchase of its track and appurtenances on foreclosure of a mortgage securing other indebtedness.

Error to Superior Court of Detroit. Submitted April 14. Decided April 21.

ASSUMPSIT. Plaintiff brings error.

Alfred Russell for plaintiff in error. A corporation cannot without specific authority, mortgage an essentially corporate franchise, *Joy v. Plank Road Co.* 11 Mich. 155; *Meyer v. Johnston* 53 Ala. 237; and if the franchise is mortgaged, the purchasers become subject to the corporate liabilities, *Eldridge v. Smith* 34 Vt. 484.

George Jerome and *G. V. N. Lothrop* for defendant in error. The franchise *to be* a corporation cannot be mortgaged without express authority from the Legislature, though the franchise *to build, own and operate* a railroad may be mortgaged under a general power. Curtis, J. in *Hall v. Sullivan R. R. Co.* (1857) U. S. Circ. Ct. Dist. N. H., 21 Law Reporter 148: 2 Redf. Am. Ry. Cas. 621.

CAMPBELL, J. Plaintiff sued defendant on a debt due him from the Detroit & Milwaukee Railroad Company, and based his claim of recovery on the ground that the defendant company is in law the same corporation as his debtor, and bound to pay all its debts. The debt consists of a judgment rendered February 26, 1875, for $5000.

On the fourth day of September, 1878, Samuel Barker and six other persons purchased the franchises and property of the Detroit & Milwaukee Railroad Company, so far as the same were mortgaged by certain mortgages executed in 1855, 1856, 1860 and 1863, by the Detroit & Milwaukee Railway Company and the Detroit & Milwaukee Railroad Company; the purchase being made on foreclosure proceedings in which a decree of sale was made by the circuit court for the county of Wayne. The Detroit & Milwaukee Railroad Company was a reorganization on a former foreclosure sale under a similar mortgage against the Detroit & Milwaukee Railway Company.

After their purchase and on the 26th day of October, 1878, these purchasers executed a statutory declaration in

accordance with the statute of 1859 (Comp. L. § 2373), whereby they declared their purpose of continuing to perform the duties and enjoying the franchises and immunities of the said railway corporation, and that they had provided the means for continuing and performing the duties and enjoying the franchises and immunities, and had provided suitable equipments for running and operating the road, and performing the duties incumbent on said corporation, and that the name by which they desired the said corporation to be called is the Detroit, Grand Haven & Milwaukee Railway Company. It was further declared that the purchasers had transferred to said corporation its railway track and appurtenances, and all the equipments necessary to run the same and perform its duties. This declaration was duly filed with the Secretary of State, and notice given to the Attorney General as required by law.

This conveyance was dated on the same day, and covered all the property and franchises.

The court below held that the corporation thus invested with these rights and franchises was not responsible for the debts of the Detroit & Milwaukee Railroad Company existing before the foreclosure.

It is claimed by plaintiff that by the method adopted by the purchasers to complete their organization, they continued the original corporation in force with all its former obligations.

The statute of 1859, entitled "An act in relation to mortgages against,--preferred stock in--and the delivery of goods by railway companies" (Laws 1859, p. 252) was passed to provide for the preservation under foreclosures of railway mortgages of the franchises of the mortgaging corporations. Until this law was passed there was no positive statute providing directly how mortgage sales should be made effective. Mortgages had been authorized of railroads, which necessarily involved the rights which could alone make them of any value, but the interests of purchasers were left to be worked out by implication, and whether

perfect or not, would necessarily give rise to some disputes as to their precise quality and extent. This statute provides that if the railway track and its appurtenances of any railway corporation are sold on foreclosure, the purchasers, if they provide suitable equipments for running the road and performing the duties incumbent on it by law, and transfer to it again its track and appurtenances and necessary equipments, and make the declaration therein provided (which is in substance like the one made in this case), may issue and hold new stock in the corporation to such an amount and of such denomination as they shall deem proper, but not more than the value of the corporate property, unless additional stock is subscribed by parties able to pay for it. Provision is then made for the cancellation of the old stock and the election of officers by the new holders, and the continuance of all the former charter rights and powers. But it was further declared that the corporation should not be liable for any debts except those subsequently contracted by it, saving however all prior mortgages and liens, and leaving all property not included in the foreclosure sale liable for existing debts.

It is impossible to read this statute without seeing that the obvious purpose is to put the railway and its appurtenances sold under mortgage under the entire control of the new stockholders and their representatives, freed from all debts not secured by lien or mortgage, under the same conditions and with the same rights as if they had been the original stockholders of a road which was not burdened with debt. The law commits no injustice to general creditors by giving to purchasers a clear title to the property which they have purchased and paid for. If property were sold to a creditor under execution, it would be absurd to allow another creditor to levy on it and sell it as if it had never been sold. A mortgage would be of no value whatever if its foreclosure did not carry a title free from all claims that were not specific liens of older date on the property cov-

ered. There is certainly no equity in giving unsecured debts a perpetual priority over those which are secured; and the statute of 1859 not only does not favor any such implication, but expressly declares the purchasers of the mortgaged premises, and the organization to which it is transferred, shall not be liable to old debts. If there is such a liability it can only be raised by holding that the statute under which the arrangement is made which assures the transfer of the corporate rights cannot prescribe the terms of such holding so as to produce such a result.

It would seem much more natural to hold that the new arrangement failed altogether, for it is impossible with any reason to declare that the whole conditions should not stand or fall together. The statute certainly contains no provision for any continued corporate dealing with the road under foreclosure except as an unencumbered property aside from prior liens. If the defendant in this case can be recognized as subject to suit under its present corporate name at all, it must be on the statutory terms.

The only direct purpose for which the Detroit & Milwaukee Railway Company was given any franchises at all was that a railway might be maintained from Detroit to Grand Haven. The company could not have complied with its corporate duties except in the management of that road. The road and such franchises as were within the legislative design were connected. The company could not have sold the road and its appurtenances and then gone into some other business or built another road. And a sale to a purchaser who could not exercise the corporate privileges could have been of no use. When the road was authorized to mortgage its property and franchises the mortgage was meant to be effectual, and it could only be made so by assuring to the purchaser in some way the use of the franchises. Undoubtedly a corporation may own property and assets which it can deal with as any private owner could, and which

are entirely independent of the ownership and management of its corporate business. It may have money in possession or due to it, and it may have other means acquired in payment of debts or otherwise, which are not intended to be used as a part of its road or appurtenances. But such property is incidental and needs no franchise to manage it. If the corporate existence remains after all of the property is disposed of which it was the entire purpose of the corporation existence to manage, it is the mere shadow of a name without any valuable significance. If the franchises pass with the mortgaged property, as they were meant to, all that is vital is thus transferred; and there is neither injustice nor incongruity in holding that the Legislature may treat the substance instead of the shadow as representing the corporate body. In the absence of legislation there might be some awkwardness in giving a precise legal definition to the new arrangement, but there could be none concerning its substantial rights. There could be no diminution of the privileges mortgaged without impairing the value of the mortgage itself as a legal security.

There would be manifest injustice in giving to the mortgagees property not covered by their contract, and this the statute has expressly exempted. The property not mortgaged is left subject to old obligations. No statutory method has been pointed out for dealing with such assets, if there are any. It is not necessary for us now to consider this. The statute has very explicitly declared that it cannot be done by treating the reorganized company as the immediate debtor of former creditors. It does not appear that any property is in hand which was not purchased on the foreclosure. If the company is in possession of any, the trust cannot be worked out by an action in common law form on the debt.

There was no error in so holding. The judgment must be affirmed with costs.

The other Justices concurred.

JOHN J. BAGLEY v. THE PEOPLE.

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Obstructing alleys.

Alleys are not public highways and cannot be governed by the same rules. They are for the accommodation of abutting owners, and the public has no general right of way through them.

Obstructing the use of an alley is not a public wrong, but if willful may cause such injury to individuals as will support an action for private remedy.

A platform built in an alley, at the rear of a store, for convenience in transferring goods cannot be assumed, as matter of law, to be an obstruction or a nuisance.

Certiorari to Recorder's Court of Detroit. Submitted April 14. Decided April 21.

COMPLAINT for encumbering alley. Respondent was convicted.

Wisner & Speed for plaintiff in certiorari. The reasonable and proper use of a way depends largely upon the local situation and upon public usage, *Clark v. Ice Company* 24 Mich. 512; *O'Linda v. Lothrop* 21 Pick. 292; *Gahagan v. B. & L. R. R.* 1 Allen 187; *Chamberlain v. Enfield* 43 N. H. 356; *Barling v. West* 29 Wis. 308; *Mathews v. Kelsey* 58 Me. 56; *Com. v. Passmore* 1 S. & R. 217.

F. G. Russell and *F. A. Baker* for defendant in certiorari. What constitutes an obstruction of a way is a question of fact, *Beecher v. People* 38 Mich. 289.

MARSTON, C. J. An alley can in no proper or legal sense be considered as a public highway, or be governed by rules relating thereto. While the city may have and undoubtedly has, certain limited rights therein for municipal purposes, yet the public have no general right of way over or through the same. It is designed more especially for the use and accommodation of the owners of property abutting thereon, and to give the public the same un-

qualified rights therein that they have in and to the use of the public streets would defeat the very end and object intended. *Paul v. Detroit* 32 Mich. 110.

Any obstruction to the right of passage through or to the proper use of any alley by those entitled thereto cannot therefore be considered as a public wrong. The grievance, if any, is an individual one, for which there may, for a willful or unnecessary obstruction, be a private remedy.

Neither do we think the court could assume as of course that the platform complained of was an obstruction,—certainly not a nuisance. On the contrary it may have been a very great convenience to the owner or occupant of the property, and have advanced the very interest and purpose such ways are intended to subserve, by affording means of expediting business done there, very materially, or at all events not causing any unusual inconvenience to the other occupants of the same block in their legitimate use of the alley.

The judgment must be set aside and the proceedings quashed.

The other Justices concurred.

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Two Hundred Thousand Feet of Logs v. John Sias.

Lien on logs—Defects in petition—Judicial notice.

A petition to enforce a lien on logs, under Comp. L. ch. 43, is fatally defective if it does not allege the jurisdictional fact that they are within the county where the suit is begun.

A petition to enforce a lien on logs alleged that the petitioner had run them into a certain boom. *Held* that the court could not take judicial notice that the boom was within the county where the suit was begun so as to cure the omission of the averment that the logs were within the county and therefore subject to the jurisdiction.

In proceedings to enforce a lien on logs the appearance and plea of a claimant does not waive previous jurisdictional defects in the proceedings, where the judgment is in form against the logs and there is no judicial determination that the claimant is the sole owner of them.

Error to Saginaw. Submitted April 15. Decided April 21.

PETITION to enforce lien on logs. Claimant brings error.

Brown & Leaton for plaintiff in error. A petition to enforce a lien on logs must show that the work for which it is claimed was necessary, *Ames v. Port Huron Log etc. Co.* 11 Mich. 147; *Chapman v. Keystone L. & S. Co.* 20 Mich. 367; *Dwinel v. Fiske* 9 Greenleaf 21.

Camp & Brooks for defendant in error.

MARSTON, C. J. Defendant in error claimed a lien upon the logs in question under and by virtue of the provisions of chapter 43 of the Compiled Laws, for his reasonable charges and expenses in breaking jams and running the same from the place where banked in Isabella county, into the Tittabawassee boom. The proceedings were commenced in Saginaw county, and in the petition filed it was alleged that petitioner did not know and was unable to ascertain who was the owner of said logs or who owned them at the time they were put into the river.

The statute (Comp. L. §§ 1662, 1663) gives the claimant the right to commence his action in any county in which the property or any part thereof may be situated. The petition contained no allegation that any of the logs were in Saginaw county. It did state that the petitioner ran the logs into the Tittabawassee boom, but contained no allegation that such boom or any part thereof was within the limits of Saginaw county, and the court could not take judicial notice of such fact.

A want of such allegation is fatal. Unless the logs or a part of the logs so run were situated in Saginaw

county at the time the petition was filed, the circuit court of that county could not have jurisdiction. A distinct allegation of such jurisdictional fact should have been made in the petition.

It is claimed, however, that after the petition had been filed, the appearance of William N. Brown as owner of the logs was entered, a plea of the general issue and notice of set-off and recoupment put in, and a trial had upon the merits, which constituted a waiver of any previously existing jurisdictional defects.

If after such appearance all subsequent proceedings had been in accordance with the practice of such court in actions of assumpsit, as the statute would seem very clearly to contemplate (§ 1663), then, in so far as a personal judgment against Brown would have been rendered, the position taken might be correct. Such was not the practice adopted, and the verdict and judgment rendered were not against Brown as owner, but in form against the logs.

There was no determination that Brown was owner; the fact that he appeared as owner would not be conclusive upon that question. Other persons might be interested as owners of the logs, and where the judgment rendered was one against the logs, the court must have had jurisdiction to render such a judgment, and such jurisdiction could not have been obtained from the appearance and waiver of one claiming to be owner. The court not having therefore acquired jurisdiction to proceed against the logs, the other questions raised become immaterial.

The judgment must be reversed with costs of both courts to Brown.

The other Justices concurred.

JAMES M. KENNEDY impleaded with ISAAC N. KENNEDY v. JOHN R. SHAW.

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Dower interest—Sufficiency of consideration—Distribution of estate.

A widow's interest in her husband's estate is a valuable proprietary interest, practically absolute, and subject only to the contingency of debts of the estate, and she can sell it whether administered or not.

Where one who bargains for the interest of an heir, agrees also to pay the debts of the estate, he gets the full benefit of the transfer of the interest.

The sufficiency of the consideration for an honest bargain cannot be inquired into if there was any consideration of value which was not separable at the time into specific values.

An administrator cannot reclaim property taken by distributees of the estate, unless it is needed for debts.

Error to Isabella. Submitted April 15. Decided April 21.

ASSUMPSIT. Defendant James M. Kennedy brings error.

Brown & Leaton for plaintiff in error.

Hopkins & Devereaux for defendant in error.

CAMPBELL, J. Shaw recovered judgment as indorsee of two promissory notes, amounting together to $725, made by James M. Kennedy and Isaac N. Kennedy to the order of Samantha Kennedy. The defense interposed was want of consideration, based upon this state of facts:

The payee was widow of Robert Kennedy, a brother of the makers, who died in September, 1872. At the time of his death he owned a third interest in a portable saw-mill, and had some other personal property and furniture. He left no children. In January, 1873, an administrator was appointed, but an agreement was made among the heirs to settle up the estate among themselves, and the administrator resigned. Isaac N. Kennedy was to pay the debts of the estate and take the property

and give the widow $725 for her interest. The widow transferred all of her interest, and took in pay therefor the notes in question.

The mill was owned in partnership with other persons. The terms of the partnership, if it was in fact a partnership, are not found. The estate was all in personalty. There was a mistake concerning the extent of Robert Kennedy's interest in the partnership property, which was supposed to be two-thirds and not one-third. The administrator took part in bringing about the sale, and was present at it and allowed the purchaser to take possession of the property. The widow gave the administrator a discharge of all claims against the estate on behalf of himself and all others. The purchaser had examined into his brother's interest, and satisfied himself, and claimed to know what it was. There was no fraud in any one.

In 1875 one Brown was appointed administrator *de bonis non*, but it does not appear any one asked for his appointment, and he never reported. He undertook to sell Robert's interest to an uncle, one Samuel Kennedy, for $200, the mill having burned down. The other partners never assumed any control over Robert's interest, and Isaac remained in possession until the mill was burned.

We have stated most of the facts found, although many of them are of no importance. The defense is absence and failure of consideration on the ground that the partnership owned the joint property and the administrator the rest, and no title passed.

The parties knew precisely what they were doing, although there may have been a mistake as to the extent of Robert's interest in the mill. The interest of the widow was a valuable proprietary interest, which she could sell, whether administered or not. At least a portion of the property she was entitled to against every one, and it was not subject to debts. But whether coming to her directly or through the hands of the administra-

tor, all of her interest was practically absolute, subject only to the contingency of debts, and as Isaac undertook to pay these, he could get the full benefit of the transfer. As a matter of fact the administrator consented to the delivery, and could not thereafter reclaim the property unless needed for debts, and it could only be so needed on Isaac's own default. See *Proctor v. Robinson* 35 Mich. 284; *Sutphen v. Ellis* 35 Mich. 446; *Eberstein v. Camp* 37 Mich. 176.

If there was any consideration of value which was not separable at the time into specific values, there can be no inquiry now into its sufficiency. Parties place their own value on their purchases, and unless a bargain is rescinded, they must pay what they agree to pay. These notes were for a valuable consideration. The contract was honest and was never rescinded or abandoned. Even if it appeared, as it does not appear, that Isaac Kennedy did not get property worth all he paid for it, there is no ground on which he can now be relieved wholly or in part from his obligation, and his co-promisor stands on the same footing.

The judgment must be affirmed with costs.

The other Justices concurred.

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82 577

THE VILLAGE OF MOUNT PLEASANT v. JAMES N. VANSICE.

Village license ordinances—Misdemeanors.

The General Village Incorporation Act does not empower village councils to ordain misdemeanors.

Authority given to a village council "to license saloons, taverns and eating houses" does not authorize it to license the sale of liquors.

A village ordinance making provision for licensing the sale of liquors, adopted under the authority of a charter granted at a time when the Constitution forbade the enactment of license laws, is void, and the subsequent repeal of the constitutional prohibition does not make it valid.

Error to Isabella. Submitted April 15. Decided April 21.

COMPLAINT under village ordinance. Judgment was given for respondent.

Brown & Leaton for plaintiff in error. The Legislature can delegate to a municipal corporation its authority to control traffic in liquors, *Flint & Fentonville P. R. Co. v. Woodhull* 25 Mich. 99; *Hoyt v. Jeffers* 30 Mich. 181; *Attorney General v. Com. Council* 29 Mich. 108; *Whipple v. Saginaw Circ. Judge* 26 Mich. 342; *Perdue v. Ellis* 18 Ga. 586; *State v. Gurney* 37 Me. 156; *East St. Louis v. Wehrung* 46 Ill. 392; *Goddard v. Jacksonville* 15 Ill. 588; *Gardner v. People* 20 Ill. 430; *Pekin v. Smelzel* 21 Ill. 464; *Strauss v. Pontiac* 40 Ill. 301; *Bennett v. People* 30 Ill. 389; *Mason v. Trustees* 4 Bush 406; *Markle v. Akron* 14 Ohio 586; *City Council v. Ahrens* 4 Strobh. 241; *Morris v. Rome* 10 Ga. 532; *Com. v. Luck* 2 B. Mon. 296; *Independence v. Noland* 21 Mo. 394; *State v. Clark* 28 N. H. 176; *Clintonville v. Keeting* 4 Den. 341; *Wightman v. State* 10 Ohio 452; *State v. Noyes* 30 N. H. 279.

A. Stout for defendant in error.

GRAVES, J. The defendant was fined fifty dollars and costs by a justice of the peace, and ordered to be imprisoned sixty days in case of non-payment, for the violation of an ordinance of the village making provision for granting licenses for the sale of spirituous and intoxicating liquors, and ordaining that violations should constitute misdemeanors punishable by fines, and in case of non-payment, by imprisonment. He appealed, and the circuit judge directed an acquittal. The village alleges error.

The incorporating act was approved April 16, 1875 (Local Acts of 1875, p. 533), and it provided that, in all things not therein otherwise regulated, the village should be governed by, and its powers and duties be defined by, the general act granting and defining the powers and duties of incorporated villages, approved April 1, 1875.

The incorporating act being silent as to the nature and extent of the power conveyed to enact ordinances, the authority depends entirely on the general act. This is not disputed. But the position taken on the part of the village is that, by the seventh subdivision of the first section of chapter seven of that law (Pub. Acts of 1875, p. 68), the Legislature made provision quite broad enough for the ordinance in question, and that the inhibition in the Constitution of legislation to authorize the licensing the sale of ardent spirits having been removed, the provision of said section seven is now imbued with sufficient force to warrant the ordinance.

The court is not able to assent to this claim. In the first place the general act referred to nowhere assumes to delegate the power to a village council to ordain misdemeanors. But this is not all. The provision cited as authority for the ordinance either purports to have given the power or does not, and if it does not, the ordinance is confessedly without foundation, and on the other hand, if it does, and is in that application therefore void, the same result follows.

In regard to the first alternative the point is considered clear. The power given is "to license saloons, taverns and eating-houses." Nothing is said about permitting the sale of ardent spirits, and we cannot impute to the words any covert or hidden sense. It is not possible to contend that saloons, taverns and eating-houses are, in contemplation of law, inseparable from the sale of ardent spirits. The course of legislation for many years proceeded on the idea of a distinction, and the courts recognized it. Moreover, when the general law of 1875 was passed the Legislature was forbidden to make laws authorizing the grant of license, and it would be a rash thing to impute to it a design to do so on the strength of such language as is used in this subdivision.

The second alternative will justify only a word or two. If the Legislature had the purpose to confer the power, and designed that the terms used should have the mean-

ing now claimed for them, the design was in conflict with the Constitution as it then existed, and the sense and scope of the provision were so far null and void. They never were of any force, and were as though they had not been expressed or involved in the language, and the words were left to carry a sense in harmony with the Constitution. The meaning claimed not having been enacted in the passage of the law, because the Constitution forbade it, it has not become a law merely through a change of the Constitution and the lapse of time. *Dewar v. People* 40 Mich. 401; *Ludlow v. Hardy* 38 Mich. 690.

There is no error and the judgment is affirmed with costs.

The other Justices concurred.

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84 384

The Star Line of Steamers v. Alfred H. Van Vliet.

Corporations—Action by holders of majority of stock.

A resolution appointing a committee to investigate the affairs of the corporation, if adopted by the holders of a majority of stock at a regular meeting, is a valid act of a corporation organized under Comp. L., ch. 83, to engage in commerce and navigation.

The management of a corporation belongs generally to the directors, but the holders of a majority of stock can act where it is necessary to investigate the management.

Where the records of a corporation show that a resolution was adopted by the stockholders, it may be presumed, unless the contrary is shown, that it was adopted by the holders of a majority of stock.

Power conferred upon a committee to investigate the affairs and accounts of a corporation, implies everything necessary to execute it, such as employing an accountant and obtaining clerical assistance for him.

Error to Superior Court of Detroit. Submitted April 16. Decided April 21.

ASSUMPSIT. Defendant brings error.

Moore, Canfield & Warner for plaintiff in error. Stockholders of a corporation have no authority to contract or appoint by a resolution a committee authorized to contract therefor, *McCullough v. Moss* 5 Den. 567; *Conro v. Port Henry Iron Co.* 12 Barb. 27; *Gashwiler v. Willis* 33 Cal. 11; *Cammeyer v. United German Churches* 2 Sanf. Ch. 186; the stockholders cannot interfere with the directors in the management of the affairs of the corporation, 1 Redf. on Railways 87, n. 1; Ang. & Am. Corp. § 279; Green's Brice's Ultra Vires 390, n.; where several persons are appointed to execute a power they must all join in its execution, *Scott v. Young Men's Society* 1 Doug. (Mich.) 149; Story on Agency § 139 *a*.

E. J. Ensign for defendant in error. Authority to employ carries with it authority to fix compensation or to do any act necessary to the purpose of the employment, Story on Agency § 58; *Anderson v. Coonley* 21 Wend. 279; *Shelton v. M. D. T. Company* 59 N. Y. 258; *Nelson v. H. R. R. R. Co.* 48 N. Y. 498; *McAlpin v. Cassidy* 17 Tex. 449; the stockholders are the supreme power in a corporation and can bind it in business, Field on Corporations 203; Green's Brice's Ultra Vires 46, 554.

GRAVES, J. The Star Line of Steamers is a corporation organized under chapter 83 of the Compiled Laws, and at a meeting of the stockholders two of their number, Messrs. Toulmin and Ketchum, were appointed a committee to employ two expert accountants to investigate the affairs, books and accounts of the company, and report the results. Mr. Toulmin engaged the defendant in error and agreed that his compensation should be graduated by allowing a certain sum per hour for himself and a certain other amount for an assistant. At least such seems to be a fair construction of the arrangement, and it is the construction which the court below put upon it. The company were aware he was prose-

cuting the business, and made no objection, and Mr. Ketchum expressed his assent and concurrence by joining with Mr. Toulmin in a written approval and acceptance of what had been done under the employment. The company refusing to pay, the defendant in error sued and was allowed to recover the price promised.

Errors are assigned on several exceptions to evidence, but none are considered of sufficient merit to require discussion.

The court assumed that the resolution appointing the committee was a valid act of the corporation, and this is excepted to. The court did not err. The resolution was shown from the records of the corporation, and there was no evidence tending to impeach it. It purported to be a legal expression of the sense of the body of stockholders, and so stood upon the corporation records.

Generally, no doubt, a stockholders' meeting would not be authorized to contract on such subjects, the ordinary management being with the directors; but as the purpose here was in part at least to investigate what had been done under the superintendence of the directors, it was competent for the holders of a majority of the stock to do what was done. Comp. L., § 2682. There is no ground on which the corporation can urge an intendment against the validity of the resolution, and arbitrarily deny its regularity and force. In view of the facts presented every presumption is the other way. There was no offer of proof that the stockholders present at the meeting did not hold a majority of the stock, and there was some evidence tending to show that the directors were aware of the proceeding and acquiesced.

The court left it to the jury to say whether Ketchum, the second member of the committee, concurred in Van Vliet's employment, and they found that he did. There was evidence warranting this submission; and not only so, the proposition scarcely admitted any other answer than the jury gave.

The power conferred on the committee implied a right

to agree upon the price to be paid for the service. The committee were to employ experts. The end thus required implied authority to use the proper means, and it could not have been supposed that competent accountants would be found to enter on such an undertaking without some understanding concerning the rate of compensation. The arrangement for clerical assistance was reasonable. If none had been made the defendant in error no doubt might have hired a clerk, and no reason is perceived why it was not proper to adjust the compensation with an eye to such help. Without it the expense to the company would probably have been greater still. It is not worth while to discuss other points. The case was fairly submitted and no ground is seen for disturbing the result.

The judgment should be affirmed with costs.

The other Justices concurred.

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JAMES GAMBLE, DAVID A. DUNCAN AND FRANK A. BREWER v. THE CITY OF EAST SAGINAW.

Illegal assessments—Certificate of valuation—Tax-sale.

In a bill to remove a cloud caused by a tax-sale, an averment that the assessor did not make any legal or valid assessment, does not point out a specific defect, and an averment that he had no right, authority or jurisdiction to assess the amount actually assessed, is not an averment of fact, and gives no information as to the real ground of complaint.

The supervisor's certificate of valuation attached to an assessment roll, cannot be contradicted in any proceeding to enforce the tax.

Dismissal of a bill to clear a title clouded by tax-sales does not prevent a defense at law against the tax-titles.

Leave, on dismissing a bill, to sue again in equity should not be granted without some equitable reason, and is properly denied where the amount involved is trifling and there is a legal remedy.

Where complainant in a bill to remove a cloud caused by a sale for a city tax had been a city official connected with the tax business when it was levied, and had bought afterwards and expressly subject thereto, he may be presumed to have been allowed to retain enough of the consideration to pay it, and has no equity to entitle him, on dismissal of his bill, to have leave to file another.

Appeal from Saginaw. Submitted April 16. Decided April 21.

BILL to remove cloud from title. Defendant appeals.

Wisner & Draper for complainants.

Lawson C. Holden and *Wm. L. Webber* for defendant.

CAMPBELL, J. Complainants filed their bill to remove what they alleged to be a cloud upon their title to certain lands bid in by the defendant for city taxes of 1877 and 1878.

The defects set out in the bill specifically consisted of certain changes in the rolls, which were not proved. But testimony was brought in to show that taxes were levied for some purposes without regular authority, that larger amounts were charged than the fair proportion of the lands, and some illegal charges were made, and irregular forms of notice. The whole amount of taxes for which the sales were made was between twelve and thirteen hundred dollars. The amount in excess is claimed to have been somewhere from $15 to $20.

The only tangible averments in the bill on which proof was introduced were very few. The averment that the assessor did not make any legal or valid assessment in either year does not point out any specific defect. The one sought to be proved was that the lands were not valued at their true value. But it is not claimed there was not a formal certificate that they were so valued, and where the proper certificate appears on the roll, it cannot be contradicted in any proceeding to enforce the tax. *Blanchard v. Powers* 42 Mich. 619. The averment

that the assessor had no right, authority or jurisdiction to assess the lands for the amount he did assess on them is not an averment of fact, and presents no information to the defense concerning the real ground of complaint. There are no other averments which could support the complaint.

The bill, not presenting any intelligible cause of grievance which has been made out by proof, must be dismissed. Complainants, however, desire that if dismissed it should be without prejudice.

Its dismissal cannot, of course, prevent any defense at law against the tax-titles. But to entitle a party who has failed in equity to ask leave to begin over again, there should be some equitable reason for the indulgence. It does not seem to us that any such reason exists. There are some reasons to the contrary. We do not care to examine into the force of the irregularities set up. There may possibly be legal objections to some of the taxes. But the amount, if any, in excess of what might have been legally collected is so small that the expense of chancery proceedings ought not to be twice inflicted because of it. Moreover, one of the complainants was a city official connected with the tax business when these taxes, or some of them, were levied. The complainants bought the land after the taxes had become charged and took expressly subject to them, and it may therefore be presumed were allowed to retain enough of the consideration to pay them.

We think, therefore, that under all the circumstances there is no very good reason why they should not be left to their legal remedies.

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

The other Justices concurred.

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THE KEYSTONE LUMBER & SALT MANUFACTURING CO. v. GEORGE E. DOLE.

Contract—Apportionment—Damages for non-performance.

Exceptions to a charge for misstating the testimony should indicate in what respect the statement was erroneous.

An express contract to pay a certain sum per thousand for running certain logs, and for floating a part of them into the main stream, is not divisible and cannot be apportioned, part to running the logs and part to supplying the water; and in an action on the contract the measure of recovery would be the full contract price as agreed less any damages from breach of any part of the contract.

Where a contract is express no provision can be implied.

Failure to perform a contract to furnish water for floating logs is not excused by an accident whereby the dam was broken, if the contract does not provide for accidents, nor if it is a continuing contract and the dam can be repaired in time for substantial compliance.

Error to Saginaw. Submitted April 16. Decided April 21.

ASSUMPSIT. Defendant brings error.

Scofield & Webster for plaintiff in error. Where the performance of a contract is prevented by inevitable accident, damages are not recoverable, *Taylor v. Caldwell* 3 B. & S. 826; *Dexter v. Norton* 47 N. Y. 62; *Wolfe v. Howes* 20 N. Y. 197; *Clarke v. Moore* 3 Mich. 55; *Cuddy v. Major* 12 Mich. 368; *Mich. Central R. R. v. Burrows* 33 Mich. 6; damages for work done on a contract partially performed are measured by the rate in the contract less the damages from failure of full performance, *Howell v. Medler* 41 Mich. 641; *Allen v. McKibbon* 5 Mich. 449; *Wildey v. School District* 25 Mich. 419; *Wilson v. Wagar* 26 Mich. 452; *Hosmer v. Wilson* 7 Mich. 294; *Bragg v. Bradford* 33 Vt. 35; *Kearney v. Doyle* 22 Mich. 294.

Wisner & Draper for defendants in error.

MARSTON, C. J. Five errors are assigned in this case. All of them cannot be considered, as the exceptions taken do not support them. The exceptions are as follows:

"Defendant by his counsel excepted to the charge on the ground that it was a misstatement of the testimony and calculated to mislead the jury.

"And he also excepted to the charge as not a correct statement of the facts admitted in the case."

Thus far the exceptions are general and to the whole charge. Counsel should in the exceptions taken have pointed out in what respect the statement of facts as embraced in the charge was erroneous. Had such a misstatement been made, and the attention of the court directed thereto, we cannot doubt but that prompt correction would have been made. There are some peculiarities about this case which perhaps may throw some light upon one of the principal questions raised.

Dole, who was plaintiff below, sought to recover the agreed price for running, during the spring of 1879, a quantity of logs for the Keystone Company. To this action a plea of the general issue with notice of set-off was interposed. The set-off was the agreed price for certain logs run by the Keystone Company in the spring of 1878 for Dole. To this claim Dole on the trial did not dispute the running of some logs under a contract to pay therefor the price claimed, but he also claimed that there were certain of the same lot of logs in Johnson creek; that the Keystone Company, from a dam therein above these logs, which that company controlled, agreed to furnish water to float these logs out of the creek into the main stream; that in consequence of a break in the dam the Keystone Company did not furnish water, and that he was thereby delayed and put to great expense in running these logs out of the creek, and that defendants did not run such logs as they had agreed; and Dole also gave evidence tending to show that it was only worth one-half the contract price for the Keystone Company to run his logs in the spring of 1878, but that he

agreed to pay the larger sum because of the agreement to furnish water.

The court charged the jury, if they found as a fact that it was worth fifty cents a thousand, the agreed price, that amount should be allowed the Keystone Company. If worth only twenty-five cents, then to allow defendant at that rate, *and against this amount* allow the plaintiff Dole his damages by reason of the failure of defendant to furnish water.

This was very clearly erroneous. The contract was express to pay fifty cents a thousand to the Keystone Company for running the logs, and in addition thereto furnishing a supply of water for a certain other purpose. This contract was not divisible. A portion of the agreed consideration could not be applied to running the logs and another part to the supplying of water, and it being express none could be implied.

Whether the Keystone Company fully performed the contract in all respects or not, yet they would be entitled to recover the agreed contract price for the logs run, less any damages the other party sustained on occasion of the breach.

In this case the effect of the charge was to charge the defendant double damages for not supplying the water, by withholding the consideration therefor, and allowing plaintiff his damages in addition thereto.

It was also a material question whether the Keystone Company could be held responsible for a failure to supply water because of the break in the dam, and authorities were cited that an inevitable accident, occurring without negligence or want of care, would be an excuse.

Undoubtedly this would be so in many cases. Yet I am of opinion this case does not come within the rule. The duty to furnish water was not cast upon the defendant by law, but by its own contract, and such accidents were not guarded against. The contract within certain limits might be considered as a continuing one.

The company might with reasonable diligence have repaired the dam, and thus supplied the water, if not at the time agreed, shortly after, but it does not appear that any effort in that direction was made.

For the error pointed out the judgment must be reversed with costs, and a new trial ordered.

The other Justices concurred.

MARTIN STUPETSKI v. TRANSATLANTIC FIRE INSURANCE CO.

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Insurance—Vacancy of premises.

A clause avoiding an insurance policy in case the premises should "become vacant or unoccupied," did not apply where a man and his family left home for twelve days to visit a sick daughter, and engaged a person to go to the house daily to look after it.

It would be burglary to break into, and arson to burn a house, during the temporary absence of the occupants.

Error to Superior Court of Detroit. Submitted April 16. Decided April 21.

ASSUMPSIT on insurance policy. Plaintiff brings error.

John C. Donnelly for plaintiff in error. Temporary absence from a house is not such abandonment as will avoid a fire insurance policy, *O'Brien v. Commercial Ins. Co.* 38 N. Y. Supr. Ct. 517; *Dennison v. Phœnix Ins. Co.* 52 Iowa 457; *Phœnix Ins. Co. v. Tucker* 92 Ill. 64.

Morgan E. Dowling for defendant in error, cited as to the effect on a fire insurance policy of vacating the premises, *Wustum v. City Fire Ins. Co.* 15 Wis. 138; *Harrison v. City Fire Ins. Co.* 9 Allen 232; *Amer. Ins. Co. v. Padfield* 4 Ins. L. J. 893; *Keith v. Quincy F. Ins. Co.* 10 Allen 228; *Thayer v. Ag. Ins. Co.* 5 Hun 566; *Ætna Ins. Co. v. Burns* 5 Ins. L. J. 69; *N. A. Ins. Co. v. Zænger* 63 Ill. 464; *Ætna Ins. Co. v. Meyers* 63 Ind. 238;

Whitney v. Black River Ins. Co. 72 N. Y. 118; *Walsh v. Hartford F. Ins. Co.* 73 N. Y. 5; *Aurora F. Ins. Co. v. Kranich* 36 Mich. 294.

CAMPBELL, J. Plaintiff sued defendant on a policy of insurance, for the destruction of his dwelling and contents by fire. The policy was by one of its conditions made void if the house should "become vacant or unoccupied" without assent of the company.

The fire which destroyed the property was on September 4, 1879. Plaintiff used the premises as his own dwelling. About ten days before the fire he received a telegraphic dispatch from South Bend, Indiana, announcing that his daughter, who lived there, was dangerously ill, and at the point of death. He with his wife and another daughter at once went there, intending to return, and he did return the next day but one after the fire. A son who was not boarding at home was directed to and did visit the house daily to look after the house and feed the stock.

The court below instructed the jury that this was enough to require the house to be regarded as vacant and unoccupied, and directed a verdict for the defendant.

There is not much authority upon this precise form of condition, but we think it must be construed as it would be usually understood by ordinary persons reading and acting on it. We think it would not convey to an ordinary mind the idea that a house is vacant or unoccupied when it has an inhabitant who intends to remain in it as his residence, and who has left it for a temporary purpose. If the phrases were used in their strict legal sense, no one would imagine that the tenant was not such an occupant as would be liable to the responsibilities attached by law to occupants, or that there was such a vacancy of possession as would suspend possessory rights. It would be burglary to feloniously break and enter the house, and arson to maliciously burn it. There may be less occasion to care for a house in which no

one lives than for one tenanted, but a person temporarily absent will usually take some pains to have his premises kept under oversight, and in the present case such provision was made for the domestic animals as well as for the house itself. It would we think be regarded as singular doctrine to hold that families leaving their houses on excursions or other temporary occasions cease to occupy them.

In *Cummins v. Agricultural Insurance Co.* 67 N. Y. 260, it was held that a removal by a son and his family to his father's house, in the neighborhood of his own, to remain with his mother in his father's house while she needed their company, but with the intention of returning to his own house, which was not dismantled, was not a vacating by removal of the son's house, although the absence actually continued about three months. It was also held in *Whitney v. Black River Ins. Co.* 72 N. Y. 118, that a saw-mill lying idle for several weeks for lack of water or logs, did not thereby cease to be occupied during the intervals, and in discussing the meaning of the terms, reference was made to a school-house in vacation as not ceasing to be occupied for school purposes.

It is not safe to resort to extreme definitions beyond the usual understanding. We think in the case before us the premises did not become vacant or unoccupied, if left for the purpose testified to, and that it was error to charge the jury as was done here.

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

The other Justices concurred.

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43	376
95	436
43	376
100	445
43	376
127	530

DANIEL C. TILDEN AND THOS. M. CROCKER, IMPLEADED ETC. v. HENRY D. BARNARD, ASSIGNEE OF WM. D. MORTON.

Promissory note—Signature—Bona fide holder.

The addition "Vestryman, Grace church," to each of the names attached to a promissory note does not make it any thing but the note of the individuals signing it, if it does not purport to bind the corporation.

Where the cashier of a bank is one of the makers and payees of a note, the bank cannot take it as a *bona fide* holder without notice.

A finding that a note was transferred before maturity for a valuable consideration and that at the time the transferee had no knowledge of the details of its origin, cannot be regarded as equivalent to a finding that he was a *bona fide* holder for value.

Error to Macomb. Submitted April 16. Decided April 21.

ASSUMPSIT on the following promissory note:

$367.09. MT. CLEMENS, MICH., May 10, 1875.

Ninety days after date we promise to pay to the order of Daniel C. Tilden, cashier, three hundred sixty-seven 09-100 dollars at the First National Bank, with interest at ten per cent per annum, after maturity, value received.

DANIEL C. TILDEN, vestryman, Grace church.
W. C. TENNANT, " " "
GEO. R. LAW, " " "
T. M. CROCKER, " " "
J. R. TRUFANT, " " "

Endorsed, "Pay W. D. Morton & Co. or order."

DANIEL C. TILDEN,
WM. D. MORTON & Co. *Cashier.*

The case was heard by the court without a jury and judgment was given for plaintiff. Defendants Tilden and Crocker bring error.

Edgar Weeks and *H. B. Hutchins* for plaintiffs in error. A church is liable on a note given by the vestrymen as such, *Brockway v. Allen* 17 Wend. 40; *Rice v. Gove* 22 Pick. 158; *Carpenter v. Farnsworth* 106 Mass. 561; *Chipman v. Foster* 119 Mass. 189; *Babcock v. Beman* 1 Ker.

200; *Shelton v. Darling* 2 Conn. 435; *Hovey v. Magill* id. 680; *Magill v. Hinsdale* 6 Conn. 469; *Johnson v. Smith* 21 Conn. 627; *Long v. Colburn* 11 Mass. 97; *Ballou v. Talbot* 16 Mass. 460; *Despatch Line of Packets v. Bellamy Mfg. Co.* 12 N. H. 229; *Farmers & Mech. Bank v. Troy City Bank* 1 Doug. (Mich.) 457; *Emerson v. Providence Hat Co.* 12 Mass. 237; *Alexander v. Sizer* L. R. 4 Ex. 102; *Means v. Swormstedt* 32 Ind. 87; *Gaff v. Theis* 33 Ind. 307; 1 Pars. N. & B. 168–170; Ang. & Ames on Corp. §§ 293–6; Story on Agency §§ 154–5; Story Prom. Notes § 69.

James B. Eldridge and *Barbour & Rexford* for defendants in error. The addition of words indicating official position to the signature to a promissory note is not enough to bind any one but the individual, *Hills v. Bannister* 8 Cow. 32; *Fiske v. Eldridge* 12 Gray 474; *Bass v. O'Brien* id. 477; *Haverhill Mutual Fire Ins. Co. v. Newhall* 1 Allen 130; *Taft v. Brewster* 9 Johns. 334; *Powers v. Briggs* 79 Ill. 493; *Barker v. Mech. F. Ins. Co.* 3 Wend. 94; *Moss v. Livingston* 4 Comst. 208; Daniell Neg. Inst. § 403; Chitty on Bills 37; Story Prom. Notes § 70.

MARSTON, C. J. The court below was undoubtedly correct in so far as the note sued upon was held to be the note not of the church or corporation but that of the individuals who signed it. The promise was not made by the corporation, and the instrument did not pretend to bind the corporation, and the addition to the names of the persons signing would not change the character of the agreement.

The court below did not find that the present plaintiff was or claimed through a *bona fide* holder. On the contrary we think it does appear that if the note was at any time negotiated to the First National Bank, of which Tilden, one of the makers and payee of the note, was cashier, the bank was not a *bona fide* holder. The finding is that the note went into the books of Tilden & Co.

or of the First National Bank as the note of Grace church. It may have been entered upon the books, if it ever was, for collection only.

The finding that it was transferred to Morton before maturity for a valuable consideration, and that at such time Morton had no knowledge of the details of the origin of the note, is, to say the least, somewhat ambiguous, and we are of opinion is not equivalent to finding Morton a *bona fide* holder for value. The court does not in express terms find Morton a *bona fide* holder, nor does he find the facts necessary to constitute him such. A transfer of the note before due for a valuable consideration is not sufficient.

The same defense is therefore open to these defendants that would have been if the action had been brought by the payee Tilden. The church was owing Tilden upon a past due indebtedness to the amount of this note which was undoubtedly given upon the supposition that it was the note of the church given for such indebtedness. The indebtedness of the church to Tilden was neither extended nor canceled nor changed in the slightest degree by the giving of this note. In so far as these parties were concerned there was no consideration to support the giving of it. No benefit accrued to them, nor even to the church they thought they were acting for. No injury was sustained from the giving and acceptance of this note by Tilden. His claim against the church remained in full force and in no way affected by the transaction. His legal rights were the same after as before. The case is too clear to require farther argument or citation of authorities.

The judgment must be reversed with costs of both courts.

The other Justices concurred.

The Davis Sewing Machine Company of Watertown New York v. Emeline Barnard et al.

Equities based on insanity.

A bill to set aside a deed as against a subsequent bond, on the ground that it was made by a person who was insane at the time, and continued so until he died, establishes no equity greater than that of the grantee, and should be dismissed.

A bond made by an insane person is void and a claim thereon should not be allowed against his estate, but while a probate decree allowing it might conclude the estate from questioning the bond, it cannot estop the widow from resisting a proceeding in aid of an execution thereon by a bill to set aside for the grantor's insanity a prior deed made to her by her husband.

Appeal from Eaton. Submitted and decided April 22.

Bill to set aside deed. Defendants appeal.

A. E. Cowles for complainant.

McPeek & Tinkham for defendants.

Per Curiam. This is a bill to set aside a conveyance of lands made by Daniel Barnard to Emeline Barnard, his wife, in August, 1870, on the ground that the grantor was insane at the time he made it. The supposed equity of complainant arises out of a bond executed by Daniel Barnard to complainant in December, 1871. Daniel Barnard died in June, 1873, and complainant has proved a claim under the bond against the estate. There being no assets of the estate to pay the claim, the bill is filed to reach this land.

It is claimed by complainant that Daniel Barnard was insane when the deed was given, and continued to be so until his death. If this was so, the bond was void as well as the deed. But complainant seeks to avoid this conclusion by relying upon the adjudication in the probate court as determining finally and conclusively the

right to recover the amount awarded. But that adjudication is shown by the bill itself to establish no equity in favor of complainant as against this deed. It was upon a void demand, and ought not to have been rendered as it was. Complainant by means of it may have concluded the estate from questioning the bond, but a technical estoppel cannot be relied upon as raising an equity against Mrs. Barnard. If the bond was valid, the deed was, and if the deed was invalid, Mrs. Barnard has as good an equity to retain it as complainant has to set it aside. In any view that can be taken of the facts, the bill should be dismissed.

Decree reversed and bill dismissed with costs.

The other Justices concurred.

EX REL. DAVID A. RICE, PROSECUTING ATTORNEY v. EPHRAIM SHAY, COUNTY TREASURER.

Location of county seat and county offices.

The legislature in organizing a county may provide for the original location of the county seat by commissioners named in the act.

Where a county seat has been located according to law, it remains where it was established until lawfully removed.

Mandamus lies to compel the county treasurer to keep his office at the county seat.

Mandamus. Submitted April 9. Decided April 28.

D. A. Rice and *M. V. & R. A. Montgomery* for relator.

Sawyer & Bishop, Fallass & McIntyre and *Hughes, O'Brien & Smiley* for respondent. Legislative power to locate county seats cannot be delegated, Cooley's Const. Lim. 116; *Shumway v. Bennett* 29 Mich. 451; *People v. Collins* 3 Mich. 343; *Maxwell v. Bay City Bridge Co.* 41 Mich 453; *Barto v. Himrod* 8 N. Y. 483.

GRAVES, J. The Legislature in 1869 passed an act, which took effect March 30th, to organize the county of Wexford (3 Session Laws 1869, p. 1085, Act 386), and by the ninth section provided for locating the county seat. The provision reads as follows:

"Sec. 9. The county seat of said county shall be and is hereby located in township twenty-four north, of range twelve west, at or near what is called Manistee bridge; and Henry J. Devoe, Isaac U. Davis, and E. C. Dayhuff are hereby appointed commissioners to locate the same. If said commissioners, or any two of them, shall fail to locate said county seat within one year from June next, then the board of supervisors and county clerk of said county shall locate the same."

May 17, 1869, the said commissioners made the location in accordance with the statute, and there has been no change whatever so far as the record shows. The relator is the prosecuting attorney and the respondent the county treasurer, and the latter keeps his office at his residence in the village of Haring, some twenty-five miles from the point designated, and refuses to keep his office thereat.

The application of relator is for a *mandamus* to compel him to do so. He sets up, by way of cause against the application, that the public opinion of the county has always been divided upon whether the county seat was actually established in point of law at the place designated, and that there has never been any general acquiescence; that the county business has been scattered and not concentrated there, and that the place has been more ignored as the county seat than respected; that five meetings of the board of supervisors have been held there, but as he is informed and believes, they have established county jails at two points several miles therefrom, and that the sessions of the circuit court are held at two places considerably removed. But the main objection raised is that the Legislature had no power to invest commissioners with authority to select the immediate spot for the county seat.

If the place was designated according to law, the

officials of the county and the people of the county are bound by it until a change is lawfully effected. Any other course would end in anarchy.

We have no doubt whatever of the validity of the provision in question of the act of 1869. It will not be denied that the original designation of a county seat pertains to the power to organize the county. The provisions of the Constitution and our system of internal government presuppose the existence of a county seat as one of the essential features of county organization, and the Legislature is the proper authority to provide originally for its establishment. It would not be easy to find any other authority. After it is once established through the agency of the Legislature, the general provisions for removal attach, and the people may decide for themselves.

The original location is, therefore, not necessarily permanent. But the Legislature in executing its duty in this regard, which is administrative rather than strictly legislative, must act upon practical views and not hair-splitting theories. It is not bound to proceed in a body to make a personal view, or required to send a committee of its own members to see and report. It may, as was done in this case, prescribe the site approximately, and then leave it to commissioners of its own selection to fix upon the exact spot. Such has been the usage ever since the State has had existence.

The numerous roads laid out under State authority have been established on the same principle, and the original seats of the old counties were mostly so fixed. The same course has been pursued in regard to many of our State institutions and State buildings, and the site of our present capital was so determined. We are of opinion that according to the record before us the county seat of Wexford was lawfully established at the place designated by the commissioner, and that inasmuch as no change has been made, the provision of the Constitution applies which requires the county treasurer

and certain other officers to hold their offices at the county seat, and it is the duty of the respondent to obey. Const. art. x, § 4.

The writ must issue, but no costs are allowed.

The other Justices concurred.

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EDWARD S. SNOW v. JOHN S. NOWLIN.

Land-trade—Fraudulent statement of value—Good faith—Interest as damages.

In an action for misrepresenting the value of land to a purchaser, it was *held* that the exclusion, on plaintiff's cross-examination, of the question whether he had not tried to sell or trade the land after visiting it, was not necessarily prejudicial, in the absence of something to show its materiality, since such an offer to sell may have been under circumstances that would not tend to show that he ratified the sale to himself.

Where one who complains of being cheated in a land trade, testifies to having offered defendant a certain sum to trade back, it was *held* proper to exclude on cross-examination the question whether he had the necessary amount of money.

The good faith of an offer to pay money cannot always be tested by an inquiry whether the person making the offer had the money necessary to fulfill it.

One who desires the benefit of exceptions to a general rule must bring himself within such exceptions.

The rejection of depositions cannot be held error if there is nothing in the record to show that material testimony was thereby excluded.

In an action for fraudulent representation of the value of lands traded for lands belonging to the plaintiff, the value of the latter is immaterial.

Interest is allowable in Michigan as damages for fraudulently representing the value of land sold or traded to the plaintiff where the mere difference in the values of the property traded will not make good his damages.

Error to Wayne. Submitted April 13. Decided April 28.

TRESPASS ON THE CASE by Nowlin against Snow for misrepresenting the value and location of land in Kansas for which plaintiff traded certain real estate in Dearborn. Certain depositions relating to the value of part of the lands were excluded on the ground that the cross interrogatories had not been put by the commissioner who took them. Plaintiff recovered judgment for $1467.60 and defendant brings error.

Geo. H. Lothrop, Levi T. Griffin and *G. V. N. Lothrop* for plaintiff in error. Where fraudulent representation in a sale is in issue, evidence of the true value of the property sold is relevant, *Matthews v. Bliss* 22 Pick. 54; a deposition will not be excluded at the trial where no motion to suppress it was made when testimony was taken, *Winans v. N. & E. R. R.* 21 How. 88.

S. R. Harris, Chas. C. Stewart and *Henry M. Cheever* for defendant in error. Wherever a vendor is to receive, not money, but the transfer of property or services, the value of the original consideration is not open to inquiry in an action for fraudulent representations by the other party as to the value of the property to be exchanged, but the value of the property or services is the measure of damages, because this is the remuneration fixed by the agreement. If land is the mode of payment, the value of the land is the compensation, Sedgwick on Damages 203; *Strutt v. Farlar* 16 M. & W. 249; *Ellison v. Dove* 8 Blackf. 571; *Bell v. Walker* 5 Jones (N. C. L.) 431; *Baldwin v. Lessner* 8 Cobb (Ga.) 71; *Lecroy v. Wiggins* 31 Ala. 13; *Herbert v. Stanford* 12 Ind. 503; *Evans v. C. R. & R. I. R. R. Co.* 26 Ill. 189; *Addams v. Tutton* 39 Penn. St. 447; *McClelland v. Snider* 18 Ill. 58; *Com. Ins. Co. v. Sennett* 37 Penn. St. 205; interest can be allowed as part of the damages in replevin and trover, *Bissell v. Hopkins* 4 Cow. 53; *Baker v. Wheeler* 8 Wend. 508; *Kennedy v. Whitwell* 4 Pick. 466; *Van Rensselaer v. Jewitt* 2 Comst. 153; *Dana v. Fiedler* 2 Ker. 50; Cooley on Torts 456-7; *Greeley v. Stilson* 27 Mich. 153; *Win-*

chester v. Craig 33 Mich. 205; *Ripley v. Davis* 15 Mich. 75; *Dalton v. Laudahn* 27 Mich. 529; *Allen v. Kinyon* 41 Mich. 284; *Bates v. Stansell* 19 Mich. 91: see however *Richmond v. Bronson* 5 Den. 55; *Black v. C. & A. R. R.* 45 Penn. St. 41; *Lakeman v. Grinnell* 5 Bosw. 625; *Walrath v. Redfield* 18 N. Y. 462; it has been granted in cases of tort, as for wrongful seizure, *Woodham v. Gelston* 1 Johns. 134; for carrying away goods *Derby v. Gallup* 5 Minn. 137; *Devereux v. Burgwin* 11 Ired. 490; for fraudulent refusal to convey land, *Handley v. Chambers* 1 Litt. 358; in marine trespass, *Murray v. Schooner Betsy* 2 Cr. 124; *Del. Col. v. Arnold* 3 Dal. 334; *The Anna Maria* 2 Wheat. 335; *United States v. Bevans* 3 id. 360; *Schooner Lively and Cargo* 1 Gall. 315; *The Apollon* 9 Wheat. 376; *The Nancy* 3 Wheat. 559.

MARSTON, C. J. The first error assigned is that the plaintiff was not permitted on cross-examination to answer the question put to him whether he did not try to sell or trade the Kansas property after his return from there, to Charles L. Toner. While it is true that in cases like the present a wide latitude has usually been allowed in the cross-examination of witnesses, and that it would not have been error for the court to have permitted the question to have been asked and answered, yet as this record presents the question, we cannot say that the plaintiff in error was prejudiced by the ruling. The offer, if made, may have been under such circumstances as to have afforded no tendency to show a ratification or satisfaction with the trade, made after full knowledge of the fraud, if any, was committed. The plaintiff may have been willing to sustain even a heavy loss if he could get rid of the property. He may have preferred this to a vindication of his rights in court. In answer to the previous question the witness had said he was not acquainted with Toner, although he thought he had seen such a man. In view of this fact and of the doubtful tendency of such evidence, even if we may assume an

affirmative answer would have been given, we are of opinion that, in connection with the question when objected to, some definite offer as to what counsel proposed to prove should have been made, or the question been followed by others showing the materiality of the proposed testimony.

The witness having testified that he had offered the defendant $200 to trade back, he was asked on cross-examination if he had the requisite amount of money under such an offer, some $2500, if accepted for such purpose. This was properly excluded. He may not have had a dollar, and yet have been able to raise and pay the requisite amount. The good faith of an offer cannot always be tested in this way. Such must be the general rule, and where there are exceptions the party desiring the benefit thereof must see that he brings himself within them.

In reference to the exclusion of the depositions because the cross-interrogatories had not been answered, while we do not say the ruling was correct, yet we cannot say it was wrong for this reason. There is nothing apparent in this record from which we can say that any material testimony was excluded. If the depositions as returned and rejected had been made a part of the bill of exceptions so that we could have seen their materiality and that their rejection must have injured the party who offered them, we could then pass upon this question. As the case stands we cannot say that any error was committed.

The remaining alleged errors which we deem it necessary to notice relate to the questions asked relative to the value of the Dearborn lands and the allowance of interest in considering the question of damages. The value of the Dearborn lands we are of opinion was a matter of no importance in this case. If a fraud was committed, no matter what the consideration passing from the plaintiff may have been, he was entitled to what he had bargained for; nor do we think the value

of the Dearborn land would have any fair tendency to show that the representations were not made as claimed.

As to the question of interest: in cases of contract and many cases of tort the rule is well settled in this State that interest may be allowed by way of damages. The plaintiff is allowed full compensation for the injury he has sustained. He is to be placed as nearly as can be in the position he would have occupied if the reprerentations made had been true. The difference in value will not accomplish this unless interest is added thereto. We are of opinion that there was no error in the court instructing the jury as was done in reference to the allowance of interest.

Judgment affirmed with costs.

The other Justices concurred.

WILLIAM LICHTENBERG ET AL v. ALEXANDER MAIR.

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Cross-examination.

The payee of a draft had testified to an interview with the drawee in which the latter objected to paying because he had an unsettled account with the maker of the draft. *Held* proper on cross-examination to draw out all that the drawee said on the subject during that conversation.

Error to Superior Court of Detroit. Submitted April 14. Decided April 28.

ASSUMPSIT on the common counts upon the following instrument:

$425.00. DETROIT, January 21, 1879.

Messrs. Lichtenberg & Sons:

Please pay to Alex. Mair whatever amount there will be to my credit on the sale of 100 barrels of flour sold you January 4th, shipped to Albany, N. Y.

JOHN BAKER, *Bloom.*

Across the face of this order was written:

"Accepted, payable when the draft drawn on Henry Russell is paid, or when we are satisfied that the flour is all right. LICHTENBERG & SONS."

The action was brought by the payee Mair who recovered. Defendant brings error.

Otto Kirchner for plaintiff in error.

Wisner & Speed for defendants in error. On cross-examination as to a conversation, a party is not entitled to show the whole of it unless it is material, 1 Phil. Ev. (4th ed.) 416; *Prince v. Samo* 7 Ad. & El. 627.

GRAVES, J. The court erred in overruling the question put on cross-examination to the plaintiff below. He had sworn on his own behalf to an interview with Lichtenburg, and that the latter admitted having received the proceeds of the flour in controversy, but claimed that there was an old account with Baker, the person who had drawn in Mair's favor on defendants in error against the proceeds of the flour, and it was quite competent to call out on the cross-examination all that Lichtenburg said on the subject in the same conversation. The proper practice has been so often and so fully explained that a reference to a few of the cases will be sufficient. *Beaubien v. Cicotte* 12 Mich., 459; *Detroit & Milwaukee R. R. Co. v. Van Steinburg* 17 Mich. 99; *Turner v. Grand Rapids* 20 Mich. 390; *O'Donnell v. Segar* 25 Mich. 367; *Wilson v. Wagar* 26 Mich. 452; *Haynes v. Ledyard* 33 Mich. 319.

As the other charges of error urged in the brief do not strike the court as serious, it is not without some reluctance that a new trial is ordered for the misstep referred to. But it appears unavoidable. The ruling cannot be reconciled with the decisions, and it is not possible to say it worked no prejudice.

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

The other Justices concurred.

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GEORGE COMAN ET AL v. JAMES THOMPSON.

Replevin—Ambiguity in description of property.

A judgment in replevin for a quantity of stacked wheat, upon which plaintiff had a lien under a chattel mortgage, was reversed because the description of the land on which it grew, as given in the writ of replevin, differed from the description in the chattel mortgage as given in the record, which contained nothing showing that it was incorrect.

Error to Eaton. Submitted April 16. Decided April 28.

REPLEVIN. Defendants bring error.

Corbin & Cobb for plaintiffs in error.

E. A. Foote and *H. S. Maynard* for defendants in error.

GRAVES, J. The defendant in error recovered in replevin a quantity of stacked wheat, the produce of about ten acres, and rulings on the trial are complained of.

The wheat claimed by defendant in error and replevied and delivered to him, is described in the writ as about ten acres sown by Joseph Demmon in the fall of 1878 on the north half of the east half of the southeast quarter of section one, in town two north, of range three west, and harvested in July, 1879. He based his right on a chattel mortgage from Demmon to himself, dated November 23, 1878, but not delivered until December 3 and not filed until the 24th of that month. On turning to that mortgage, as it appears in the printed record and also in the original return to the writ of error, we discover that it does not cover the wheat replevied and in controversy in this action.

The description contained in that paper is of "ten or eleven acres of wheat now growing on the north-east quarter of the north-east quarter of section one, town two north, of range three west, Eaton county, State of Michigan." The difference is apparent. The writ called for

wheat raised on the "southeast" quarter of the section, and the chattel mortgage for wheat raised on the "northeast" quarter.

The court is bound by the record. We cannot assume arbitrarily that the description in the mortgage as returned is incorrect and ought to correspond with the writ, and there is nothing on the face of the record to warrant us in reading the description otherwise than as written. We might indulge in conjecture, but court records are not to be interpreted or altered in that way.

Assuming the record to be true, and we cannot, as just stated, do otherwise, and it follows that the judgment is erroneous, and must be reversed with costs and a new trial granted.

The other Justices concurred.

DUDLEY J. SMITH v. FRANCIS KELLY.

Money paid without consideration—Measurement of logs—Instructions to jury in absence of counsel.

An action will lie against a party to recover back money paid him without consideration, even though he was an agent and had paid over the money to his principal, if the party dealing with him had no notice of the agency.

In an action based on a shortage of logs sold, it was shown that the measurement was to have been by the scale of a certain company in whose boom the logs were lying. *Held* proper to instruct the jury that the parties must be deemed to have contracted with reference to the scale by which the boom company's business was ordinarily conducted, which was sufficiently proved by the measurement which they had entered on their books and acted on, and the original tally need not be produced.

In an action involving the measurement of logs sold, the jury were charged that if the parties agreed that a certain scale should be followed unless the purchaser was notified to the contrary, that scale must govern; but if they did not so agree, and the vendor told the purchaser to notify him if he wanted the logs re-

scaled, and the purchaser said nothing, it would not be an assent. Afterwards the court sent for the jury and told them, in the absence of the vendor's counsel, that he did not mean to charge them that they could not find an assent from the purchaser's silence, and that they might draw their own inferences from the conduct of the parties. *Held* that the original charge would not have been erroneous unless the notice to the purchaser was given before the contract was closed and the logs paid for, and that the absence of the vendor's counsel did not prejudice him when the possible false impression was corrected.

Error to Saginaw. Submitted April 16. Decided April 28.

ASSUMPSIT. Defendant brings error.

D. P. Foote for plaintiff in error.

Tarsney & Weadock for defendant in error.

CAMPBELL, J. Kelly sued Smith to recover back the price paid for logs not delivered. He bought a lot of logs lying in the boom of the Tittabawassee Boom Company, estimated at 75 thousand feet, which were mixed up in a large lot, and which were to be delivered to him in another boom, to which they were taken in small parcels, and as he claimed ran short in quantity about 19 thousand feet. The number of logs held out, but not the measurement. The chief controversy was whether Kelly was to take the logs at a prior scale made by one Newton, or at the boom company's scale. There was also a claim by defendant that if he took at a re-scale it was to be by a scaler to be agreed on.

A question arose whether Smith, who was in fact an agent for another party, could be held for the money after he had paid it to his principal. It was found, however, by the jury, that Kelly knew nothing of the agency.

One principal controversy on the trial was concerning proof of the boom company's scale. It appeared to have been made somewhat more loosely than scales for other purposes. It was proved to have been done by the scaler giving his figures to a tally-boy, who reported them to a

clerk, who in turn handed them in to the office. The tally-boy was not produced, nor his original tallies. It appeared that Smith who was to pay the boomage settled by the books and paid on only the amount alleged by Kelly to have been all that he received.

The court held that if it was agreed between Kelly and Smith that the quantity should be determined by the boom company's scale, and as settled between the parties and the boom company, then that scale must govern; and they must be deemed to have contracted with reference to the manner in which the boom company ordinarily did business. This is complained of.

We think that it must be presumed from the form of this bill of exceptions that there was testimony tending to show just such an agreement, and especially so as no remark was made pointing out any want of correctness in this regard. But it is not denied there was testimony to show an agreement to abide by the boom scale, and we think this meant what the judge intimated, the scale by which their own business was conducted. In the multiplicity of work done by boom companies, it would be unreasonable to suppose it would always be practicable to show how every scale of every log or parcel of logs was made, and for such purposes the necessity of having different persons engaged in measuring, tallying and entering results would make it impossible for any one to know whether the rest made the true tallies or entries. The question here was not whether these entries were strictly correct, but what was the scale as determined by the company, and that, we think, must be the one which they entered on their books and acted on.

The collateral questions arising out of this method of proof were therefore not important. We do not think it was necessary to produce the tally-boy or his book. The fact that booming companies do not scale closely was no doubt considered in determining what was agreed on, but parties could accept it if they chose.

Upon the bargain itself there was evidence both ways.

Smith claimed among other things that Kelly agreed Newton's scale should govern unless he was notified to the contrary.

The court gave this charge, which is objected to. If they agreed that Newton's scale should be the scale unless he was notified, then that scale must govern, because that is the agreement between the parties. If there was no agreement to that effect, and Smith informed the plaintiff when he went away that if he desired to have the logs re-scaled he should notify him, and Mr. Kelly said nothing, it would not be an assent to that proposition.

After the jury retired the court sent for them and, in the absence of Smith and his counsel, told the jury he did not mean to instruct them they could not find an assent from Kelly's silence. That they might draw their own inferences from the conduct of the parties, and might find that the assent made a contract. It is claimed this instruction could not avail to cure the error, if given in the absence of the parties.

We think the charge as originally given was not erroneous. To make it so the notice to Kelly should have been given before the contract was closed and the logs paid for. They were paid for before Kelly left, and there was at best a controversy whether at that time the whole arrangement had been closed. But we think the absence of defendant's counsel did not operate to his prejudice when the possible false impression was corrected. As corrected there was nothing to complain of.

We think there is no error in the record, and the judgment should be affirmed with costs.

The other Justices concurred.

NORMAN L. MCDONALD v. WILHELM BŒING.

Contract of employment—Acceptance of offer.

An offer to employ another does not bind the person making it unless he is given to understand that it is accepted; and the right to compensation arises from the parties having placed themselves in the relative positions of employer and employed, and assumed respectively their obligations and duties.

A contract of employment must always be a voluntary act on the part of the employer and employed, coinciding in a common understanding.

B declined to give M the refusal of certain lands for which he had asked him a stated price, but wrote him promising to pay the usual commissions if he sold it to good parties. M did not reply but caused a purchaser to negotiate with B, and the result was that B sold the land personally, though at a lower price. *Held* that the written offer was not general, but was to be construed in connection with the previous statement of price, and as M had not notified B that he accepted it, he was not entitled to claim any commissions under it.

Error to Saginaw. Submitted April 16. Decided April 28.

ASSUMPSIT. Plaintiff brings error.

McDonell & Mann for plaintiff in error. Commissions for selling may be earned by procuring a purchaser, *Knapp v. Wallace* 41 N. Y. 477; *Lincoln v. McClatchie* 36 Conn. 136; *Cook v. Fiske* 12 Gray 491; *McCreery v. Green* 38 Mich. 172.

Chauncey H. Gage for defendant in error. Acceptance of terms is necessary to complete a contract of employment, *Chic. & G. E. Ry. v. Dane* 43 N. Y. 240; *Averill v. Hedge* 12 Conn. 424; *Martin v. Black* 21 Ala. 721; a broker has not earned his commission until he has found a purchaser ready to buy on the terms prescribed by his principal, *McGavock v. Woodlief* 20 How. 221; *Darrow v. Harlow* 21 Wis. 306; *Fraser v. Wyckoff* 63 N. Y. 445; *Wylie v. Marine Nat. Bank* 61 N. Y. 415; *Briggs v. Rowe*

1 Abb. App. Dec. 189; and the principal can sell the land himself, *Hungerford v. Hicks* 39 Conn. 259.

COOLEY, J. The plaintiff sues to recover commissions on a sale of lands. The defendant denies that he ever employed the plaintiff to make the sale on which commissions are claimed, and it is conceded that the defendant made the sale himself; the plaintiff claiming only to have been the procuring cause thereof.

The controversy turns upon the question of employment. The dealings of the parties were exclusively by mail and telegraph. On August 22, 1878, plaintiff wrote defendant, inquiring if his lands on sections 16 and 19, town 22 north, range two west, were for sale, and if so, requesting terms and lowest prices. Defendant replied August 30th that they were for sale; those on section 16 for $8500. On the receipt of this letter plaintiff sent a telegram requesting a refusal of the land for twenty days, and stating that he thought he could buy or make a sale—probably the latter. In reply to this the following letter was sent:

"MANISTEE, Oct. 19, 1878.

Mr. Norman L. McDonald:

DEAR SIR: Returning from a trip I find your message. I do not want to give a refusal of any of my lands, but you may go and sell it to good parties, and if you do I will pay you the usual commissions. Please reply and oblige Yours truly,

WILLIAM BŒING."

No reply was ever made to this letter, but plaintiff interested himself in having a man who was looking for land go upon and examine the lands on section sixteen and open negotiations with defendant therefor. The result was that defendant sold the lands personally, on November 9, 1878, for $7000. No communication passed between him and the plaintiff after October 19, before the sale by defendant was perfected.

The circuit judge instructed the jury that as the plaintiff never notified the defendant of the acceptance

of the terms of his letter of October 19th, or that he was seeking to sell the lands by virtue of any offer made to him by defendant, the latter was at liberty to proceed and sell the lands himself, without being liable to the plaintiff.

The instruction was correct. No offer to employ another binds the person making it to pay for services unless he is given to understand that the offer is accepted. The right to compensation arises from the parties having placed themselves in the relative positions of employer and employed, and assumed respectively the obligations and duties belonging to those positions. And the contract of employment must always be a voluntary act on the part of the employer and of the employed, coinciding in a common understanding.

The plaintiff never assumed the obligations and duties of an agent, nor was defendant ever notified that he proposed to do so after the request that he might have the refusal had been denied. Defendant therefore had a right to understand that plaintiff had dismissed the subject from his attention, and had no reason to suppose that plaintiff was laboring for commissions or expecting them. On the other hand, if plaintiff had taken advantage of any superior knowledge he may have had of peculiar value in the lands, to purchase them himself at less than their real worth, there could have been no ground on which defendant might impeach the sale as being constructively fraudulent by reason of the obligation which the existence of an agency imposes, that the agent shall disclose to his principal all important facts within his knowledge affecting the value of the land before he purchases. Apparently, so far as defendant knew, the parties when the sale was actually made, stood to each other in no fiduciary relations whatever.

It is to be further observed that the sale was not made on the terms on which the defendant had empowered the plaintiff to make one. The letter of October 19th must be understood as having been written in view of the price

before named; and so construing it, the plaintiff was told in substance: "You may go on and sell for $8500, and when you do so I will pay you a commission." But instead of making a sale, plaintiff interested himself in sending a purchaser to defendant, to whom the land was sold for $7000. This service may have been valuable, but defendant had never contracted for it, and we have no reason to conclude as against him that he would ever have agreed to pay for it. He might have been willing to pay a liberal commission on a sale at the larger sum, and none at all on a sale such as was made. But speculation on the subject is useless: there was never any proposition to plaintiff that he should act generally in the sale of this land, and the proposition actually made to him, that he procure a purchaser at a named price was never accepted and never acted upon. *Darrow v. Harlow* 21 Wis. 302; *Fraser v. Wyckoff* 63 N. Y. 445; *McGavock v. Woodlief* 20 How. 221.

The judgment must be affirmed with costs.

The other Justices concurred.

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CHARLES P. HESS v. L. WADE GRIGGS.

Replevin—Right of action—Proving contract by subscribing witness—Tax-deed relating back—Waste.

Replevin for timber cannot be maintained on a showing by plaintiff of title to an undivided half of the land from which it was removed.

A presumption of the ownership of timber and the right to recover it *in specie*, by an action of replevin, does not arise from proof that plaintiff had an interest in the land in common with another person.

Where replevin rests on plaintiff's possession through another person who holds under a contract with him which the other contracting party had signed only by his mark, the contract must be proved by the subscribing witness.

The statutory right of a party to testify on his own behalf does not dispense with the necessity for calling the subscribing witness to prove a contract to which he was a party.

A tax-deed cannot relate back to the time of the sale for the purpose of making parties trespassers by reason of acts done on the land before the deed was given.

Where the notice of special defense to an action of replevin for timber cut from land merely puts in issue the title to the land at the time of cutting, the existence of a remedy for waste is not in question.

Error to Saginaw. Submitted April 20. Decided April 28.

REPLEVIN. Defendant brings error.

Gillett & Holden for plaintiff in error.

Samuel M. Porter for defendant in error.

COOLEY, J. Griggs brought replevin for ten pieces of pine timber. The case was begun in justice's court, and was certified to the circuit court on a plea by defendant that the timber was cut by him on certain described lands which then were and still are owned by one Harlan P. Smith and not by the plaintiff.

On the trial no question was made that the timber was cut by defendant on the lands described. Plaintiff undertook to show title to the lands in himself, but showed only a title to an undivided half thereof, in common with one Millard. He then undertook to show that he was in possession of the lands when the timber was cut, but the evidence was that he was "in possession of said lands by one John Bennett, to whom he claimed he had sold certain timber on said lands, and who was then occupying the same for the purpose of cutting and removing said timber." Bennett was then called, for the plaintiff, and testified that sometime previous to the commencement of this suit he executed a contract with plaintiff concerning the cutting of timber on the lands in question; that he could neither read nor write, but signed the contract by making his mark

and afterwards turned it over to defendant by assigning to defendant his interest therein. A contract was then presented to the witness which purported to be executed by Griggs of the one part and the witness signing with a mark of the other, and the execution attested by one M. B. DeLand. Witness was then asked whether he recognized his signature to the instrument. This was objected to on the ground that the instrument could only be proved by the subscribing witness, unless his absence from the court was accounted for and excused. The objection was overruled, and the witness, after stating that he could not read or write, and having the paper read over to him, testified that that was the contract he had spoken of. By this contract Griggs purported to sell to Bennett "all the pine timber or trees now lying on the ground, all the white oak trees lying or standing, all the basswood, white ash, butternut and elm trees standing or being on the land" described.

So far as we can see, the legal rights of the parties depend mainly upon this instrument. By it Griggs purports to sell to Bennett timber on the land in question, but so specifies what is sold as to exclude the growing pine timber or trees. The pieces of timber in dispute in this case are alleged to have been cut by Hess as standing trees after the date of this instrument. It is upon this ground that Griggs claimed that the timber belonged to him, and that he assumed to replevy it. Had he shown title to the lands, he might have contented himself to rely upon that title as sufficient evidence in his favor; but failing in this, he fell back upon evidence of his possession. But upon this point his own testimony was that he was in possession by Bennett, who was there for the purpose of cutting and removing the timber which had been sold to him. Bennett, however, testified that he had transferred his possession to Hess in assigning the contract to him, and the conclusion must be that Hess had such possession as he might lawfully have as purchaser of such timber as was sold by

the contract. The contract thus became a vital part of the plaintiff's case, and it was incumbent upon him to make proof of it in the customary mode. 1 Greenl. Ev. § 569.

The customary mode was to call the subscribing witness. There is nothing in the change in the law whereby parties are permitted to be witnesses on their own behalf which will dispense with his being called. He is made a witness to the instrument for the very purpose of having a disinterested person in position to speak to the very facts where the parties concerned might perhaps distort or falsify them. *Hollenback v. Fleming*, 6 Hill, 303-305. The importance of the rule appears in this case, for the contract was executed by one party who could neither read nor write, and was consequently to some extent at the mercy of others, and it contained a very important interlineation.

We pass over in this case many objections which we think have no force. The objection of plaintiff to the showing of title in Harlan P. Smith we think well taken. Smith claimed by a tax deed, given after the timber was cut but on a sale which had been made previously. He therefore had no title at the time of the cutting. For some purposes such a deed may relate back to the time of the sale, but it could not by relation make parties trespassers by reason of acts done upon the lands before it was given. *Smith v. Milles* 1 T. R. 475; *Case v. De Goes* 3 Caines 261; *Bacon v. Kimmel* 14 Mich. 201. In some cases the occupant of lands may be liable for waste under such circumstances: *Stout v. Keyes* 2 Doug. (Mich.) 184: but the existence of such a remedy is not in question here; the notice of special defense merely putting in issue the title at the time the timber was cut.

It appears then that as the case was submitted to the jury the plaintiff had shown title in himself to an undivided one-half of the land, but had not shown possession. He was not therefore entitled to maintain the suit, both because a presumption of ownership of the

timber and of the right to recover it *in specie* does not arise from his proof that he had an interest in the land in common with another, and also because apparently defendant had possession of the land when the cutting took place, and therefore, in the absence of any legal showing of the circumstances or contract under which he occupied, had apparently the right to cut timber. If this right was in any way qualified, plaintiff should have made proof of the fact.

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

The other Justices concurred.

PETER SCHALL AND LAFAYETTE W. SCHALL v. KINYON BLY.

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Certiorari—Dissolution of attachment—Attorney for diverse interests.

A circuit court commissioner has jurisdiction of proceedings to dissolve an attachment.

A debtor's right to the dissolution of an attachment on his property is not affected by the fact that later attachments have also been levied, as he is not dispossessed by the levy and no question arises as to the restoration of the property.

The same attorney can act in proceedings to levy and to dissolve attachments in distinct suits by different creditors against the same debtor.

The circuit court, like the Supreme Court, cannot on *certiorari* review upon the facts the proceedings before a circuit court commissioner for the dissolution of an attachment.

A circuit court commissioner's rulings as to the admission of evidence, in proceedings to dissolve an attachment, are not reviewed in the circuit court on writ of *certiorari*.

Certiorari to the Circuit Court of Cass County. Submitted April 20. Decided April 28.

ASSUMPSIT. Defendants assign errors on an order of

the Circuit Court quashing the order of a circuit court commissioner dissolving an attachment against them in the original case.

R. R. Pealer for plaintiffs in certiorari.

Howell & Carr for defendants in certiorari.

GRAVES, J. The circuit court quashed an order of the circuit court commissioner dissolving an attachment sued out by Bly against Schall's property. The ground on which the writ was obtained was that they were about to dispose of their property with intent to defraud their creditors, and the property levied on consisted of land and growing wheat.

The commissioner, in entertaining the proceedings, acted within his jurisdiction. The sufficiency of the application has not been questioned. There were later levies by other parties on the land, and the point is made that this cut off the debtor's right to proceed for a dissolution. The objection is not valid. Neither levy operated to dispossess them (*Smith v. Collins* 41 Mich. 173), and they were not bound to submit in silence to a levy which they considered as based on an untrue statement against their honor and good faith, merely because other persons had subsequently levied on the same property. As the actual possession continued in the debtors there was no question concerning restoration to interfere. *Smith v. Collins*, supra.

The circumstance that the same counsel who acted for the debtors before the commissioner was the attorney of the later creditors is of no importance. There is no law which hinders an attorney from appearing for a party in one transaction and against him in another wholly distinct from it, merely because a third person interested in the first takes exception.

Before the commissioner the case turned upon the facts, and he received all the evidence offered and found as matter of fact that the creditor had not good and

legal cause for suing out the writ. That the evidence produced was sufficient to call for the exercise of his judgment is very plain, and that being so his conclusion upon it is final. It has been decided several times that this court has no power to review upon the facts (*State Bank of Fenton v. Whittle* 41 Mich. 365; *Hyde v. Nelson* 11 Mich. 353; *Linn v. Roberts* 15 Mich. 443; *Brown v. Blanchard* 39 Mich. 790) and the rule equally applies to the circuit court. That tribunal has an authority peculiar to itself in case of original motions in court to quash attachments, but the proceeding by *certiorari* to a commissioner is very different. The refusal of the commissioner to pass on the objections as they were made worked no prejudice. Rulings in regard to admitting evidence are not reviewed on *certiorari* in this class of cases, and if the commissioner had explained his decisions they would not be re-examined.

The circuit court erred in quashing the order of the circuit court commissioner, and the determination is reversed with costs.

The other Justices concurred.

AUGUSTUS JACOBSON v. JOHN A. J. METZGAR, WILLIAM G. WHITE, NATHANIEL WHITE AND FRANK HIBBARD.

Replevin bond—Defense to action.

If the pendency of bankrupt proceedings invalidates a levy, they should be shown in an action of replevin to recover the value of the goods levied on, and not withheld to be be litigated in proceedings relating to the replevin bond.

One who replevies property transferred to him in fraud of creditors, and levied upon accordingly, cannot after suffering judgment in replevin enjoin a suit on the replevin bond, on the ground that the debtor had made a composition with creditors and thereby recovered his assets.

Appeal from Clinton. Submitted April 20. Decided April 28.

INJUNCTION. Defendants appeal.

Simonds & Fletcher for complainant.

Pealer & Andrews for defendants.

CAMPBELL, J. This is a bill to prevent proceedings to enforce a replevin bond. Metzgar as sheriff of the county of St. Joseph levied an execution in favor of the other defendants against Jacob Jacobson and Bennett Jacobson upon property in complainant's possession, which complainant claims was his, but which the sheriff claimed as liable on the execution. It is evident from the testimony that the property had been transferred to complainant under circumstances supposed to be fraudulent as against creditors.

This levy was made May 25, 1874. On the same day the execution debtors were declared bankrupts in proceedings commenced against them in the preceding January. In June, 1874, the law was amended providing for compositions, and in October, 1875, a composition was ratified by the legal number of creditors, and the assignee subsequently relinquished the assets. The assignee had done nothing to set aside the transfer to complainant.

On May 26, 1874, complainant replevied the property from Metzgar, and gave the bond now in controversy. The replevin suit was tried, and judgment rendered in favor of Metzgar for $403.66, on the 5th of November, 1875. The register in bankruptcy reported the compromise on the 11th of November. A suit seems to have been brought by the execution debtors in the Grand Rapids Superior Court in equity for the same purpose as the present bill, and to have been dismissed.

The court below regarded complainant as entitled to the relief prayed, as a matter of equity.

If there was any objection to the levy of the execution against the judgment debtors, it was because the bankruptcy proceedings were pending, and not because of the subsequent composition. This defense, therefore, existed when the replevin suit was tried, and should have been set up then to avoid the levy. If complainant is right in claiming that the levy was bad, such proof would have prevented the officer from establishing any right under it, and could not have made out the special interest on which we must presume he recovered. The recovery here was not for the property replevied, but for money, and we held in *Ryan v. Akeley* 42 Mich. 516, that in such a case the special property must be determined on the hearing of the case, and not postponed until subsequent litigation. If Metzgar's levy was invalid, then was the time to litigate it.

We have found nothing to indicate that complainant could thereafter question it. Neither is it apparent to us how any one else can put him in any worse position should he pay the bond. The assignee may no doubt assail fraudulent transfers made by bankrupts, but when the bankrupt himself by means of a composition gets back his assets, he certainly does not thereby get a right to avoid his own transfers for his own fraud. The bankrupt law has made no such absurd provision.

The finding in the replevin suit determined that complainant had no honest title to or interest in the goods replevied, and that as against creditors his title ought not to stand. If his bill is true, there are now no other creditors who are interested in pursuing the property. The defendants are only getting payment of a just debt by the enforcement of the bond, and complainant is only compelled to render to them what he wrongfully withheld from creditors of the judgment debtors. We can see no equity in his complaints.

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

The other Justices concurred.

SEYMOUR COOPER v. HORACE TOMPKINS.

Replevin for goods taken by United States marshals.

Replevin lies against a United States deputy marshal to recover goods belonging to the plaintiff and attached by defendant under process against another person.

Error to Eaton. Submitted April 20. Decided April 28.

REPLEVIN. Plaintiff brings error.

Cobb & Baird and *M. V. Montgomery* for plaintiff in error.

Simonds & Fletcher for defendant in error. Replevin lies in a State court for property wrongfully levied upon by a federal officer. *Buck v. Colbath* 3 Wal. 334.

MARSTON, C. J. This was an action of replevin brought to recover possession of property of the appraised value of $341.24. The defendant as a deputy of the United States marshal for the Western District of Michigan filed a plea that he had seized the property under a writ of attachment issued out of the Circuit Court of the United States for said Western District against the goods and chattels of Charles Hagner. Cooper claiming the property as his, sued out this writ. The case comes within and is clearly covered by the decision of this court in *Carew v. Matthews* 41 Mich. 576, and no farther discussion is necessary at present.

The judgment must be reversed with costs and the cause remanded for farther proceedings.

The other Justices concurred.

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CHRISTINA MASON v. ADDISON E. DUNBAR, EXECUTOR.

Wife's services—Compensation—Bargains with incompetents.

A wife can recover compensation for services in taking care of her father-in-law, living in the family, if he understands and assents to the arrangement, and if her husband gives up to her his own right to her time and services.

Where a man and his wife live with the man's father, on the father's farm, it is presumed that they are not living together under any contract relation, but as a family, and that there can be no claim for services, or for supplying the ordinary conveniences of life.

Bargains cannot be made with a person who is imbecile, but where a man is merely weak and helpless, and in the exclusive care of his children, there is no legal impediment to their dealing with him if he retains legal capacity, though their bargains should be closely scrutinized.

Error to Monroe. Submitted April 20. Decided April 28.

ASSUMPSIT by Mrs. Christina Mason against Dunbar as executor of the estate of her father-in-law for the amount of a claim against his estate "for care, nursing, attendance, and washing for said deceased, from August 14th, 1876, to June 13th, 1878,—650 days at $2 per day, $1,300." The claim was allowed by commissioners on the estate, and on appeal to the circuit court the judge directed a verdict for the estate. The claimant brings error.

O. E. Angstman for plaintiff in error. A husband might give his wife her earnings, at common law, *Connors v. Connors* 4 Wis. 131; 2 Kent's Com. 163; and if the services were not inconsistent with her family duties, she could recover for them, *O'Connor v. Beckwith* 14 Mich. 657; *Glover v. Alcott* 11 Mich. 492.

Willits & Critchett for defendant in error. A wife's services belong to her husband, and she has no title to her earnings even though she had agreed for compensa-

tion with the party for whom services were performed, and with her husband's assent. Tyler on Coverture § 478; *Glann v. Younglove* 27 Barb. 480; *Woodbeck v. Havens* 42 Barb. 66; there is no presumption of a promise to pay for services done by one person in a family for another, *Williams v. Hutchinson* 3 Comst. 318; *Bowen v. Bowen* 2 Bradf. Sur. 336.

Cooley, J. It was decided in *Tillman v. Shackleton* 15 Mich. 447, approved in *West v. Laraway* 28 Mich. 464, that a married woman with the consent of her husband might carry on business on her own account, and be protected in the results thereof against him and against his creditors to the same extent as if she were unmarried. This is the logical result of the statute, which empowers a married woman to hold, sell, mortgage, convey, devise and bequeath as any other person may, any property to which she may become entitled "by gift, grant, inheritance, devise or in any other manner."

It is insisted by defendant that these cases do not rule the present. They decide only that a married woman may carry on a separate business on her own account, and this she may do without encroaching on the common law rights of the husband to the wife's services, which the statute has left undisturbed, and which is as absolute now as it ever was. The present suit is an attempt to appropriate to her exclusive benefit the services of the wife in the family itself; thereby making her altogether independent of her husband, in the household as well as elsewhere.

But my brethren are all of opinion that no distinction can be drawn between the services of the wife performed in and about the house, and those performed elsewhere, as a foundation for a claim to recovery for her own benefit. If the husband can consent to her giving her time and attention to the management of a millinery or dress-making establishment, or to any other regular business away from her home, and if this makes the business

her own, there seems to be no conclusive reason why he may not consent to her making her services in the household available in the accumulation of independent means on her own behalf. He relinquishes his right to her services in the one case no more than in the other, and perhaps in the last case the ordinary course of marital relations is least disturbed. In *Tillman v. Shackleton*, supra, the business for which the wife was preparing was that of keeping boarders, and in *Meriwether v. Smith* 44 Ga. 541 she was to give her personal labor in the cultivation of a cotton crop. In the well considered case of *Peterson v. Mulford* 36 N. J. 481, the labor in the proceeds of which the wife was protected was picking berries, boarding children, selling milk, butter, eggs, etc. My brethren think all these cases are well decided, and that they cannot be distinguished from the present.

The plaintiff claims that her husband and herself alternately took charge of the husband's father, who in his extreme old age was blind and imbecile, and required constant care and supervision, day and night, and that it was distinctly agreed between herself and her husband that for her own services she should receive compensation from the father. If such was the fact, and if the father understood the arrangement and assented to it, the court is of opinion that she would be entitled to recover what would be just and reasonable. The husband had the right to give her for this purpose her services, or to refuse to give them at his option; and if he made the gift, the legal right to deal with the father as a stranger might would follow.

But we are all of opinion that the father must have been made aware of the arrangement, and must expressly or by implication have assented to it before he could have been chargeable with any legal claim in plaintiff's favor. The legal presumption is that the wife is employing her services in her husband's interest; and where she is working with her husband, as was the case here,

a great wrong would sometimes be done if each might present and recover upon separate claims, when the other party supposed and had a right to suppose he was dealing with the husband alone. It is not enough to show that the husband has given the wife her services, but the other party must also understand that contract relations between himself and the wife exist and that the wife expects compensation.

In the present case there are peculiar reasons why the showing that the father expected to pay for the services should be made. All the parties appear to have been living together in the same house upon the father's farm. They were father and children, presumptively living together as a family, and receiving mutual benefit and comfort from their association, and from the property which they enjoyed in common. No presumption can arise under such circumstances that claims were to be made by either against another for services, or for the ordinary conveniences of life which were furnished. On the contrary we must presume that the parties were residing together on the usual terms of members of one family, and not under any contract relations.

It is claimed by the executor that on the facts sworn to by the claimant and her husband the father was helpless in their hands, and they virtually occupied the position of guardian to him. *Jacox v. Jacox* 40 Mich. 473. Under such circumstances, it is said, they should not undertake to bargain with him, but should procure the appointment of a legal guardian who could deal with them on equal terms. We agree that if he was an imbecile, they could not bargain with him, and if he was simply weak and exclusively in their care, all bargains should be closely criticised, and the utmost fairness insisted upon. In dealing with him they would have been exposed to serious suspicions, but there was no legal impediment so long as he retained legal capacity.

We all agree that claimant gave some evidence on

which she was entitled to go to the jury, and which she should have been permitted to follow with other evidence tending in the same direction.

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

The other Justices concurred.

AARON COURTRIGHT, RELATOR v. OTTO KIRCHNER, ATTORNEY GENERAL.

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Costs against the State—Debt on bail bond—Attorney General.

Costs against the State can be granted only by virtue of some express statute.

An action upon a recognizance of bail for the appearance of a person charged with crime is not such a civil action as authorizes costs to be taxed against the State under Comp. L. §7407.

The sum recovered in an action of debt upon a recognizance of appearance bail is a penal forfeiture, and may be remitted like a fine.

The measure of recovery on a recognizance of bail is the whole amount of the obligation, without reference to the merits.

The Attorney General cannot properly certify to the due institution of a suit of which he has no fuller information than is furnished by a copy of a declaration, order of dismissal, order of retaxation, and bill of costs.

Costs are not taxable when there is no judgment for them.

MANDAMUS. Submitted April 21. Denied April 28.

L. N. Keating, Joab Baker and *H. J. Hoyt* for relator. Costs were allowed against the State where it was held that there was no right to prosecute, in *Attorney General v. Soule* 28 Mich. 153.

Attorney General *Otto Kirchner* for respondent.

CAMPBELL, J. This is an application for a mandamus

to compel the Attorney General to certify a bill of costs taxed against the State in an action on a recognizance.

Courtright and one Simons were sued in debt on a recognizance of bail for the appearance of John Mack, alias Thomas McGee, to answer to a charge of larceny. The circuit court for the county of Muskegon, where the suit was brought, allowed a discontinuance against Simons, and an amended declaration was then filed against Courtright alone. A motion was then made to quash the proceedings for want of jurisdiction of the person of the defendant, by reason of such discontinuance against Simons, and the court made an order quashing the proceedings without costs of the motion. No other judgment was entered.

A bill of costs was made out and presented to the clerk of the court who disallowed them. The circuit judge on a motion for retaxation taxed the costs at $21.

Relator then presented to the Attorney General a copy of the amended declaration, a copy of the order of dismissal, and a copy of the order of retaxation, and of the bill of costs, and asked him to certify under section 6173 of the Compiled Laws "that such suit or proceeding was duly instituted as the law requires." This he refused, and the present application is made to compel him to do so.

It might be sufficient for the present motion to say that not only is there no judgment for costs under which any taxation could be made, but that these papers do not furnish any information how or when the suit was instituted, or whether Courtright or Simons was ever served or ever appeared in the cause. It is difficult to understand on what ground, if there was such an appearance, the proceedings were quashed. But the Attorney General could not properly certify to the regular institution of a suit of which he had no fuller information than these papers gave him.

But as there may possibly be something else not now appearing, which might be the basis of another applica-

tion, we may properly dispose of the matter on its merits.

Costs cannot be granted against the State except by virtue of some express statute. The only statute on the subject on which reliance is had is section 7407 of the Compiled Laws, which is as follows: "In all civil suits or proceedings by or in the name of the people of this State, instituted by any officer duly authorized for that purpose, and not brought on the relation, or for the use of any citizen, or upon any penal statute, the people shall be liable for costs in the same cases, and to the same extent, as if such suit or proceeding was instituted by an individual."

The record does not show whether this recognizance was ever regularly forfeited and authorized to be prosecuted; but assuming it was, then there is no doubt an action of debt upon it is a civil action. But whether it is such a civil action as would allow the State to be held for costs is a different question.

The statute does not allow such costs in actions brought on any penal statute. We had occasion in *Metcalf, relator v. Auditor General* 38 Mich. 94, to consider whether actions for penalties for obstructing highways, carried costs against the State, and we held they did not. We think that the present action is within the exception referred to. The only purpose of such a recognizance is in subservience to the criminal law. It represents no contract or other civil origin, and is not designed to secure rights of property. It in effect compels the sureties to submit to a vicarious money penalty as a consequence of their enabling the party charged with crime to escape the imprisonment he would otherwise be subjected to in order to have him ready to answer on a trial. The amount fixed in the obligation is not a security to be satisfied on a showing and recovery of actual damages but the whole penalty is incurred and collectible upon a forfeiture, without reference to the merits. In our statutes the proceedings are included in a chapter entitled "The Collection of Penalties and Forfeitures;" and the moneys collected are not devoted to the general purposes of the State, but are

placed with the proceeds of fines in the county treasury, for the benefit of township libraries. The State reserves no interest in them. The sum recovered is really as well as nominally a penal forfeiture, and subject to remission on the same footing with fines. Comp. Laws §§ 6870, 6873, 6875-6.

We think therefore that the relator can have no remedy in this class of cases. The writ must be refused with costs.

The other Justices concurred.

LIZZIE PALMER v. THE PEOPLE.

Complaint for disorderly conduct—Evidence—Prisoner's statement.

A complaint before a justice was held sufficient which alleged under the proper venue that "on the 2d day of February A. D. 1880, and for thirty days next preceding said day, at the city of Ionia, in said county, Lizzie L. Palmer is, and for said thirty days has been, a disorderly person within the meaning of section one of chapter fifty-three of the Compiled Laws of said State, for that she, the said Lizzie L. Palmer, at the city of Ionia aforesaid, is and was for said thirty days the keeper of a bawdy house, contrary to the form of the statute," etc.

A justice is not held to strict rules as to the reception of evidence in proceedings for disorderly conduct, and his rulings will not be reviewed by the Supreme Court on *certiorari* farther than to see that injustice has not been done by them.

A person on trial before a justice should make his statement to the jury at the proper time, before the prosecutor has summed up, and if he does not do so, he cannot complain of the justice's refusal to allow him to do so afterward.

CERTIORARI to William B. Thomas, justice of the peace. Submitted April 21. Decided April 28.

Smith & Sessions and *A. B. Morse* for plaintiff in certiorari. A complaint for keeping a bawdy house should state what facts constitute the offense, 2 Bish. Cr. Pro.

§§ 273-5; Tiffany Crim. Law 42, 250; *People v. Jackson* 3 Den. 101; *People v. Wilber* 4 Parker's Cr. Rep. 19-23; *People v. Phillips* 1 id. 104; *Enders v. People* 20 Mich 233; *People v. Olmstead* 30 Mich 431.

Attorney General *Otto Kirchner* for the people, cited to the sufficiency of the complaint, *Stratton v. Com.* 10 Met. 217; *Com. v. Davis* 11 Pick 432, and argued that the writ of certiorari was issued improvidently, citing *Farrell v. Taylor* 12 Mich. 113; *Smith v. Reed* 24 Mich. 240; *Withington v. Southworth* 26 Mich. 381; *Adams v. Abram* 38 Mich 302.

COOLEY, J. This case is brought before us by common-law writ of *certiorari* allowed by a circuit court commissioner. It appears from the return that the plaintiff in error has by a justice of the peace been adjudged a disorderly person, and required to enter into recognizance for her good behavior for one year, and that she has done so under protest. The disorderly conduct consisted in being keeper of a bawdy house. She complains that the justice refused on her motion to quash the complaint as insufficient; that he received evidence which was not strictly admissible according to the rules of law; that he refused to allow her to make her statement to the jury after the prosecutor had made his summing up, she not having offered to make one before, and that he charged the jury upon the law. Little need be said upon any of these complaints.

The complaint was sufficient. A copy is given in the margin,* and it will be seen to be in the general form

*The complaint was as here given:

"William B. Thomas, justice of the peace.

STATE OF MICHIGAN, } ss.
COUNTY OF IONIA, }

The complaint and examination on oath and in writing of Erastus H. Stanton, taken and made before me, a justice of the peace, of the city of Ionia, in said county, upon the 2d day of February, A. D. 1880, and for thirty days next preceding said day, at the city of Ionia, in said county, Lizzie L. Palmer is and for said thirty days has been a disorderly person within the meaning of section one of

commonly made use of in such cases. *Stratton v. Commonwealth* 10 Met. 217; Tiff. Cr. Law by Howell (2d ed.) 250.

We cannot in cases of this sort review the rulings of the justice on the reception of evidence, and hold him to the same strict rules which are properly enforced in courts of record. All we can undertake to do is to see that injustice has not been committed by erroneous rulings. Of that we find no evidences in the record. There was evidence, entirely unexceptionable in character, sufficient to warrant a conviction, and none received of a questionable nature which would have been likely to prejudice her.

If plaintiff in error desired to make a statement to the jury, she should have made it at the proper time, before the summing up commenced. When she asked leave to make it afterwards, she appealed to the discretion of the justice, and cannot complain of his decision.

The charge of the justice could not have prejudiced this party. He did little more than to state to them what the nature of the case was, and to inform them that the whole case was submitted to their decision. No other allegations of error seem to us to require attention.

The writ of *certiorari* must be quashed as improperly issued.

The other Justices concurred.

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chapter fifty-three of the Compiled Laws of said State, for that she, the said Lizzie L. Palmer, at the city of Ionia aforesaid, is and was for said thirty days the keeper of a bawdy house, contrary to the forms of the statute in such case made and provided, and against the peace and dignity of the people of the State of Michigan.

Wherefore the said Erastus H. Stanton prays that the said Lizzie L. Palmer may be apprehended and held to answer this complaint and further dealt with in relation to the same as law and justice may require. ERASTUS H. STANTON.

Taken, subscribed and sworn to before me the day and year first above written. WM. B. THOMAS,

Filed this 2d February, 1880. *Justice of the Peace.*"

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GEORGE HALL v. THE PEOPLE.

Information for statutory offense—Withdrawing of counts.

An information for feloniously breaking and entering a store not adjoining a dwelling house, with intent to steal the chattels therein found, does not charge any offense known to the law.

An information for a statutory offense must identify and distinguish it from every other, and set forth specifically its statutory components.

A prisoner having been once in jeopardy upon a count which has been withdrawn by the judge at the trial, cannot afterward be held upon it.

An information alleging a breaking and entry of a store not occupied with a dwelling, but not stating whether it was done either in the night time or in the day time, does not allege any offense under Michigan laws.

Error to St. Clair. Submitted April 21. Decided April 28.

INFORMATION for breaking into a building with intent to steal. Respondent was convicted below.

Avery Brothers and *Thomas A. E. Weadock* for plaintiff in error. An information for a statutory crime is fatally defective if it does not allege every essential constituent of it, *Enders v. People* 20 Mich. 239; *State v. Philbrick* 31 Me. 401; *Markle v. State* 3 Ind. 535; *Lambert v. People* 9 Cow. 578; *Lewis v. State* 16 Conn. 32; Tiff. Cr. Law 622-3; 1 Archb. Cr. Pl. 265; 2 Bish. Cr. Pro. 103; Bish. on Stat. Crimes 331.

Elliott G. Stevenson, prosecuting attorney, for the people. Breaking into a building by night and by day are different degrees of the same offense, *Hanna v. People* 19 Mich. 322; *Waters v. State* 53 Ga. 567; 1 Am. Crim. Cas. 367; and a person charged with the greater offense may properly be convicted of the smaller, *Campbell v. People* 34 Mich. 351.

GRAVES, J. The information against the plaintiff in

error charged that "on the 16th day of November, A. D. 1878, at the township of St. Clair, in the county of St. Clair aforesaid, the store of Madison Phenix, there situate, not adjoining to or occupied with a dwelling-house, feloniously did break and enter, with intent the goods and chattels of the said Madison Phenix, in the store then and there being found, then and there feloniously and burglariously to steal, take, and carry away, against 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." There was a second count charging larceny of property of the value of $120. The evidence was directed mainly to make out the first charge, and there was no proof of value. The circuit judge submitted the case on the first count and withdrew the count for larceny altogether. The jury found the plaintiff in error "guilty of burglary *only*, in manner and form as the said people have in their information in this cause charged," and the court then sentenced him to the State's prison at hard labor for three years.

It is alleged for error that the accusation on which the jury found and the court imposed the sentence describes no offense whatever, and we think the position is true. The pleader no doubt intended to charge some one of the statutory offenses partaking of the common law crime of burglary. He failed however to include the necessary constituents of either of them. The Legislature has seen fit to enact of what they shall consist, and the presence of all the required components is necessary to mark the presence of the offense. No general description will answer. The crime laid must be so described as to identify it and distinguish it from every other. Here the breaking and entry are not charged as having been done in the night time, and hence no crime is alleged under Comp. L., § 7563. They are not alleged to have been effected in the day-time, and consequently no offense is set up under section 14 of Act 93 of the laws of 1875 (Pub. Acts 1875, p. 131). No charge of larceny is included.

The accusation is not put forth as one of a substantive

offense formed of an attempt to commit larceny, and does not contain the matter necessary in preferring such a charge.

There are no other provisions to which the proceeding can be referred. There is no occasion to look into the decisions made in other States. The doctrine is settled by our own cases. *Koster v. People* 8 Mich. 431; *People v. Chappell* 27 Mich. 486; *People v. Olmstead* 30 Mich. 431; *Byrnes v. People* 37 Mich. 515.

The judgment was erroneous and must be reversed; and as plaintiff in error has been once in jeopardy on the charge of larceny, he must be discharged.

The other Justices concurred.

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THE PEOPLE v. JAMES WHITSON, IMPLEADED WITH JOHN MCMARTIN AND THOMAS MAHER.

Impeaching testimony—Proof against accomplices.

Impeaching testimony against a person not yet called as witness cannot be admitted.

In a prosecution for robbery it was shown that after the robbery the complaining party went into a house in the door of which a woman was standing. *Held* that the witness could not be cross-examined as to the reputation of this woman as a prostitute, thief and brothel keeper.

A witness cannot be impeached by showing her to be a thief, prostitute and brothel keeper, though she may perhaps be asked on her own cross-examination as to such matters.

Where a robbery is committed by several persons acting in concert, it is proper on the separate trial of one of them to show that the plunder was found with one of the others, or in the cell where he had been locked up.

Exceptions before judgment to the Recorder's Court of Detroit. Submitted April 21. Decided April 28.

INFORMATION for robbery. Respondent was convicted.

Attorney General *Otto Kirchner* for the People.

Miller & Clarke for respondent.

CAMPBELL, J. Whitson was convicted of the robbery of one John Guilman, of which he was jointly charged with McMartin and Maher, but separately tried. The testimony of the offense was direct and positive. The money taken was part in silver and part in bills. Complainant identified one of the bills positively, and others not so clearly. One of the witnesses for the prosecution mentioned several women, and among them one Sarah Burns, as standing at the door of a house which Guilman went to after the robbery, while he bore the marks of violence. On cross-examination he said it was a house of bad repute. He was then asked on cross-examination concerning the reputation of Sarah Burns as being a prostitute and thief and brothel keeper, and this inquiry being excluded, respondent excepted, and now claims it to have been error.

We do not think if Sarah Burns had been at that time sworn as a witness, that such testimony would have been proper impeaching testimony. It might have been allowable on her own cross-examination, and when she afterwards became a witness it is evident full latitude was given for such questioning. But it is a novel practice to seek to impeach a witness who has not as yet been sworn in the case at all, and it is not allowable.

The only other error alleged is that one of the police officers was allowed to show that he found the bills in question in McMartin's cell, where he was locked up at the police station. The only ground of this objection is that inasmuch as Whitson was separately tried, he could not be proven guilty by any conduct of the co-defendants.

Inasmuch as the offense charged and proved was committed by the three acting together and in concert, it was competent to trace out the fruits of the robbery to any of them. The money identified was sworn to have been taken by force from Guilman by an assault

from all three, and tracing this money to any of them was, if not necessary, at least very pertinent. There is no reason suggested which seems in any way plausible against it.

There is no error, and the prisoner should be sentenced.

The other Justices concurred.

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The Farmers' Mutual Fire Insurance Company of Barry and Eaton Counties v. Oscar Crampton.

Fire insurance—Over-valuation—Burning by assured.

In an action on an insurance policy it is proper to cross-examine the plaintiff as to whether a fraudulent over-valuation of the property was not given at the time he applied for the policy.

Notice of special defense attached to a plea of the general issue, is not required to be as precise as special pleading.

In assumpsit on an insurance policy, a notice attached to the plea of the general issue that defendant would show that plaintiff was guilty of fraud in procuring the insurance, is sufficient if it fairly apprises the plaintiff of the defense to be set up.

Where defendant in an action on a fire insurance policy claimed that plaintiff himself set fire to the property, it was *held* proper to show that money belonging to the plaintiff, and personal property belonging to near relations of his, was destroyed; also, that the value of the property destroyed far exceeded the insurance.

Where it was claimed in defense to an action on a fire insurance policy that the plaintiff himself set fire to the property, statements made by him before the fire, to third persons, to the effect that he was going away were inadmissible; so also was plaintiff's evidence as to why he went and where he was on the night of the fire.

In assumpsit on a fire insurance policy where the defense is that plaintiff himself burned the property, testimony tending to show that he had loose notions respecting the destruction of insured property is material, though the weight of such testimony might depend on whether he had expressed such views lately or long before.

Error to Eaton. Submitted April 21. Decided April 28.

ASSUMPSIT on insurance policy. Defendant brings error.

I. D. McCutcheon and *M. V. & R. A. Montgomery* for plaintiff in error.

E. A. Foote and *R. W. Shriner* for defendant in error.

MARSTON, C. J. The offer to show on cross-examination of the plaintiff a fraudulent overvaluation of the property insured at the time he made his application should have been admitted. Notice was given with the plea of the general issue that the defendant would give in evidence that the plaintiff was guilty of fraud in procuring the insurance. The accuracy required in special pleading has never been applied to a notice of special defense, and to so hold would defeat the very object in view in thus simplifying the rules of pleading. It is sufficient if such a notice fairly apprises the plaintiff of the defense that will be set up, and we are of opinion that when so tested the notice in this case was sufficient. We need not therefore pass upon the question whether such a defense could be shown under the general issue.

The evidence offered to show that a certain amount of money belonging to the plaintiff, and personal property of near relatives of his, was in the house and destroyed by the fire, was, we think, admissible. It was expressly stated that plaintiff did not seek to recover for the property or money so destroyed, or any part thereof, but that as the defense claimed that the plaintiff had set fire to the building such evidence was admissible as bearing upon the improbability of such being the case. If the building and contents thereof far exceeded in value the amount of insurance, such would be strong testimony in favor of the loss being an honest one, as it is not to be supposed that a person will willfully set fire to his own property and destroy the same under such circumstances. Nor is it at all probable that one would attempt to destroy the property of a relative with whom he was on friendly terms when neither could be the gainer thereby.

Evidence of statements made by the plaintiff to third parties, previous to the loss, that he was going to Detroit, and his object in going there on the morning of the day previous to the fire, and where he stayed the night of the fire, was inadmissible. This evidence is covered and excluded by what was said in *Elliott v. Van Buren* 33 Mich. 49.

The court erred in striking out the testimony of Levi and Fanny Crampton, which tended to show that the plaintiff had rather loose notions respecting the destruction of property insured, and also tending to show that he burned the property in question. That the latter was material and important evidence is not disputed; it is claimed such evidence was not stricken out. Upon this there may be some question. There is none however but that the other was. The time when such statements were claimed to have been made may have affected the weight thereof. If made shortly before the fire, such evidence would have more force than if made long previous thereto. This however would not go to the admissibility thereof, but rather to the weight to be given it by the jury.

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

The other Justices concurred.

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THE MERCANTILE INS. COMPANY v. ROSE MORLEY HOLTHAUS.

Fire insurance—proofs of loss—assignment of claims.

An insurer's neglect to object within a reasonable time to proofs of loss where the defects in them could be remedied if intelligibly pointed out, amounts to a waiver; the question whether he has acted in good faith and seasonably is for the jury.

Where defects in the proofs of loss of insured property are found to have been waived, any objection to the certificate attached to

the proofs is disposed of by the verdict, and presents no legal question.

Separate interests held by several persons under the same policy of insurance, may be united by the assignment of the policy to one individual who may bring suit upon it.

Where each of several persons assured by the same policy have distinct insurable interests, they can enforce their rights under the policy in equity if they cannot at law.

Error to Ingham. Submitted April 22. Decided April 28.

ASSUMPSIT on insurance policy. Defendant brings error.

Cowles & Cahill for plaintiff in error.

M. V. & R. A. Montgomery for defendant in error.

GRAVES, J. The defendant in error sued as assignee of Matilda Morley and Mary L. Ayers to recover a loss which they suffered under a policy of fire insurance issued by the company to them September 17, 1877. She recovered in the court below and the case comes up on exceptions. The assured were mother and daughter, and being widows they lived together in the same house. The subject of insurance was personal property consisting of household furniture, provisions, clothing apparel, and other articles, and some of it they owned in severalty. The fire occurred on the 6th of December, 1877, and preliminary proofs of loss were forwarded on the 17th. On the 14th of January following the company returned objections. They were that the proofs were "incomplete and imperfect, having been verified and subscribed to by Mary L. Ayers only, who is incompetent to make proofs of loss as to value and loss sustained to the personal of Matilda Morley;" and further that the proofs did "not bear the certificate of a magistrate, notary public, or commissioner, as is required by the conditions of said policy of insurance."

In communicating these objections, which were the only exceptions taken, it was stated that no liability was then denied or admitted and that the company reserved

to itself any and all rights it had under and by virtue of the policy and the conditions thereto attached. In the interval between the forwarding of these first proofs and this reply the assured transferred their claim to defendant in error. Soon after the reception of the objections to the proofs, negotiations were opened between the parties for an amicable adjustment, and were continued during the season. The company throughout these efforts however persisted in the claim that it was not liable, and averred that in seeking to effect an arrangement it was influenced by a desire for peace. The attempt proving unsuccessful, the defendant in error on the 20th of September forwarded new proofs of loss to the company's office at Cleveland, in the State of Ohio.

By the terms inserted in their policy the payment of loss could not be required until the lapse of sixty days from the reception of complete proofs of loss at the office of the company, and another stipulation put in declared that no suit upon the policy should be maintained unless commenced within the term of twelve months next after the loss.

These provisions were incorporated in the policy as conditions the company had the right to insist upon and did insist upon. As the fire took place on the 6th of December, 1877, the twelve months for bringing suit would expire in the fore part of the approaching December, and at the time of sending the second proofs in September there remained only about seventy-five days, and hence only about fifteen days beyond the term reserved to the company within which to make payment after complete proof of loss.

The provision relative to a certificate, to which reference was made, required the assured to produce "the certificate under seal of a magistrate, notary public, or commissioner of deeds nearest the place of the fire, and not concerned in the loss or related to the assured, stating that he has examined the circumstances attending the loss, knows the character and circumstances of the

assured, and verily believes that the assured has, without fraud, sustained loss on the property insured to the amount claimed by the said assured."

No certificate accompanied the proofs first made, but those sent the 20th of September contained one as follows:

"I, Augustus F. Weller, a justice of the peace residing in the city of Lansing, Michigan, most contiguous to the property hereinbefore described, hereby certify that I am not concerned in the loss or claim above set forth, either as a creditor or otherwise, or related to the insured or sufferers; that I have examined the circumstances attending the fire, or damage, as alleged, and that I am well acquainted with the character and circumstances of the insured, and do verily believe that they have by misfortune, and without fraud or evil practice, sustained loss and damage on the property insured to the amount of two thousand five hundred dollars.

"In testimony whereof I have hereunto set my hand and official seal this 18th day of September, A. D. 1878."

Then followed the magistrate's name and seal.

The assured and assignee united in making these proofs. The company retained these papers until the 28th of October, more than a month, without signifying dissatisfaction or suggesting any defect. There remained only thirty-eight days of the twelve months which the company had fixed as the limitation for commencing suit; and assuming, for the purpose of this case, which is entirely proper, that the company was committed to this stipulation as one completely binding on the assured, and it is apparent that a portion of the sixty days reserved as a fixed term of credit had elapsed. There was no longer, on this supposition, any time left for completing preliminary proofs. The company had not only delayed the notification of dissatisfaction with the papers for the two weeks which the limitations permitted without prejudice to the assured, but for a sufficient time beyond to disable the latter, according to the claims made by the company through the terms of the policy, from doing anything to obviate objections.

At that late day a series of objections was tendered. The only one calling for present notice relates to the

certificate. It stated "that the justice of the peace making certificate, under seal, is not the magistrate, notary public or commissioner of deeds nearest the place of the fire, as required by the conditions of the policy; and as we verily believe, from information, does not know and has not examined into the circumstances of the said fire, the amount of said loss or the character of the claimants."

The discussion under this objection is confined to the first branch of it. The latter portion was fully disposed of before the jury, and is not questioned. The position taken by the counsel for the company is that in fact the justice was not the nearest to the fire, and that the condition being one precedent to the right of action, the defect is fatal to the cause. It is not needful to consider in the abstract what real force such stipulations possess. It was admitted on the trial that in fact the magistrate, Mr. Weller, resided and kept office a block further from the fire than another magistrate named, and that there were notaries public nearer than either; and the circuit judge instructed the jury that the policy gave the company a right to insist upon a certificate from the magistrate, notary public or commissioner nearest to the fire. The defendant in error contended that the evidence required a finding that the objection was not open to the company, and it is manifest from the charge that the judge considered the case must be determined according as the jury should find on the facts contemplated by that theory. He accordingly charged elaborately under that view.

The law is well settled that when any defects are found in the proofs of loss, capable of being remedied if intelligibly pointed out, a failure by the underwriters to make known the difficulty, or to call for the information omitted, when that is the infirmity, within a reasonable time, is deemed to be a waiver (Wood on Ins. 716 and cases), and the rule is believed to be without exception that the insurer must object seasonably if at all. He must act in good faith, openly, frankly and distinctly, and make his objections known within a rea-

sonable time; "and whether he has done so or not in a given case, is a question for the jury." Wood on Ins. 718 and cases cited.

There was much evidence at the trial bearing on this question. There were the negotiations protracted through the season, the somewhat blind form of the objections, and the neglect to point them out in the certificate for more than a month, and not until the defendant in error was entitled to infer from the policy that no time was left to obviate the objections.

Had the exception to the magistrate been at once notified, or had the company offered sufficient time, new and precise proceedings might have been taken. But neither was done. Under the charge, which was very fair, the jury must have found that the objection to the certificate was not open, and that all right to defend on account of the shape of the certificate or the incompetency of its author was waived. The point was therefore disposed of by the verdict.

It appeared on the face of the policy that some of the property was held in severalty. The description implied it, and the agent knew it. There was no fraud about it. Each of the assured had an insurable interest, and if the form of the contract presented insuperable impediments to the enforcement at law of their separate rights—a point which is not examined—the parties were not without remedy. A court of equity, if necessary, could have entertained the case and protected the rights of all. The inability of the assured to sue at law jointly, in case such inability existed, is no answer to the suit by their assignee. It is every day's experience to see separate and independent interests, whether arising from one paper or many, united by assignment in one ownership, and the sole object is often no other than to save a multiplicity of suits.

The amendment of the declaration was matter of discretion, and there is not the least ground for contending that the discretion was improperly exercised.

What has been said disposes of all the points insisted on, and as no error is shown, the judgment must be affirmed with costs.

The other Justices concurred.

DANIEL J. CAMPAU v. TOUSSAINT LAFFERTY.

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Striking out evidence—Adverse possession—Form of lease.

A trial judge cannot strike out relevant evidence which the parties are willing to retain, nor stipulate conditions to the reception of evidence, as by refusing to allow testimony to stand unless a party consents to an answer at large.

An adverse holding cannot exist if the holder does not believe in his title.

Where a trespasser, in whom title by adverse possession has not been perfected, accepts a lease and agrees to give up possession when it expires, he is estopped from repudiating his recognition of his landlord's title and from claiming adversely to such title.

It seems that usage permits a lease to be executed by exchanging duplicates each of which is signed only by the other party.

A parol lease for a single year, if accepted, is enough to break a period of adverse possession and bar the statute of limitations against actions for real estate.

Error to Wayne. Submitted April 22. Decided April 28.

EJECTMENT. Plaintiff brings error.

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

E. H. Rogers and *C. A. Kent* for defendant in error, cited *Fuller v. Sweet* 30 Mich. 237.

CAMPBELL, J. Plaintiff brought ejectment for an undivided interest in certain lands in Grosse Point, Wayne county, which were patented by the United States to the heirs of Nicholas Campau September 2, 1840. Title was

regularly traced into plaintiff from various heirs, and among others from Catherine Lafferty, the mother of defendant, who was one of the heirs living at the date of the patent. She deeded her interest August 20, 1845, to Joseph Campau, father of plaintiff, and to Barnabas Campau, and took back from them on the same day a life lease of the entire property. She died in October, 1854. After her death (as the case was put to the jury, and there is apparently no testimony which would authorize any previous occupation by defendant to be regarded as independent), defendant went into possession, and has occupied the premises since. This suit was brought December 28, 1875. The only defense is an occupation for more than twenty years. The regular title is shown to be in plaintiff.

Plaintiff showed a lease executed in duplicate on the 23d day of June, 1865, between the administrators of Joseph Campau and defendant, whereby they leased to him for a year the premises in question for the rent of one dollar and payment of the taxes on these premises and the remainder of a larger tract including them, in which he covenanted also to keep the buildings in repair, and at the end of the year to surrender the premises to the lessors.

Some collateral questions came up during the trial concerning evidence, but the principal error assigned is concerning the charge of the court.

Upon the objection of plaintiff some testimony was excluded, whereby defendant was asked to swear concerning certain transactions between himself and Denis Campau, one of the administrators. But after this was excluded defendant's counsel were allowed to ask him, without objection, some further questions of the same sort, and in answer to one of them he said that Denis read the lease to him. The court, then, of his own motion struck out this answer, and refused to allow it to stand unless plaintiff would consent to allow the witness to answer at large.

As it did not appear that this suit was brought in the interest of Denis Campau's estate, and Denis was not acting in his individual right, we do not perceive why the testimony was not admissible. But it was clearly error for the judge to strike out relevant evidence which the parties were willing to retain, and it was not within his province to stipulate conditions concerning the reception of evidence. This testimony stricken out was important because it proved the knowledge by defendant of the terms of the lease, concerning which he set up a claim of ignorance. How far any such claim could avail him, if true, is not now important.

The court was requested by plaintiff to charge that "the lease executed by Toussaint Lafferty in 1864 shows a full recognition of the title of Joseph Campau, and if the jury find it was signed by him with full knowledge of its contents, the plaintiff is entitled to a verdict."

This was refused, but the court charged on this point that it would under such circumstances be very strong evidence that he understood he had no title to the property. In connection with this the court charged that twenty years adverse possession would give him a perfect title.

The effect of this charge was, with its context, to allow if not to require the jury to find that such an instrument was not inconsistent with an adverse holding. They were not told that a holding cannot be adverse if the holder does not believe in his title, and there is no doubt a possession may be maintained long enough by an undisturbed and defiant trespasser to bar an ejectment. Under the charge the verdict for defendant was almost inevitable, for the possession had probably lasted twenty years, and unless the lease broke it, the jury might without further explanations find no means of knowing what was meant by adverse possession.

But we think plaintiff was entitled to the charge requested. The court, as already suggested, told the jury, and rightly, as it seems, that defendant had no posses-

sion which could avail him, before his mother's death. There was no pretense of legal title in defendant at any time. In 1865, when this lease was made, there had not been time for any title to be raised adversely, and if he was not in possession as tenant at will or sufferance under the real owners, he was a mere trespasser and liable to ouster. Under such circumstances acceptance of a lease and an agreement to deliver up possession at its termination, created as distinct and unequivocal an estoppel as could be made, and the tenant who thereby was released from his liability as trespasser, and invested with a rightful possession, could not afterwards repudiate the recognition.

The case is entirely different from that referred to in *Fuller v. Sweet* 30 Mich. 237, where a tenant in common already rightfully in possession was held not estopped to deny the title of a wrongful claimant to the remaining interest, from whom he had as a supposed co-tenant taken a lease which had been regularly terminated by proper notice. Here there was a valuable consideration and an advantage secured by the transaction, which the tenant had the enjoyment of.

It was suggested on the argument that there was no foundation for this claim here, because the instrument produced was signed by no one but the tenant. It appears however that a duplicate was executed and given to him, and the transaction was probably the usual one where each party signs the paper delivered to the other, and does not always sign the one he keeps. As the lease was for a single year, it might have been made by parol. But the testimony is that it was in writing.

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

The other Justices concurred.

HENRY B. CARPENTER v. HARLEY INGERSOLL AND A. JONES. 43 433 73 122

Patent to lands—Re-engrossment of bill in equity.

One who holds only an equitable title to land cannot attack a patent thereto by proceedings at law.

It *seems* that a foreclosure sale is not necessarily invalidated by neglect to re-engross the foreclosure bill after amending it by adding a new party defendant.

Error to Ingham. Submitted April 22. Decided April 28.

EJECTMENT for premises claimed by Carpenter under the foreclosure of a mortgage, and by defendant under a patent from the State. The original purchaser of the land only took a certificate of purchase from the Commissioner of the Land Office, which certificate, after several intermediate assignments, was assigned to Ingersoll for a valuable consideration, and without notice of a mortgage on the premises, given by one of the former assignees and assigned to Jas. W. Tillman, who foreclosed it, and whose widow and heir-at-law transferred to Carpenter all the title thereby obtained. Ingersoll assigned the certificate of purchase to T. D. Knight, who took out a patent from the State and re-conveyed to Ingersoll. The foreclosure bill was amended by adding Ingersoll as a defendant, but the bill as amended was not engrossed and filed as required by Chancery Rule 21, though the amendments were made upon the original bill. The court below found for defendants.

H. B. Carpenter in person, and *M. V. Montgomery* for plaintiff in error. The holder of a land certificate may bring ejectment, *McGlone v. Prosser* 21 Wis. 273; *Gough v. Dorsey* 27 Wis. 119.

S. L. Kilbourne for defendants in error. One who holds by patent has the legal title (*Clark v. Lockwood* 21 Cal. 220; *Rhodes v. Craig* id. 419; *Thompson v. Lyon*

33 Mo. 219), and the patent cannot be impeached collaterally in a court of law on the trial of an ejectment, 3 Washb. R. P. 175; see *Romain v. Lewis* 39 Mich. 233; *Cook v. Bertram* 37 Mich. 124; *Dale v. Turner* 34 Mich. 405; *Jackson v. Hart* 12 Johns. 77; *Jackson v. Marsh* 6 Cow. 281; *People v. Livingston* 8 Barb. 255; *People v. Mauran* 5 Den. 389; *Jackson v. Lawton* 10 Johns. 23.

COOLEY, J. If this case was before us for determination on all the merits, it is probable there would be no difficulty in sustaining the sale under which the plaintiff claims, as being a valid sale on the foreclosure of an equitable mortgage, notwithstanding the irregularity which has been pointed out in the proceedings. *Torrans v. Hicks* 32 Mich. 307. But we decided in *Romain v. Lewis* 39 Mich. 233, that the holder of the equitable title could not attack the patent at law; and that case rules the present. The plaintiff has a more suitable remedy, and must be left to pursue it.

The judgment must be affirmed with costs.

The other Justices concurred.

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FRED. NIELSEN v. JOHN J. WAKEFIELD, HIGHWAY COM'R.

Proceedings to lay out a highway—Service of notice.

Proceedings to lay out a highway are void if there is no proof of service of the notice of the meeting to determine its necessity and appraise the damages.

Certiorari to highway commissioner. Submitted April 22. Decided April 28.

W. E. Ambler for plaintiff in certiorari. Notice of proceedings to lay out a highway must be shown in the return by the highway commissioner to a writ of certio-

rari, *Van Auken v. Com'rs* 27 Mich. 414; *People v. Com'rs of Nankin* 14 Mich. 528; *Dupont v. Com'rs* 28 Mich. 362.

MARSTON, C. J. Proceedings were taken to lay out a highway. The commissioner returns that a meeting was held to view the premises, ascertain and determine the necessity of laying out the highway and to appraise the damages, and that although action was taken at that meeting, yet there was no proof of service of notice thereof in any manner. The case is therefore disposed of by previous decisions and the proceedings must be quashed.

The other Justices concurred.

DOUGALD MCARTHUR v. THEODORE LUCE ET AL.

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s5NW 451
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Money paid under mistake of facts.

One who after investigation pays a claim made in good faith, but afterwards found to be baseless, cannot recover back the money on the ground that it was paid under mistake of fact.

Error to Alpena. Submitted April 22. Decided April 28.

ASSUMPSIT. Plaintiff brings error.

Kelley & Clayberg for plaintiff in error. A claim cannot be re-opened if after having been disputed and asserted in good faith, it has been settled without fraud, undue advantage or mistake of fact, *Kercheval v. Doty* 31 Wis. 476; *Trigg v. Read* 5 Humph. 529; *Larue v. White* 8 Dana 46; *Ross v. McLauchlan* 7 Gratt. 86; an account stated may be impeached for mistake, *Lockwood v. Thorne* 11 N. Y. 170; *Philips v. Belden* 2 Edw. Ch. 1; or an award set aside, *Carter v. Carter* 109 Mass. 306; *Spoor v. Tyzzer* 115 Mass. 40;

specific performance will be denied when there was a mutual mistake as to the subject matter of the contract, *Jones v. Clifford* L. R. 3 Ch. D. 779; *Davis v. Shepherd* L. R. 1 Ch. App. 410; *Dale v. Roosevelt* 5 Johns Ch. 174; *Marvin v. Bennett* 8 Paige Ch. 312; *Lawrence v. Staigg* 8 R. I. 256; money paid under mutual mistake may be recovered back, *Little v. Derby* 7 Mich. 325; *McGoren v. Avery* 37 Mich. 120; *Bend v. Hoyt* 13 Pet. 263; *Waite v. Leggett* 8 Cow. 195; *Burr v. Veeder* 3 Wend. 412; *Wheadon v. Olds* 20 Wend. 174; *Kelly v. Solari* 9 M. & W. 54; *Bell v. Gardiner* 4 M. & G. 11; *Milnes v. Duncan* 6 B. & C. 671; *Lazell v. Miller* 15 Mass. 207; *Millett v. Holt* 60 Me. 169; *Lawrence v. Am. Nat. Bank* 54 N. Y. 432; *Kingston Bank v. Eltinge* 40 N. Y. 391; *Canal Bank v. Bank of Albany* 1 Hill 287; *Devine v. Edwards* 87 Ill. 177; *Bradford v. Chicago* 25 Ill. 410; *Allen v. Mayor* 4 E. D. Smith 407; *Lewellen v. Garrett* 58 Ind. 442; *Citizens Bank of Baltimore v. Grafflin* 31 Md. 507; *Mowatt v. Wright* 1 Wend. 363; *Guild v. Baldridge* 2 Swan 295.

Turnbull & McDonald for defendant in error. A *bona fide* claim with color of right will sustain a settlement, *Gates v. Shutts* 7 Mich. 132; *Moore v. Detroit Locomotive Works* 14 Mich. 275; *Hull v. Swarthout* 29 Mich. 252; the law will not disturb settlements made deliberately especially if acquiesced in for a long period, *Frazer v. Hext* 2 Strobh. Eq. 250; and when there was full opportunity to ascertain the amount due, *Boyer v. Pack* 2 Den. 108; *Brisbane v. Dacres* 5 Taunt. 143; 2 Smith's Leading Cases 242; *Mowatt v. Wright* 1 Wend. 364; *Williams v. Irving* 47 How. Pr. 440; a payment made voluntarily and with a knowledge of all the facts cannot be recovered back, *Stewart v. Ahrenfeldt* 4 Den. 190; *Clarke v. Dutcher* 9 Cow. 674; a settlement may be sustained if the parties thought there was a doubt in the case, 1 Pars. Cont. 439; *Mills v. Lee* 6 Mon. 91; *Moore v. Fitzwater* 2 Rand. 442; *Pierson v. McCahill* 21 Cal. 122; *Bennet v. Paine* 5 Watts 259.

MARSTON, C. J. Luce & Co., in demanding that McArthur pay them for logs cut, as they supposed, upon their land, acted in entire good faith. They had a survey made, and according thereto the plaintiff had cut logs over the line. When the claim was made upon the plaintiff he employed a surveyor and they went upon the land and plaintiff then became satisfied that he had cut and taken logs from off defendants' land, and authorized a settlement to be made, which was done. This was in 1871 and all parties rested in the belief that a correct settlement had been made until some time in 1875 when a new survey established the fact that no logs had been cut upon defendants' land and this action was brought to recover back the moneys paid, upon the claim of having been paid under a mistake of fact.

Where a claim is thus made against another who, not relying upon the representations of the claimant, has the opportunity to and does investigate the facts, and thereupon becomes satisfied that the claim made is correct and adjusts and pays the same, I think such settlement and payment should be considered as final. If not, it is very difficult to say when such disputed questions could be considered as finally settled, or litigation ended. In the settlement of disputed questions where both parties have equal opportunity and facilities for ascertaining the facts, it becomes incumbent on each to then make his investigation and not carelessly settle trusting to future investigation to show a mistake of fact and enable him to recover back the amount paid. One course encourages carelessness and breeds litigation after witnesses have passed beyond the reach of the parties: the other encourages parties in ascertaining what the facts and circumstances actually are while the transaction is fresh in the minds of all, and a final and peaceful settlement thereof. *Detroit Advertiser & Tribune Co. v. Detroit,* ante p. 116 and *County of Wayne v. Randall,* ante p. 137.

The judgment must be affirmed with costs.

The other Justices concurred.

ANGUS C. MCDONALD v. CHARLES BEWICK, ANDREW W. COMSTOCK ET AL.

Construction of promise to pay.

A written assurance that "we here agree to pay every man you have in your employ * * * that stays by you until you put in your logs," does not cover persons not employed till after it was received.

Error to Alpena. Submitted April 22. Decided April 28.

ASSUMPSIT. Plaintiff brings error.

Holmes & Carpenter for plaintiff in error.

Turnbull & McDonald for defendants in error.

CAMPBELL, J. McDonald sued defendants on an alleged agreement made by them to become personally responsible for the payment of all men employed under one Kennedy in getting out logs. The writing under which he sues was as follows:

"ALPENA, MICH., May 10, 1878.

Mr. D. A. Kennedy, Wilson Township, Mich.:

I am told that there are some fears expressed by some of your men that they will not get their pay. You may say to them all, and show them or any of them that we here agree to pay every man you have in your employ to the last dollar that may be due him for labor, that stays by you until you put in your logs.

BEWICK, COMSTOCK & Co."

McDonald was not in the employ of Kennedy when this letter was written, but was afterwards employed by him. There was considerable testimony on the subject of this employment, and of Kennedy's having work of his own as well as of defendants. The court below charged that no cause of action was made out, and these questions do not become very important. The declaration declares on an original and not a collateral undertaking, but this, also, becomes immaterial in the view taken on the law of the case.

At the time this letter was written, as appears from the letter itself as well as from other proofs, Kennedy had a number of men in his employ who were unwilling to trust to him personally for pay, and threatened to leave him. Defendants knew or had means of knowing how many of these men there were, and on what terms they were employed. The testimony indicates they had special reasons for protecting them. The letter sued on, by its natural and plain sense, is intended for the single purpose of inducing men already employed, to remain with Kennedy until he finished his work. There is nothing authorizing him to discharge these men or to employ others, unknown to defendants, and on such terms as he might choose. They could easily anticipate how much they would have to pay to the men already engaged, and were willing to pay them. But it could not be supposed they would be willing to put their personal credit entirely at the discretion of Kennedy in favor of any one he should thereafter employ. It would require very plain language to favor such an obligation. The language of their letter is clear and not ambiguous, and its natural meaning is sensible and reasonable. We think it had no reference to persons not then employed.

There is no error in the record, and the judgment must be affirmed with costs.

The other Justices concurred.

CHARLES E. MASON AND BENJAMIN F. LUCE v. SETH A. L. WARNER AND GORDON H. DAVIS.

Agreement to take pay from proceeds—Purchaser's insolvency.

One who agrees to take his pay from the proceeds of a sale must lose ratably with the other party if the purchaser becomes insolvent and neither party interested in the payment is at fault in the matter.

An agreement to take pay in goods or their proceeds will not sustain a demand for a cash payment without the consent of both parties, especially where it would compel the debtor to resort to funds which he had guarded by this arrangement.

W manufactured shingles for M, and agreed to take his pay in shingles, or their proceeds. M sold a quantity and received, besides some cash, a note made payable to W, to whom he turned it over, but refused to indorse it. W took it on condition that he found the maker to be responsible, but while holding it the maker failed. *Held* that W could not recover the amount of the note from M, but could only claim his *pro rata* share of the cash and available paper received for the shingles.

Error to Alpena. Submitted April 22. Decided April 28.

ASSUMPSIT. Defendants bring error.

Turnbull & McDonald for plaintiffs in error.

Kelley & Clayberg for defendants in error.

MARSTON, C. J. In the spring or early summer of 1878 an agreement was entered into between the parties hereto, under which Warner & Davis were to take possession of Mason, Luce & Co's shingle mill for the purpose of manufacturing the shingle logs of the last named firm. Warner & Davis were to have the mill free of rent, and were to fit up and run the mill at their own expense, but with the privilege of removing any belts or machinery put in by them, and were to manufacture the logs for $1.05 for XXX and No. 1 shingles, and to take their pay in shingles of such brands, at the market price. Such an agreement was reduced to writing and agreed upon but never executed. Mr. Warner, one of the plaintiffs below, testified that they were to take their pay in shingles because Mr. Luce did not want to be compelled to pay them until they realized from the shingles. And he farther testified that there was an understanding that Warner & Davis were to have a lien on the shingles until paid, and were not to expect any money out of the shingles until they were sold, as Luce & Co. would not take money from their other business to pay for sawing

the shingles, "and we were either to take shingles or the proceeds of shingles."

Thus far we understand there is no controversy, so that we may safely assume the contract to have been as above stated.

Shingles were manufactured and sold and settled for under this agreement, and about which there is no question.

Sometime in September one of the firm of Luce & Co. sold shingles to Huff & Vandermeulen of Detroit, amounting in value, with freight added and which was paid by Luce & Co., to about $1100. It is not quite clear how much was paid Luce & Co. in cash at the time of this sale, but somewhere from $400 to $600. Besides the cash payment, Huff & Vandermeulen gave Mason, Luce & Co. their note for $150, and also a note for $450, dated September 20th, due December 20th, payable to the order of Warner & Davis. This note was about September 28th delivered to Mr. Warner, and a dispute arises here as to the terms and conditions, if any, under which Warner & Davis received this note. They claim they did not know the makers, and requested Mason, Luce & Co. to indorse it, which was refused; that they then said they would take it and make inquiries as to the responsibility of the makers, and if responsible they would keep it; otherwise not. They did make inquiries and retained the note until November 1st, when, learning of the failure of the makers, they returned the note to Mason, Luce & Co. who declined to receive it. Before this note fell due this action was brought against Mason, Luce & Co. to recover the balance claimed on the shingle contract. It does not appear that Mason, Luce & Co. received anything on the $150 note referred to. While there was some other evidence bearing upon the questions raised, the above is sufficient for the present purpose. The principal controversy on the trial was whether the plaintiffs below, Warner & Davis, took this note as a conditional or absolute payment. They obtained a verdict and judgment for the amount of their claim.

Even if the plaintiffs accepted the note of Huff & Vandermeulen conditionally, and did not make it their own by keeping it longer than was necessary to ascertain the pecuniary responsibility of the makers—questions upon which we have no desire to express or even intimate an opinion—still we are of opinion the present judgment cannot be maintained. Upon the plaintiff's own theory they were to take their pay in shingles or their proceeds, and Mason, Luce & Co. were not to take any money from their other business to pay for sawing the shingles. The previous sales having been satisfactorily adjusted, this one must stand or fall by itself.

Under such a contract it would be the duty of the person making sales to sell in the usual manner and upon the general and customary terms and conditions pertaining to such business. He, or the firm which he represented, if the sale was made in part for cash and part upon time paper, could not retain the cash and insist upon and compel the other interested parties,—in this case Warner & Davis,—to accept the paper and run the risks attending its collection. Of course Warner & Davis could accept such paper in payment, and if they received it with full knowledge of the terms of the sale, or after acquiring such knowledge retained the paper an unreasonable length of time, or if they were satisfied with and retained the paper, even although they had no knowledge of the fact that the sale made was in part for cash, they would be bound thereby, and in case of failure to collect they could not turn around and hold Mason, Luce & Co. for the loss, or any part thereof.

If they did not receive or retain this note under such circumstances as would bind them, then they could look to Mason, Luce & Co., not for the amount thereof, but for their *pro rata* share of the cash or available paper received by Mason, Luce & Co. after deducting the freight and such other expense, if any, as was right and proper.

This works out equal and exact justice to each party; each receives his proportional share of the proceeds and

bears a like share of the losses. This must have been what the parties contemplated at the time they entered into their agreement. It certainly was not then contemplated that either one should sustain all the loss without fault on their part. Under such a contract the law compels each to lose his just share. *Fredenburg v. Turner* 37 Mich. 403. And a contract payable in shingles or their proceeds cannot by either party, without the consent of the other, be changed or converted into a cash payment, especially where to do so would be to compel the debtor to resort to funds which he had guarded against by his contract, as in this case. *Roberts v. Wilkinson* 34 Mich. 130.

As the case was not presented to the jury quite in accordance with the views here expressed, the judgment must be reversed with costs and a new trial ordered.

The other Justices concurred.

MENZO SWART v. JAMES KIMBALL.

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149 [2]465
f149 [2]466

Trespass on State lands—Trial by jury—Verification of information—False imprisonment—Error.

Act 100 of 1857 (Comp. L. ch. 256) is tyrannical, oppressive, unconstitutional and void in so far as it authorizes persons charged with trespasses on State lands to be tried in some other county than that where the offense was committed.

The right of trial by jury involves the indefeasible right to be tried by a jury of the vicinage.

The provision in the Constitution of Michigan that "the right of trial by jury shall remain" means the right as it had become known to the previous jurisprudence of the State.

A person accused of crime cannot waive any essential of the right of trial by jury, and no substantial and beneficial incident of that right can be divested by legislation.

An affidavit attached to an information and stating that affiant has good reasons to believe and does believe the contents of the

information to be true, is not such verification as will warrant an arrest, especially where there has been no preliminary examination and a *prima facie* case made out.

An officer is not protected in what he does under the authority of a superior, if the latter acts under an invalid law.

In an action for false imprisonment, an averment that plaintiff incurred large expense in obtaining his liberation from imprisonment, is a sufficient allegation of special damages to sustain proof of the amount of the attorney fee.

In an action for false imprisonment it was shown that defendant had sought to obtain the re-arrest of the plaintiff. *Held* that the evidence was admissible, and as likely to aid the defendant as to injure him, if it was uncertain whether it was done in malice or in an honest belief of plaintiff's guilt.

Judgment will not be reversed for error that does not prejudice.

Error to Alpena. Submitted April 22. Decided April 28.

TRESPASS ON THE CASE for false imprisonment. Defendant brings error.

Kelley & Clayberg for plaintiff in error. An affidavit attached to an information, stating that affiant knows the contents of the above information and verily believes the same to be true as therein set forth, is a sufficient verification, *Mentor v. People* 30 Mich. 91; a verification of a positive charge by an oath according to the affiant's best knowledge and belief is enough to authorize a justice to issue a warrant, *State v. Hobbs* 39 Me. 212; *People v. Lynch* 29 Mich. 274; *Johnson v. Maxon* 23 Mich. 130; *People v. Hicks* 15 Barb. 153; *Pratt v. Bogardus* 49 Barb. 93; *Vannatta v. State* 31 Ind. 211.

Turnbull & McDonald for defendant in error. An information sworn to on information and belief is void if the statute requires the verification to be by some one who can testify to the facts, *Teachout's Case* 15 Mich. 346; *Proctor v. Prout* 17 Mich. 473; *Brown v. Kelley* 20 Mich. 33; *Hackett v. Wayne Circ. Judge* 36 Mich. 335; one who procures or advises an illegal arrest is liable in trespass for false imprisonment, 2 Chit. Pl. 64; *Baird v. Householder* 32 Penn. St. 168; *Sullivan v. Jones* 2

Gray 570; *Clifton v. Grayson* 2 Stew. (Ala.) 412; *Cole v. Radcliff* 4 W. Va. 332; *Allen v. Greenlee* 2 Dev. 370; *Luddington v. Peck* 2 Conn. 700; *Bauer v. Clay* 8 Kan. 580; *Painter v. Ives* 4 Neb. 122; *Poulk v. Slocum* 3 Blackf. 421; *Lansing v. Case* 4 N. Y. Leg. Obs. 221; Cooley's Torts 127, 132; damages in false imprisonment cover costs incurred in obtaining a discharge, 3 Wait's Actions 322; *Parsons v. Harper* 16 Gratt. 64; *Bonesteel v. Bonesteel* 30 Wis. 515; *Clark v. Newsam* 1 Exch. 131.

COOLEY, J. This is a remarkable case on the law and on the facts.

By "An act for the better protection of the public lands, and to punish the cutting and carrying away of timber therefrom," approved February 12, 1857 (Comp. L. ch. 256), the cutting down or destroying or causing to be cut down or destroyed any trees standing or growing on any of the lands of the State, or lands held in trust by the State, or the taking and carrying away any trees or parts thereof, or any timber or lumber made therefrom, so cut or destroyed, when the same was willfully and knowingly done, and with intent to convert the same to the use of the party or his employer, was made a felony if the value of the trees etc. exceeded the sum of twenty-five dollars, and a misdemeanor when the value did not exceed that sum. The maximum punishment for the felony was five years' imprisonment in the State prison. The fifth section of the act provided that "All prosecutions under this act may be either by indictment or information in the county where the offense is committed; or, if it be committed in the Upper Peninsula, in any county in said peninsula; if in the Lower Peninsula, in the county where the offense was committed, or in such other county as the Commissioner of the State Land Office, or the Attorney General, shall, by written instructions to the prosecuting attorney thereof, direct."

The sixth section provides that "Such information shall be brought by the Attorney General or by the prosecut-

ing or district attorney of the county where the same is to be prosecuted. It shall set forth the offense with reasonable certainty; shall not be filed nor have effect without an affidavit of some credible person verifying the charges therein contained, which shall be filed at or before the time process shall issue for the arrest of the accused, nor until the circuit or district judge of the court shall, by an indorsement thereon, allow the same to be filed. When so allowed, the proper prosecuting attorney shall take out a warrant from the office of the clerk, in the usual form as near as may be, for the arrest of the accused; and whether the prosecution be by indictment or information, the warrant of arrest may be directed to the sheriff of the same or any other county, and may be served anywhere in the State, by arresting the offender and committing him for trial in the proper county." The further provisions relate to forms and methods of procedure, and need not be recited here.

In the summer of 1878 Mr. Swart, the plaintiff in error, was in the employ of the State land department in looking after trespasses on State lands, and was informed by reports of his predecessor, then on file or of record in the Land Office, that a trespass had been committed by Kimball, the defendant in error, in the county of Alpena. He went to Alpena, partly to inquire into this trespass, and while there claims to have obtained evidence of a further trespass by Kimball, committed more recently. He went to see Kimball and endeavored to make him settle for the alleged trespasses, but did not succeed. The accounts given by the two parties as to the interviews between them differ very considerably; that of Swart only showing an endeavor in a proper way to obtain a settlement for the timber cut, while Kimball gave evidence tending to show that he denied having committed any trespass, and that Swart made threats of criminal prosecution against him with the evident purpose to extort money from him whether innocent or guilty. The attempts at a settlement failed, and Swart

proceeded to institute a prosecution. He went to Lansing, 250 miles or so from the county of the alleged trespass, and there procured an information to be drawn against Kimball, to which the Land Commissioner appended an order to the prosecuting attorney of Ingham county, directing him "to prosecute the foregoing information in the county of Ingham and State of Michigan." The following is the verification appended to the information:

"STATE OF MICHIGAN, } ss.
COUNTY OF INGHAM, }

Menzo Swart of the village of Flushing in the county of Genesee being duly sworn deposes and says: *First*, that he has heard read the foregoing information, and that he knows the contents of the same; *second*, that he knows the contents of the foregoing information, and that he has good reason to believe and does believe the same to be true as therein set forth. *Third*, and further saith not. Subscribed," etc.

Upon the information thus verified, and without any further or other evidence that an offense had been committed, or that the accused was probably guilty of any violation of law, a warrant was issued out of the circuit court for the county of Ingham, commanding the arrest of Kimball, and his production in that court to answer the information. Kimball was arrested by virtue of this warrant by an officer, who arrived with him in Mason the third day thereafter, and immediately placed him in jail, where he remained for thirteen days. At the end of that time he obtained legal assistance and applied to the Hon. Geo. M. Huntington, circuit judge, for the writ of *habeas corpus* to inquire into the legality of his imprisonment, and the writ having been granted to him, he was discharged on a hearing. In the August following he brought suit against Swart for false imprisonment in causing his arrest and incarceration, and obtained judgment, and this judgment is now before us for review on exceptions.

The record in this case does not show on what ground

Kimball was discharged by the circuit judge; whether it was because in his opinion the act under which the prosecution took place was invalid, or because the proceedings under it were not in conformity to its provisions. The circuit judge who tried the action for false imprisonment seems to have sustained the act. In this he was plainly in error. The act is not only tyrannical and oppressive in the last degree, and such as no legislature, even if its power was ample, should ever have passed, but it is manifestly in conflict with one of the plainest and most important provisions of the Constitution.

The Constitution of the State provides that "The right of trial by jury shall remain, but shall be deemed to be waived in all civil cases, unless demanded by one of the parties in such manner as shall be prescribed by law." Article vi. § 27. The right is to *remain*. What right? Plainly the right as it existed before; the right to a trial by jury as it had become known to the previous jurisprudence of the State. *Underwood v. People* 32 Mich. 1. The right is not described here; it is not said what shall be its incidents; it is mentioned as something well known and understood, under a particular name; and by implication at least, even a waiver of its advantages is forbidden. If the accused himself cannot waive them, plainly the Legislature cannot take them away. The next section of the Constitution repeats the guaranty of this method of trial "in every criminal prosecution," and nothing is better settled on the authorities than that the Legislature cannot take away a single one of its substantial and beneficial incidents; Opinions of Judges 41 N. H. 550; *Ward v. People* 30 Mich. 116; and even the accused cannot waive any one of the essentials. *Work v. State* 2 Ohio (N. S.) 296; *Cancemi v. People* 18 N. Y. 128; *Hill v. People* 16 Mich. 351; *Allen v. State* 54 Ind. 461.

Now that in jury trial it is implied that the trial shall be by a jury of the vicinage is familiar law. Blackstone says the jurors must be "of the *visne* or neighborhood;

which is interpreted to be of the county where the fact is committed."* 4 Com. 350. This is an old rule of the common law; Hawk. P. C. b. 2, c. 40; 2 Hale P. C. 264; and the rule was so strict and imperative that if an offense was committed partly in one county and partly in another, the offender was not punishable at all. Hawk. P. C. b. 2, c. 25; 1 Chit. Cr. L. 177. This overnicety was long since dispensed with, but the old rule has in the main been preserved in its integrity to this day. It is true that Parliament as the supreme power of the realm made some exceptions, which are enumerated by Mr. Chitty in his treatise on Criminal Law, vol. 1 p. 179, the chief of these being cases of supposed treason or misprision of treason examined before the Privy Council, and which under a statute of Henry VIII might be tried in any county, and offenses of the like character committed out of the realm, and which by a statute of the same arbitrary reign were authorized to be tried in any county in England. But it is well known that the existence of such statutes with the threat to enforce them was one of the grievances which led to the separation of the American colonies from the British empire. If they were forbidden by the unwritten constitution of England, they are certainly unauthorized by the written constitutions of the American states, in which the utmost pains have been taken to preserve all the securities of individual liberty. It has been doubted in some States whether it was competent even to permit a change of venue on the application of the State, to escape local passion, prejudice and interest; *Kirk v. State* 1 Cold. 344; *Osborn v. State,* 24 Ark. 629; *Wheeler v. State* 24 Wis. 52; but this may be pressing the principle too far, *State v. Robinson* 14 Minn. 447; *Gut v. State* 9 Wall. 35. But no one doubts that the right to a trial by a jury of the vicinage is as complete and certain now as it ever was, and that in America it is indefeasible. 1 Bish. Cr. Law [2d ed.] § 552; Whart. Crim. Law § 277; *Paul v. Detroit* 32 Mich. 108; *Ward v. People* 30 Mich. 116.

If we needed evidence of the value of the right we would find abundance of it in this record. A citizen is arrested on a criminal accusation and carried off to a distant part of the State for trial. If he is poor and relies upon many witnesses for his exculpation, this will almost of necessity put it out of his power to make a complete defense: if he is a man of moderate means, the defense may ruin him. The State makes no provision for paying the expenses of witnesses for the defense except on a showing that it is impossible for the defendant, for want of means, to procure their attendance; and we all know that when provision is made it is meagre and imperfect, and leaves to the prosecution a great advantage. Especially is this advantage great when the State officers take charge of the prosecution with abundant means, as they are likely to do when State property is involved. But a disadvantage quite as great as the want of means is likely to be experienced in the fact that the accused is away from his friends and among strangers who will know of him only this; that he is under arrest upon presumptive proof of being a felon. Of what avail is a man's good reputation to him under such circumstances, when the neighbors who know it are at a distance, and when the very accusation among strangers will necessarily fix upon him a strong suspicion?

We have not the slightest hesitation in declaring that the Act of 1857 so far as it undertakes to authorize a trial in some other county than that of the alleged offense, is oppressive, unwarranted by the Constitution, and utterly void. But plain as this is, it is no plainer than that the poor and insufficient provision it makes for the protection of accused parties was not observed in this case.

When this act was passed, the Grand Jury was still retained as a part of the judicial system of the State. When the act for the trial of criminal accusations upon informations was passed two years later, full provision was made for an examination of a criminal charge before

a magistrate, and an information was not suffered to be filed until the accused had had opportunity to be heard, and the examining magistrate had decided that a *prima facie* case was made against him. Comp. L. § 7944. This examination was supposed to give the accused all the protection and even more than he would have from a grand jury. An information filed without this examination would be dismissed as unwarranted. *Washburn v. People* 10 Mich. 372; *Annis v. People* 13 Mich. 511.

The Act of 1857 did not provide for any such preliminary examination, and there may be a question whether the general law respecting informations in criminal cases applies to these trespasses on public lands. But regardless as the Act of 1857 was of private rights, it did not assume to permit a man to be arrested and incarcerated in prison without some evidence of his guilt. There must be, the act declared, "an affidavit of some credible person verifying the charges" contained in the information. Charges are not verified by an affidavit that somebody is informed and believes they are true. This is mere evasion of the law: the most improbable stories may be believed of any one, and the man most free from any reasonable suspicion of guilt is not safe if he holds his freedom at the mercy of any man three hundred miles off who will swear that he has been informed and believes in his guilt. It is easy to tell falsehoods, and those who are least fitted to judge of their credibility are generally the very persons who will believe them because they are told. But to substantiate charges within the meaning of the law evidence is required, and not merely suspicions or information or beliefs. Bish. Cr. Pro. §§ 716-719; *Commonwealth v. Lottery Tickets* 5 Cush. 369; *Brown v. Kelley* 20 Mich. 27; *People v. Judge of Wayne Circuit* 36 Mich. 334. It is said that an information thus verified was sustained in *Washburn v. People* 10 Mich. 372; and so it was; but that was an information filed after the evidence of guilt had been made on preliminary

examination; and the verification was required only by way of showing good faith in the prosecution, and not to make out a *prima facie* case as this is. The Constitution itself expressly requires a showing of cause before warrant shall issue. Article vi. § 26. The arrest in this case would therefore have been unwarranted even if the law had been valid.

The justification of Swart having failed utterly, it remains to be seen whether he was injured by any rulings of the circuit judge which could affect the amount of the recovery.

There is no room for saying that Swart was protected in what he did because he acted under the orders of his superior officer. The Land Commissioner could lawfully give no such orders, and Swart could lawfully obey none.

There was no error in allowing Kimball to prove that the expense of an attorney fee of $50 was incurred in obtaining his discharge. The declaration averred that plaintiff incurred large expense in obtaining his liberation from imprisonment, and this was a sufficient allegation of special damages for this purpose.

It is complained that the judge used the word *extortion* in connection with the attempts of Swart to bring about a settlement with Kimball. Perhaps it would have been better not to use the word; but whether there was an attempt at extortion would necessarily be judged by the jury upon the evidence given by Swart to show that he believed Kimball guilty. If he did believe it, he should have endeavored to obtain payment for the timber: if he did not, he was attempting extortion. A careful reading of the evidence does not satisfy us that any injustice was done to Swart in this regard.

There was some evidence introduced, however, which it is said was clearly erroneous. It was proved under objection that Swart subsequently endeavored to obtain new papers against Kimball in Ingham county, and that the circuit judge refused to permit the information to be filed. Swart might have done this of malice, which

would have been greatly reprehensible, or he might have done it in the belief that Kimball was guilty, which would render him blamable only as he ought to have known that this distant prosecution was illegal. But the proper construction of ambiguous conduct must always be for the jury. And we cannot help believing, after reading the record, that this evidence tended as much to aid Swart as to injure him: that it was quite as likely to lead to a belief in his good faith as in his purpose to injure and oppress. The award which the jury made was the very moderate one of $350, and this gives abundant evidence that the jury viewed the conduct of the defendant in the most favorable light. If, therefore, the evidence was improperly received we should think the case a proper one for applying the rule that error without injury shall not reverse the judgment. *Cummings v. Stone* 13 Mich. 70; *Sinclair v. Murphy* 14 Mich. 392; *Sheehan v. Dalrymple* 19 Mich. 239; *Slocomb v. Thatcher* 20 Mich. 52; *Hill v. Robinson* 23 Mich. 24. But my brethren all think the evidence was competent.

The judgment will be affirmed, with costs.

The other Justices concurred.

Joseph O. Adams v. Auditor General.

Bill to vacate assessments—Defendants.

Counties and townships are necessary parties to a bill to vacate taxes assessed, where a decree would make it necessary to charge the taxes back against the county, or spread them upon the land of the township.

Appeal from Tuscola. Submitted and decided April 28.

Injunction to restrain enforcement of tax. Complainant appeals.

H. H. Hoyt for complainant.

Attorney General *Otto Kirchner* for defendant.

PER CURIAM. Complainant sought to have certain taxes assessed against his lands declared void. As the result of such a decree would be to have such taxes charged back by the Auditor General against the county in which the lands lie, and by the board of supervisors of such county ordered re-assessed upon the same lands, or spread upon the lands of the township, such municipalities are necessary parties, and no relief can be granted without giving them an opportunity to be heard.

The appeal must be dismissed, and the record remanded, giving complainant leave to move the court below for leave to bring in such parties as he may be advised is necessary.

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BENJAMIN F. FARRINGTON v. JARED A. SEXTON, EUGENE ROBINSON AND VALENTINE HILSENDEGEN.

General assignments—Fraud—Garnishment of assignee.

Where the right to proceed to the trial of an issue against a garnishee depends on the state of the principal case, the court is at liberty to consider the record in that case without separate proof.

A finding of fact will not be reviewed unless there was no testimony tending to support it.

Fraud in a general assignment is fairly inferable from the fact that the goods were inventoried at $55,011.68 and were appraised at $27,272.77, while the goods on hand five weeks before inventoried about $95,000; it may also be inferred from a showing that the assets of a certain company belonged to the firm making the assignment, and had been disposed of by collusion.

A general assignee is not a *bona fide* purchaser, and general assignments are not exempted from the consequences of actual fraud that has any tendency to hinder, delay, or defraud creditors.

It is fraud to intentionally withhold from a general assignment property which ought to have been included in it.

A general assignment that is broad enough in its terms to cover any property belonging to the assignor is nevertheless invalid if property is secretly kept back from the assignee and used for private purposes and no authority is given to the assignee to take measures to set aside fraudulent transfers.

Error to Superior Court of Detroit. Submitted April 9. Decided April 30.

ASSUMPSIT against garnishee. Defendant brings error.

Douglass & Bowen for plaintiff in error.

Alfred Russell for defendant in error.

CAMPBELL, J. Farrington was sued as garnishee of James Nall, Jr., & Co. He claimed under an assignment to him for the benefit of creditors, and the plaintiffs below assailed it as void as against them. Upon the trial of the garnishee proceedings in the Detroit Superior Court, it was held void, for actual fraud. The case now comes before us on the single question whether there was any testimony on which that conclusion could lawfully be based.

It is suggested that although the court inspected the principal proceedings and based the finding on them, the failure to prove them separately is an objection to the validity of the finding. We think, however, that inasmuch as the right to proceed to the trial of the issue against the garnishee depends on the state of the principal cause, the court is at liberty to consider the record without proof. The whole record is connected, and it would be a vain and useless ceremony to introduce proof separately when it is all necessarily together before the same tribunal.

Upon the question of fraud we have no authority to pass, unless the court below had no testimony whatever tending to prove it. We think there was such testimony. It is not claimed Mr. Farrington was in any way to blame. The fraud was charged and found against the

assignors. The assignment upon its face is assumed to be regular.

The testimony as acting on the mind of the judge of the Superior Court indicated that the assignment was made February 13, 1879, at which time the goods on hand inventoried at cost $55,011.68, and were appraised at $27,272.77; that in the early part of January, 1879, aside from other assets, the goods on hand inventoried at cost either $95,000 or about that amount less ten per cent., and were represented as worth a little over $95,000. The discrepancy between these amounts as fixed by the cost of the goods induced the court to conclude that a large amount of this property was fraudulently withheld from the assignee, and not reasonably accounted for. The testimony would justify such an inference if the court drew it, and it is always to be borne in mind that we have no power to determine to what extent such testimony as is given should satisfy the judgment of that court. It was for the judge to say whether an explanation, if given, convinced him of its fairness. There was an apparent occasion for more explanation than was given.

There was further testimony from which it was open to claim that the assets of the Nall Manufacturing Company belonged to the firm, and had been disposed of by collusion.

We need not go further. If these facts or any of them existed, the court did not go beyond the law in concluding that a considerable amount of property had been secretly and fraudulently kept back from the assignee and used for private purposes.

The only remaining question is whether such dealings are fraudulent in such a way as to vitiate the assignment. Upon this we think there is no ground for serious controversy.

A general assignee is not a *bona fide* purchaser, and there is no rule of law which exempts a general assignment from the consequences of actual fraud that has any tendency to hinder, delay or defraud creditors. The only ground on which such assignments are

upheld is that the debtor has in good faith put all of his assets into the hands of a trustee for the sole purpose of paying his lawful debts, as far as the assets will go. It has always been held that it was fraud to intentionally withhold property which ought to be assigned.

In the present case the assignment is broad enough to cover any property which belonged to the assignors. But it does not authorize the assignee to take measures to set aside fraudulent transfers. As to those he stands in the shoes of his assignors. The creditors may attack them, as they are doing here, but the assignee takes only what the assignor owned, and no one can get relief against his own fraudulent conveyances. When parties secrete and cover up property, it is at least as likely that they may resort to fraudulent transfers as to their own possession.

It can make no difference in practical effect, and it does not lessen either the character or extent of fraud, whether property is left out of the terms of an assignment, or put where the assignee and creditors will not find it. The fraud consists in preventing the assignee and creditors from getting the benefit of it, and if that is the purpose it can make no difference by what means it is carried out. Property may be honestly omitted, but property cannot be secretly and intentionally covered up and kept out of reach without palpable dishonesty.

It is therefore not important to conjecture by what devices or in what way the property was disposed of. It is enough to justify the judgment that it was misappropriated in any way, with a fraudulent purpose. And without a satisfactory explanation that purpose can be inferred if such is the impression made on the court from the whole case.

The judgment must be affirmed with costs.

MARSTON, C. J., and GRAVES, J., concurred.

COOLEY, J. I have been unable to find any evidence of fraud in the record in this case.

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73 254

HENRY W. COOLEY RELATOR v. PETER W. ASHLEY.

Quo warranto—Incomplete finding.

Proceedings by *quo warranto* for the office of alderman were dismissed for want of jurisdiction upon a finding which did not show how many votes were cast, or how many for either party, or that either received more than the other, and which recited the acts of the election inspectors without deciding upon their accuracy. *Held* that the finding was not full enough to justify final judgment in the appellate court.

Error to St. Clair. Submitted April 9. Decided April 30.

INFORMATION in the nature of *quo warranto*. Relator brings error.

Alex. R. Avery, Chas. R. Brown, and *H. W. Stevens* for plaintiff in error.

Elliott G. Stevenson for defendant in error.

GRAVES, J. This is a controversy for the office of alderman in the city of Port Huron. Relator and respondent were opposing candidates in the sixth ward at the election held in April, 1879, and the relator was declared by the inspectors to have been elected, and subsequently he received the election certificate. He accordingly took his place as alderman and acted during several sessions; but at a special meeting of the common council held on the 30th of April the question of his election was regularly brought forward and a petition was presented from the respondent setting up that his vote was in truth larger than that of relator, and that the announcement of relator's election, by the inspectors, and the giving to him of the certificate, were owing to a mistake by the inspectors in counting the ballots, and the respondent prayed the common council to re-count the ballots and to admit him to the seat in case it should be found that his vote exceeded that cast for relator.

May 5th there was a regular meeting of the council, and proceedings were then taken on the petition, by which, as was claimed by respondent, the relator was lawfully ousted and respondent admitted. Relator contends that these proceedings were carried on irregularly and when there was no quorum, and that they were wholly void. From that time however the respondent was recognized by the mayor and clerk as alderman in place of relator.

Up to the respondent's admission, and during these proceedings, the charter provided that "the common council shall be the judge of the election and qualifications of its members, and shall have power to determine contested elections." Local Acts of 1877 p. 211 § 6. And the law so continued until May 31, 1879, at which time a provision repealing this regulation took effect. Local Acts 1879 p. 277 § 11.

Immediately after this repealing act came into operation the relator filed an information in the nature of quo warranto in the court below, and in due season the case was brought to issue and tried before the circuit judge, sitting without a jury. He filed a special finding of facts, but determined finally that the right was exclusive in the common council, in case of controversy, to decide who were elected aldermen, and that the court had no jurisdiction, and dismissed the case. The relator brought error.

On recurring to the facts settled by the circuit judge we find that they are not sufficient to support any judgment on the merits. There is no finding at all on the important issues. It is not found how many votes were cast for the office, or the number given for either party; nor is it found that the one or the other received a majority, or that either received a larger number than the other. It is true the judge gives the doings of the inspectors; but they are not set forth as his findings for himself of what votes were given, or for whom. They

are merely set forth historically. The accuracy of their proceedings was one of the matters brought into question, and they are not facts on which the issues can be decided. The circumstance that they took place is not decisive that they were true and right. The controversy ought not to be settled piecemeal.

The case was tried upon the merits, and the finding should have been made full enough to enable the court to decide the whole contention in the event of a conclusion favorable to the jurisdiction. As the record is shaped no such result is possible. Were we to investigate the subject on this record so far as practicable and finally come to an opinion on the point of jurisdiction adverse to that of the circuit judge, no final judgment could be given. The case would have to go back with the chance of its coming up again upon the state of facts that should have been made up at first. A sanction would be given to fishing appeals and experiments both impolitic and expensive. The question of jurisdiction ruled by the circuit judge is one of importance and no little difficulty, and it ought not to be considered unless upon a finding sufficient to support an explicit and final determination whether the conclusion on that question is one way or the other.

The case is very much in the predicament of *People v. Doesburg* 17 Mich. 135. It is substantially an instance of mistrial, and in case the parties consider the object of sufficient importance, which is hardly probable, there must be another trial.

The other Justices concurred.

SALMON S. MATHEWS v. THADDEUS DENSMORE, ELISHA P. GROW AND DEWITT GROW.

43 461
s5NW 669
r109US 216
r27Led 912
r 8SC 126

Attachment—Affidavit for writ—Seizure.

A writ of attachment is invalid in Michigan if issued upon an affidavit that does not state the claim to be due. Comp. L. § 6398.

An invalid writ of attachment will not justify the officer who executes it in seizing property in the possession of mortgagees.

Proceedings by attachment are statutory and must conform strictly to the requirements of the statute.

Error to Ingham. Submitted April 16. Decided April 30.

REPLEVIN. Defendant brings error.

Julian G. Dickinson, John D. Conely and *Theodore Romeyn* for plaintiff in error. An officer acting under process from a State court cannot interfere with the possession of goods acquired by a United States Marshal by virtue of the process of a Federal court, *Buck v. Colbath* 3 Wall. 334; *Freeman v. Howe* 24 How. 450; *Chapin v. James* 14 Am. L. Reg. 214, n.; on principles of comity, a State court will not in a collateral proceeding declare the process of the Federal court void in a pending suit regularly begun, *Voorhees v. Bank of U. S.* 10 Pet. 449.

Henry P. Henderson for defendant in error. An officer is not protected by his writ, in a suit by third parties, if he does not show that it was legal, 1 Waterman on Trespass § 467; 2 Hilliard Torts (2d ed.) 210-212.

COOLEY, J. Plaintiff in error is marshal of the United States for the Eastern District of Michigan, and as such levied an attachment issuing out of the United States Circuit Court for that District, upon a stock of goods in possession of the defendants in error. The plaintiffs in the attachment composed the firm of Simonds, Hatch & Whitten, and the defendants the firm of Gates & Marler.

Before the attachment was served Densmore, by virtue of one chattel mortgage given by Gates & Marler, and Elisha P. and DeWitt Grow, by virtue of another, had jointly taken possession of the stock of goods, and were then in possession and making sale of them. When the marshal seized the goods and dispossessed them, they brought suit in trespass. The marshal justified under his attachment. On the trial the attachment was held to be void for fatal defects in the affidavit on which it issued, and the plaintiffs had judgment.

The record in error presents only the one question; whether the court was right in ruling out the officer's justification. In this court scarcely an attempt has been made to support the affidavit. The statute under which the writ was taken out requires the plaintiff or some one in his behalf to make affidavit of the amount owing to him from the defendant, over and above all set-offs, and that the same is due. Comp. L. § 6398. The defect in the affidavit in this case was that it did not aver that the debt was due.* The affidavit might

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THE AFFIDAVIT.*

STEPHEN B. SIMONS, CORNELIUS B. HATCH and HENRY C. WHITTEN v. FRANK GATES and THOMAS MARLER. } *In the Circuit Court of the United States for the Eastern District of Michigan.*

UNITED STATES OF AMERICA, EASTERN DISTRICT OF MICHIGAN. } ss.

Julian G. Dickinson, being duly sworn, says that he is the attorney for the above named Stephen B. Simons, Cornelius P. Hatch and Henry C. Whitten, who comprise the firm of Simons, Hatch and Whitten, plaintiffs in the above entitled cause. That said plaintiffs' action in the said cause is founded upon contract express and implied, and was commenced by declaration in said court, wherein judgment has not yet been recovered. That the said declaration in said cause has been personaliy served upon the said Frank Gates, who is now the only existing member of said firm, the said Marler having never acted as a member of the firm of Gates & Marler, but having absconded and concealed himself ever since the purchase of the goods upon which this action is founded.

And deponent further says that said defendants in the annexed writ in said cause, are indebted to said plaintiffs in said writ in the sum of five hundred dollars, over and above all legal set-offs, as near as this deponent can estimate the same, upon contract express and implied. That this deponent has good reason to believe that the

be true, and yet no right of action have accrued upon it. *Cross v. McMaken* 17 Mich. 511; *Wells v. Parker* 26 Mich. 102. As this proceeding is extraordinary, and depends wholly upon the statute, the failure to follow the statute in this important particular was correctly held to render the affidavit nugatory.

It is nevertheless urged on behalf of the marshal that though the affidavit was defective, his writ was fair upon its face, and was therefore a complete protection to him on the familiar principle that an officer is justified in obeying any process which appears to be lawfully issued to him, and which on its face apprises him of no legal reason why he should refrain from doing so, *Erskine v. Hohnbach* 14 Wall. 613; *Bird v. Perkins* 33 Mich. 28; *Watson v. Watson* 9 Conn. 140; *Lott v. Hubbard* 44 Ala. 593; *Hill v. Figley* 25 Ill. 156; *Seekins v. Goodale* 61 Me. 400; *Underwood v. Robinson* 106 Mass. 296; *Walden v. Dudley* 49 Mo. 419; *Gore v. Mastin* 66 N. C. 371. And no doubt the writ in this case must be

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said defendants fraudulently contracted the said debt respecting which the said suit is brought; that the said defendants have disposed of their property with intent to defraud their creditors.

And further deponent saith not.

[Signed] JULIAN G. DICKINSON.

Sworn to and subscribed before me this 13th day of January, A. D., 1879.

[Signed] ADDISON MANDELL,
Com. Circuit Court U. S., E. D. of Michigan.

THE WRIT.

STEPHEN B. SIMONS, CORNELIUS B. HATCH, and HENRY C. WHITTEN, *vs.* FRANK GATES and THOMAS MARLER. } *In the Circuit Court of the United States for the Eastern District of Michigan.*

CIRCUIT COURT UNITED STATES, FOR THE EASTERN DISTRICT OF MICHIGAN, } ss.

The President of the United States of America to the Marshal of the Eastern District of Michigan—Greeting:

WHEREAS, A suit has been commenced in the above entitled cause in said court, by declaration in an action of *assumpsit* founded on an express and implied contract, which said suit is now pending and undetermined:

You are, therefore, commanded to attach so much of the lands, tenements, goods, chattels, moneys, and effects of Frank Gates and

regarded as fair on its face. Under the general law relating to attachments, where the suit is begun by that writ, the affidavit is attached to and in legal effect becomes a part of it, and if then the affidavit is void the writ is void also. But under an amendatory statute passed in 1867, which permits the issue of the writ in pending suits, the affidavit is filed with the clerk, and the officer to whom the writ is issued is supposed to know nothing of it, Comp. L. § 6433. It was under the amendatory statute that the writ in this case was issued, and an inspection of its provisions shows that the writ contains all the recitals that the statute requires, Comp. L. § 6434.

But the principle which is appealed to has no application to a case of this description. The marshal in this case is not seeking to defend himself under his writ; he is endeavoring to assail the title of others. He has not seized goods in the hands of Gates & Marler and confessedly owned by them, but he has taken goods

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Thomas Marler, who are citizens of the state, and residents of the Eastern District of Michigan, the defendants in said suit, not exempt from execution, wheresoever the same may be found within said district, as will be sufficient to satisfy the demand of the said Stephen B. Simons, Cornelius P. Hatch, and Henry C. Whitten, plaintiffs in said suit, who are citizens of the state of Massachusetts, amounting as is alleged to the sum of five hundred dollars and upwards, over and above all legal set-offs, and safely keep the same to satisfy any judgment that may be recovered by the said plaintiffs in said suit against the said defendants. And have you then and there this writ, with a return of your doings thereon, before the judge of said court, at the district court room in the city of Detroit, on Tuesday, the 4th day of February, A. D. 1879.

[SEAL.]

Witness, the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this thirteenth day of January, in the year of our Lord one thousand eight hundred and seventy-nine, and of the independence of the United States the one hundred and third. [Signed.] ADDISON MANDELL, *Clerk.*

EASTERN DISTRICT OF MICHIGAN.—ss.

I do hereby certify and return that I executed the within writ of attachment on the 16th day of January, A. D. 1879, by seizing, within the said district, the lands, tenements, goods, chattels, moneys, and effects of the defendants, designated and described in the inventory thereof, which is hereto annexed, and by making the said inventory, and by serving within said district a copy of such attachment and inventory, duly certified by me, upon Frank Gates, at Dansville, Michigan, in said district.

[Signed] S. S. MATHEWS,
U. S. Marshal.

away from Densmore and the Grows to which they assert a title as mortgagees, and is seeking to hold them on the alleged ground that by virtue of a writ against Gates & Marler in favor of certain of their creditors, he is in position to contest the right set up by the mortgagees. Now if in point of fact he has a valid writ of the kind he claims, the marshal, representing the creditors, is in position to attack the mortgages; but if he has no such writ, it is no concern of his whether the mortgages are valid or not. The first step in his justification is therefore to show not a writ merely, but a valid writ; and there can be no valid writ of attachment without a sufficient affidavit. *Earl v. Camp* 16 Wend. 562; *Parker v. Walrod* 16 Wend. 514 517; *Beach v. Botsford* 1 Doug. (Mich.) 199; *LeRoy v. East Saginaw City Railway* 18 Mich. 233; *Watkins v. Wallace* 19 Mich. 57, 74. The marshal understood this, and endeavored to satisfy the rule by producing a certified copy of the affidavit. Unfortunately the evidence defeated the justification instead of supporting it.

The circuit court decided correctly in holding that no ground had been shown for interfering with the possession of the mortgages, and the judgment must be affirmed with costs.

The other Justices concurred.

FRANKLIN SMITH v. JOSEPH HOBART.

Breach of warranty—Declaration in justice's courts.

A declaration in a justice's court for breach of warranty must show the nature of the warranty, and state the breach.

Error to Genesee. Submitted April 22. Decided April 30.

ASSUMPSIT on breach of warranty. Defendant brings error.

Newton & Howard for plaintiff in error, as to the insufficiency of the declaration, cited *Stoflet v. Marker* 34 Mich. 313; *Hurtford v. Holmes* 3 Mich. 461; 1 Selw. N. P. 644-5.

Long & Gold for defendant in error. Pleadings before justices should be liberally construed, *Comstock v. Howd* 15 Mich. 243; if a declaration alleges a substantial grievance, objections for inartificiality should be raised by demurrer, *Briggs v. Milburn* 40 Mich. 512.

GRAVES, J. This cause was brought before a justice of the peace, and taken by appeal to the circuit court. The trial was before a jury, and Hobart, the plaintiff, was allowed to recover $90. The controversy grew out of the transfer of a pair of horses from Smith to Hobart for another horse and a sum of money, and the ground of action was breach of warranty. The declaration or statement of cause of action on which the trial proceeded was in writing, and as follows:

"The plaintiff declares in assumpsit specially for damages for breach of warranty on a pair of horses purchased of defendant, and claims damages of $200."

On the first offer of testimony the plaintiff in error objected expressly that the declaration stated no cause of action, and the objection was maintained and urged through the entire case.

Was it valid? We have no doubt about it. The case is beyond the aid of the liberality extended to pleadings before magistrates. The declaration not only lacks matter of substance, but is wholly vague and uncertain. No one can gather from it any clear notion of the essential characteristics of the complaint intended to be asserted. Much depends on the nature of the controversy as to what may suffice to denote it with tolerable precision. In some cases a few bold strokes may point out and

identify the claim or charge, and leave no chance for surprise. A half-a-dozen words may disclose enough to convey the substance of a cause of action. But the instances are innumerable where a great deal more is required to give an intelligible hint of the real charge or demand.

The grievance has peculiar features, and no complaint can be set out upon it without representing the group of elements which distinguish it from other similar grievances. The specific peculiarities belonging to it are what confer a sort of individuality upon it. Take the present case. Some kind of a contract of warranty is indicated. But what were the terms? The statement does not explain, and such contracts are not run in a mould. They vary indefinitely in their substance. The name conveys no idea of the ingredients. The transaction pointed at, so far as is known from the declaration, may have related to title, or to soundness, or docility, or other matters, or to all together; and yet, whatever were the terms and conditions as made and connected, they constituted the identical warranty, and their description, in substance, together with a statement of the breach, were necessary to show the particular cause of action.

It sometimes occurs that parties contend without good pleadings, and the court refuses to regard their subsequent objections. Their practice may have been such that the complaining party may be deemed to have waived defects or be regarded as estopped, or the statute of amendments may be applicable, or the case may be one where the law considers the party not prejudiced. Neither of these reasons apply here.

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

CAMPBELL, J., concurred.

MARSTON, C. J. I am of opinion that under the liberal rules applicable to pleadings in justice's court, the declaration under a plea of the general issue was good.

A more strict rule will, in my opinion, be more productive of evil than good.

COOLEY, J. The declaration in this case was manifestly insufficient if any objection had been taken to it at the time of pleading; and that is the time the defendant should have objected. Nevertheless, as the plaintiff's attention was called to the defect as soon as any evidence was offered, and he took no steps to amend, I concur, with some hesitation, in the result of the opinion of Mr. Justice Graves.

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JOHN POWERS v. THE GOLDEN LUMBER COMPANY, ALEXANDER V. MANN, ENOCH REMICK, CALVIN DAVIS AND THE LUMBERMAN'S NATIONAL BANK OF MUSKEGON.

Mortgages—Lien for redemption—Subsequent encumbrancers—Personal liability—Costs.

A lien for redemption money is an independent equity, and not merely appurtenant to the mortgage held by a mortgagee who has redeemed; so that proceedings to enforce the lien may be taken before such mortgage matures and the discharge of the mortgage does not cut off the lien.

Any one who has any interest in mortgaged premises, or in any part of them, is entitled to redeem them from foreclosure, and he must redeem completely if at all.

A sale on statutory foreclosure satisfies the mortgage debt and releases the personal obligation to the extent of its proceeds; but a subsequent encumbrancer who redeems from it, thereby obtains such an interest in the land as will protect him, and later encumbrancers who are also benefited must not only repay the redemption money, but must pay his mortgage, and as the two claims are distinct, the liens therefor are not merged, and the payment of one cannot release the other.

A bill to enforce a lien for redemption from a mortgage can be filed at any time after the lien becomes fixed, and must bring in all subsequent liens or titles.

The liability of subsequent encumbrancers to a lien for the reimbursement of one who has redeemed from a foreclosure, is not

affected by the transfer or discharge of some intermediate lien, even though it be a mortgage held by the one who has redeemed from foreclosure.

A lien for redemption from foreclosure can only be satisfied by a payment or voluntary discharge.

A personal liability extinguished by statutory foreclosure is not revived by the creation of a lien for redemption therefrom where the land is sufficient to satisfy it. The lien is confined to the land and the declaration of personal liability in a decree for its enforcement is merely provisional, and the mortgagers cannot be compelled to pay it unless a deficiency arises.

Costs cannot be awarded to parties who have not appealed even though the decree is modified as to them.

Appeal from Oceana. Submitted April 22. Decided April 30.

BILL to enforce a lien for redemption from a mortgage and to foreclose against subsequent encumbrancers and purchasers. Defendants appeal.

W. E. Ambler and *Robert M. Montgomery* for complainant. A person who redeems from a mortgage becomes in equity an assignee of it and may enforce the lien thereof, *Mattison v. Marks* 31 Mich. 421; *Sager v. Tupper* 35 Mich. 134; *Lamb v. Jeffrey* 41 Mich. 719; Jones on Mortgages § 1086.

Smith, Nims & Erwin for defendants. When a mortgage has been discharged by foreclosure sale and redemption it cannot be again foreclosed, *Pardee v. Van Anken* 3 Barb. 534; *People v. Beebe* 1 Barb. 379; redemption extinguishes a mortgage, *Johnson v. Johnson* Walk. Ch. 334; *Garwood v. Eldridge* 1 Green. Ch. 145; Comp. L. §§ 6922–3; money paid to redeem enlarges the mortgage lien it was paid to protect, *Robinson v. Ryan* 25 N. Y. 320; *Burr v. Veeder* 3 Wend. 412; *Vaughn v. Nims* 36 Mich. 297; *Faure v. Winans* Hopk. Ch. 283; *Wright v. Langley* 36 Ill. 381; *Hill v. Eldred* 49 Cal. 339; *Miller v. Whittier* 36 Me. 577; *Reed v. Reed* 10 Pick. 400; *Page v. Foster* 7 N. H. 396; *Dale v. M'Evers* 2 Cow. 118;

Brown v. Simons 44 N. H. 477; Jones on Mortgages § 358; 2 Dan. Ch. Pr. 1244, *n.*

CAMPBELL, J. Powers filed a bill for the purpose of enforcing his rights to reimbursement under the redemption of a mortgage, and also to enforce a mortgage of his own against the defendants, who were subsequent encumbrancers and purchasers. Powers held a mortgage on which at the date when his bill was filed there were no arrearages, but an installment was to become due on the 1st of November, 1877, the bill being filed October 11, 1877. A previous mortgage covering the lands on which he held his security had been foreclosed under the statute in 1876, and the time of redemption would have run out July 15, 1877. Powers redeemed this on the 6th of July, 1877.

After his bill was filed his mortgage was paid, and he discharged it. But inasmuch as no payment was made beyond this he procured a decree for the enforcement of his lien for the redemption money paid to get rid of the statutory foreclosure.

An appeal is taken from this decree on the grounds, *first*, that the bill was prematurely filed; and *second*, that the discharge of his mortgage cut off his lien for the redemption money. Both of these claims are put on the same basis, which is the assertion that the lien for the redemption money was a mere appurtenance to the mortgage, and not an independent or separate equity.

This view is not in our opinion entitled to any weight. The principles underlying the rights of parties in mortgage matters are too elementary to require extended consideration. Any one who has any interest whatever in the mortgaged premises, or in any part of them, whether absolute or qualified, has a right of redemption, and must, if he redeems at all, redeem completely. If Powers had, instead of holding a mortgage on all the land, been absolute owner of a parcel of the tract regularly sold as an entirety, he could not under the statute have redeemed

less than some entire parcel sold separately on the foreclosure, but he would have had a right to redeem the whole, and enforce his lien on so much of the parcel as he did not previously own. In such a case it is obvious that his title to reimbursement for the payment beyond what protected his own share, could not depend on what he should subsequently do with his original estate. While a sale on statutory foreclosure satisfies the debt secured by the foreclosed mortgage to the extent of the proceeds of the sale, and thus far releases the personal obligation, yet any party redeeming gets such an interest in the land as is necessary to protect him. And if he is a subsequent encumbrancer, who has advanced the money to protect his security, the redemption creates no merger of liens, but those who stand later in the order of title or security must pay the redemption money which he advances for the benefit of their titles, as well as his mortgage which made the advance necessary. These two claims are separate and distinct, and paying one cannot, in good sense or reason, have any effect to release the other.

Powers had a right to file his bill to enforce his redemption lien at any time after that lien became fixed. A bill to enforce it would have been defective unless it had brought in all the subsequent liens and titles. 1 Dan. Ch. Pr. 261 et seq. The fact that his own mortgage had not yet become payable did not make it any the less a security involved in the enforcement of this lien, and necessary to be disposed of on a final redemption or foreclosure. Its subsequent payment did not lessen the amount unpaid on the lien which was superior in time. The money paid on the statutory redemption was a separate payment to the benefit of all existing claims, which would have been destroyed had the foreclosure become absolute. It cannot concern the liability of these subsequent claims to be subjected to the lien that some other intermediate lien has been transferred or discharged. It cannot hurt them if the holder of this

lien allows a part of his liens to be discharged instead of requiring payment of the whole, any more than if he had accepted part payment on an ordinary mortgage and given time on the rest, or accepted payment of one of two successive mortgages and retained the other. *Baker v. Pierson* 6 Mich. 522.

Nothing can relieve the land of complainant's lien except its payment or voluntary discharge.

We think the decree directing a sale and foreclosure is valid and should be affirmed. No decree can be made personally against Remick and Davis [the original mortgagers] for any deficiency, as the lien is confined to the land and does not revive their personal liability extinguished by the statutory foreclosure. The setting forth of such a liability in the decree is always merely provisional, and until a deficiency arises, and they are called in to answer for it, Remick and Davis could not be bound to pay it even if responsible. They have not appealed, and therefore no costs can be awarded to them for the error. But the decree should be modified in this respect, so as to prevent any future complications. The parties appealing were not concerned in that part of the decree.

The decree must be affirmed except as to so much of it as sets forth a personal liability in Remick and Davis, and must be modified so as to leave out any such provision. The time of sale may be fixed at any time after the first of August next, and notices may be given at any time after the 10th of June, if payment is not made sooner. Complainant is entitled to his costs in this court against the appealing parties.

The other Justices concurred.

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WILLIAM HALL v. CHRISTIAN Y. EDWARDS, HELEN EDWARDS, LEAH H. EDWARDS, ORLANDO M. BARNES, ISAAC P. CHRISTIANCY, THE JACKSON, LANSING & SAGINAW RAILROAD COMPANY AND THE MICHIGAN CENTRAL RAILROAD COMPANY.

Release by mortgagee as affecting subsequent purchasers.

A mortgagee who has notice that since the mortgage was given, a portion of the land has been sold, cannot release any part of the land to the prejudice of the purchasers. It is enough if he is notified by letter from the mortgager as to the names of the buyers, and if the deed is on record.

Where mortgaged property has been wrongfully released to the prejudice of subsequent purchasers and the value of the parcel paid to the mortgager, the purchasers are equitably entitled on foreclosure to have the amount for which the parcel was released deducted from the mortgage debt before their parcel is sold.

Appeal from Ingham. Submitted April 22. Decided April 30.

FORECLOSURE. Defendants Barnes and Christiancy appeal.

Jason E. Nichols for complainant. A mortgagee who releases a part of the premises to the prejudice of subsequent purchasers need not allow the value of the land released before selling their parcel, if he had not had notice of the purchase before the release, *James v. Brown* 11 Mich. 25; *Reilly v. Mayer* 1 Beas. 59; *Blair v. Ward* 2 Stockt. 126; *Birnie v. Main* 29 Ark. 591; *Van Orden v. Johnson* 1 McCart. 376.

Cowles & Cahill for defendants and appellants.

PER CURIAM. This is a foreclosure, and the only important question is whether the defendants Barnes and Christiancy, who are subsequent purchasers of a part of the mortgaged premises, have any equity against complainant as mortgagee, by reason of his having released after their purchase a small parcel of the resi-

due of the premises. The mortgage was given to him by the defendants Edwards in October, 1873, to secure the purchase money—the premises consisting of about eighty-six acres in the city of Lansing. He is a resident of the State of New York, and he transacted a part of the business through his brother-in-law, Mr. Ezra Jones of Lansing; and Mr. Daniel Edwards, the husband of defendant Helen, acted as her agent, and also to some extent represented the defendant Christian Y. Edwards.

Immediately after the Edwards purchased and mortgaged back for purchase money, they sold to defendants Barnes and Christiancy a small portion of the land. In September, 1876, complainant released to the Chicago & Northeastern Railroad Company from the lien of the mortgage about an acre and a half. The release was given for the appraised value, being $297, which was paid to Edwards. No consent was obtained from Barnes and Christiancy, and they object that their parcel ought not to bear any greater proportion of the incumbrance than it would have been subject to if the complainant had not released. There can be no question about the principle.

If the complainant had notice that Barnes and Christiancy had bought in, he had no right to release any part of the remaining land to their prejudice. The share of liability of their parcel for the common debt was so far fixed by their purchase, without special stipulations on the subject, that he could not, after having notice, work any change in it to their injury without their assent, and the release of a part of the residue might well effect such a change. The consequence might be the same practically as it would be were the mortgagee to be allowed to create an additional incumbrance on the parcel of defendants Barnes and Christiancy subsequent to their acquirement of it.

In regard to the fact of notice there seems to be no fair chance for controversy. The letters to complainant,

when read together, appear to decide the question. One was written December 23, 1874, by C. Y. Edwards, and the other January 3, 1875, by Daniel Edwards before mentioned. The first informed complainant of the sale of part of the land, but did not disclose the purchasers; and the second only a few days later expressly stated who the purchasers were; and the deed was on record and the means consequently at hand for perfecting the information. This seems to be sufficient. *James v. Brown* 11 Mich. 25; *Dewey v. Ingersoll* 42 Mich. 17; *Howard Ins. Co. v. Halsey* 4 Seld. 271.

The circuit court decreed that the property should be sold in three parcels, and that the parcel of defendants Barnes and Christiancy should be last; but the claim set up to have the value of the released portion applied upon the debt was denied.

In strictness the value of the parcel released should not be applied on the debt; but when the parcels first chargeable shall be sold, the equity of Barnes and Christiancy to have the amount deducted before their parcel is sold, seems to be clear. The decree should therefore be so modified as to allow the sum for which the parcel was released to the railroad company, and which presumptively was the value, before the Barnes and Christiancy parcel shall be sold. But as the sum paid by the railroad company was not received by the mortgagee, but by the mortgagor, it will stand as a part of the decree against him, and will only be taken into account for the protection of the purchasers named in the contingency above provided for.

The decree will be modified accordingly, and the defendants Barnes and Christiancy will recover costs of this court.

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CHARLES W. RICHARDSON v. THOMAS MCGOLDRICK.

Contract for employment—Value of services—Party as witness—Jury have no concern with appeal papers.

The actual value of services may be shown in an action on a contract of employment where there is a direct conflict of evidence as to the agreed rate of payment.

A party to an action on a contract of employment is as competent as any other witness, if he knows the facts, to swear to the agreed rate of payment, or to the value of services.

A jury in a circuit court has no concern with the appeal papers in a case brought up from before a justice.

Error to Alpena. Submitted April 23. Decided April 30.

ASSUMPSIT. Defendant brings error.

Kelley & Clayberg for plaintiff in error.

Turnbull & McDonald for defendant in error. Evidence of the value of work is admissible as tending to show the agreed price, *Allison v. Horning* 22 Ohio St. 138; *Rauch v. Scholl* 68 Penn. St. 234.

CAMPBELL, J. McGoldrick sued Richardson for a balance due him for wages of himself and wife, declaring on the common counts as well as on an agreement. On the trial upon appeal from a justice to the circuit court for Alpena county, McGoldrick swore that there was an express agreement to pay $35 a month, and Richardson swore there was an agreement for $25. Both swore to an express agreement. McGoldrick was allowed under objection to show by his own testimony and by other testimony what the value of his services was according to going wages at that time. This is the only question requiring consideration, for the objection that the jury in the circuit court were not allowed to examine the appeal papers from the justice is not of any weight whatever. Their business was to try the facts on the evidence before them.

Under this direct conflict of evidence the jury might perhaps have thought the parties never came to any actual understanding on the rate of wages, and never, therefore, agreed upon it. The testimony of what was the value of the services, or the current rate of wages, would be proper in such a case on a *quantum meruit*. If, as is not unlikely, they thought an agreement was made, we think the testimony had some bearing on the probabilities, and was within the rule approved in *Campau v. Moran* 31 Mich. 280. In such a conflict of evidence between the only two persons knowing the facts, corroborating circumstances may very fairly be regarded. On either ground the testimony was admissible.

We do not understand the force of the suggestion that a party himself cannot swear to such rates or values. He can swear to anything which he knows, on the same footing with any other witness.

The judgment must be affirmed with costs.

The other Justices concurred.

JASON GILLETT AND JAMES D. TURNBULL v. JAMES C. BOWMAN.

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Parol evidence to supplement contract—Construction—Right to terminate.

A written contract to deliver timber at certain rates is not varied by parol testimony of an understanding between the parties that it was to be measured at the ports of destination.

Parties to contracts may come to an independent agreement upon details as to the execution thereof at the time of contracting as well as afterwards.

A contract for the shipment of timber in providing that it should be paid for "on the returns of each load shipped" contemplates its measurement at the port of destination.

The manifest meaning of a contract must govern until it is shown to be impracticable.

A right to terminate a contract subject to a liability for damages does not entitle one party to alter its terms on giving notice to the other.

Error to Alpena. Submitted April 23. Decided April 30.

ASSUMPSIT. Defendant brings error.

Turnbull & McDonald for plaintiff in error.

Holmes & Carpenter for defendant in error.

COOLEY, J. Bowman, as assignee of Henry Turner, brought suit against Gillett & Turnbull for the delivery of cedar timber under the following contract:

"It is hereby agreed by and between Henry Turner of the first part, and J. Gillett & Co. of the second part, witnesseth: The said first party hereby agrees to deliver over the rail of vessels all the cedar timber now lying on the beach and in Devil river, being the same timber got out by said second party during the winter of 1876 and 1877, for the following prices: All the paving timber for seventy-five cents a cord; all fence posts for one cent apiece; said timber to be put over the rail of vessels as vessels may arrive to receive them; and to employ sufficient force for doing the same as may be necessary, so that vessels may not be unnecessarily delayed. In consideration of the first party faithfully performing his part of this contract the said second party agrees to pay the price above mentioned as follows: on the returns of each load of paving timber shipped, to pay the said first party the amount due on such cargo in cash, and the posts to be paid for when shipped and counted.

HENRY TURNER,
Dated, May 7, 1877. J. GILLETT & Co."

The chief controversy between the parties on the trial related to the measuring of the paving timber. This timber was shipped to Detroit and Chicago, and defendants claimed that the cargoes were to be measured at the ports of destination, and that they were to pay according to the returns of the measurement; and they offered evidence that such was the understanding of the parties when the contract was entered into. The circuit judge excluded this evidence, on the ground that it would vary the contract, and permitted the plaintiff to give

evidence of the measurements and estimates of quantity made by himself in loading the vessels.

We think the excluded evidence was not objectionable on the ground stated. It did not tend to vary the contract; it did not affect any of its terms. The loading of timber was to be paid for according to quantity, and it was proposed merely to show what understanding the parties had as to the method of arriving at the quantity. It is perfectly competent for parties to agree upon any such matter of detail in the execution of their contracts; as well at the time of contracting as afterwards. It is agreeing only upon what shall be the evidence of performance.

But we are of opinion that the contract itself provided for the very course the defendants insisted upon. The posts were to be paid for when shipped and counted, but the paving timber "on the returns of each load shipped." Why pay on the returns? It is not claimed or pretended that payment was only to be made from the proceeds; Turner had no concern with these, and if Gillett & Co. gave credit on sales, Turner would nevertheless be entitled to payment in cash. The "returns," then, were of no importance for any purpose unless they determined how much the contractor was to be paid for. And there was good reason why the paving timber should be measured at the port of destination. The pieces were not piled up where they were, and to measure them there would require piling for the express purpose; an unnecessary labor, largely increasing the contractor's task; while they would naturally be piled suitably for measure at the point of delivery, for convenience in sale or subsequent use. Worthless timber would also be rejected there; as the record shows that only sound sticks are counted as paving timber. The parties seem to have adopted this view in some of their settlements, and they should have done so in all. It may happen under any such contract that circumstances will render the ascertainment of quantity in the manner proposed impractica-

ble; but the contract must govern until the impracticability is made to appear.

Another exception taken by the defendants below requires some notice. It seems that after the contract had been partly performed, the defendants, for certain reasons that need not be mentioned, notified the plaintiff that if he loaded any more of the paving timber he must put the sticks aboard as posts, and charge for them as posts by the piece. The plaintiff nevertheless charged for the paving timber thereafter as theretofore, by the cord. The defendants contended that they might terminate the contract at any time, subject to a liability to pay damages for so doing. This is true; but it is also true that so long as the contractor was suffered to go on in the completion of the contract he was entitled to charge for his services according to the terms fixed by the contract. Notifying him that the parties would only pay him according to some other standard was merely nugatory.

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

The other Justices concurred.

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FRANKLIN S. DEWEY v. THE UNION SCHOOL DISTRICT OF THE CITY OF ALPENA.

Actus Dei—Effect on contract—General verdict.

A general verdict in a case submitted to the jury on more than one point, does not show how they determined either question considered alone.

Small pox is not *actus Dei* in such a sense as to excuse a school district from liability on a contract with a teacher the performance of which the district has prevented by closing the school.

The act of God which will release one from the obligation of a contract is one which renders its performance impossible.

Error to Alpena. Submitted April 23. Decided April 30.

ASSUMPSIT. Plaintiff brings error.

Holmes & Carpenter for plaintiff in error. Performance of an express contract is not excused by inevitable accident or other unforeseen contingency, *Harmony v. Bingham* 2 Ker. 106; *Adams v. Nichols* 19 Pick. 275; 1 Chit. Cont. 67, *n*; 2 Pars. Cont. §§ 672-3; provision should have been made for it, Chit. Cont. 1074, *n*.

Turnbull & McDonald for defendant in error. A contagious epidemic, like small-pox, is *actus Dei* that will excuse performance of a contract, *Wolfe v. Howes* 20 N. Y. 201; *Lakeman v. Pollard* 43 Me. 463; *Stewart v. Loring* 5 Allen 306; Bish. Cont. 623; so is sickness or death, *Harrington v. Fall River Iron Works Co.* 119 Mass. 82; *Jennings v. Lyons* 39 Wis. 553; where performance becomes impossible by reason of the non-existence of the subject matter of the contract, without default of either party, the law excuses it, *Walker v. Tucker* 70 Ill. 527; though where the duty is not one imposed by law but by the contract itself, its non-performance is not excused if provision was not made against contingencies, *Mich. Cent. R. R. v. Burrows* 34 Mich. 13; *Chic. etc. Railroad Company v. Sawyer* 69 Ill. 285; 2 Chit. Cont. 1078, notes.

GRAVES, J. The plaintiff was regularly hired by the district to serve as teacher in its public schools for ten months for $130 per month. He entered on his duties on the 2d of September and continued up to the 10th of December, at which time the district officers closed the schools on account of the prevalence of small-pox in the city, and kept them closed thereafter for the same reason until the 17th of March. They were then re-opened and the plaintiff resumed his duties. He was subsequently hired for the next school year, and his compensation was increased $100. The district refused to pay him for the period of suspension, and he brought this action to recover it.

The claim was resisted on two grounds: *First*, that on the second hiring it was mutually agreed that the addition of $100 to his compensation for incoming service should stand and be allowed and accepted in full satisfaction of all claim for pay during the time in question; and *second*, that the suspension was the effect of an overruling necessity, or in other words, the act of God, and that all parts of the contract were suspended for the time being.

The circuit judge submitted to the jury both questions in a very clear manner, and instructed them to find against the plaintiff in case they were satisfied the alleged compromise was in fact entered into; or in case they should find that the small-pox was so prevalent that it became obligatory on the board to close the schools as a necessary step to prevent the spread of the disease and save human life.

The jury returned a verdict in favor of the district. But we cannot know with legal certainty whether they determined only one of these questions in favor of the district, or whether they so determined both, and of course if one only was so decided it is impossible to say which one. The evidence on the compromise was conflicting, and as it appears in the record the advantage was with the plaintiff. Still if no other ground of defense had been laid, the verdict must have been conclusive. As just explained it is not so now.

The second objection must be briefly considered. Beyond controversy the closing of the schools was a wise and timely expedient; but the defense interposed cannot rest on that. It must appear that observance of the contract by the district was caused to be impossible by act of God. It is not enough that great difficulties were encountered, or that there existed urgent and satisfactory reasons for stopping the schools. But this is all the evidence tended to show. The contract between the parties was positive and for lawful objects. On one side school buildings and pupils were to be provided, and on the

other personal service as teacher. The plaintiff continued ready to perform, but the district refused to open its houses and allow the attendance of pupils, and it thereby prevented performance by the plaintiff. Admitting that the circumstances justified the officers, and yet there is no rule of justice which will entitle the district to visit its own misfortune upon the plaintiff. He was not at fault. He had no agency in bringing about the state of things which rendered it eminently prudent to dismiss the schools. It was the misfortune of the district, and the district and not the plaintiff ought to bear it.

The occasion which was presented to the district was not within the principle contended for. It was not one of absolute necessity but of strong expediency. To let in the defense that the suspension precluded recovery the agreement must have provided for it. But the district did not stipulate for the right to discontinue the plaintiff's pay on the judgment of its officers, however discreet and fair, that a stoppage of the schools is found a needful measure to prevent their invasion by disease, or to stay or oppose its spread or progress in the community; and the contract cannot be regarded as tacitly subject to such a condition.

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

The other Justices concurred.

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MILES E. MCCUTCHEON, ADM'R v. THE COMMON COUNCIL OF THE VILLAGE OF HOMER.

Municipal Corporations—Injury resulting from legislative act—Res judicata.

A municipal corporation is not liable as for misfeasance for the legislative action of the common council in widening a street so as to bring within its limits an existing nuisance.

A municipal corporation is not liable for an injury sustained by an individual in consequence of neglect to put and keep a public way in repair.

A decision by a majority of a court is conclusive, and a change in the composition of the court will not warrant a re-opening of the controversy unless the court itself orders a reargument.

Error to Calhoun. Submitted April 27. Decided April 30.

TRESPASS ON THE CASE. Plaintiff brings error.

John C. Patterson and *Wm. H. Brown* for plaintiff in error. A municipal corporation is liable in an action for private injury caused by its active misfeasance in negligently creating a dangerous nuisance in the public street, Whart. Neg. 265; Shear. & Redf. Neg. § 133; Dillon Mun. Corp. § 789; Potter Corp. § 407; Cooley on Torts 608; *Irvine v. Wood* 51 N. Y. 224; *Davenport v. New York* 37 N. Y. 568; *Conrad v. Ithaca* 16 N. Y. 158; *West v. Brockport* id. 161; *Wallace v. Mayor* 2 Hilt. 440; *Prentiss v. Boston* 112 Mass. 43; *Mayor v. Lasser* 9 Humph. 757; *Emery v. Lowell* 104 Mass. 13; it is liable in a civil action for special injuries resulting from neglect to perform the duty of keeping in safe condition the bridges, streets and sidewalks within its limits if it is its duty to repair or keep them safe, resting upon the corporation as such, and supported by the power to levy taxes or impose local assessments, Cooley Const. Lim. 247-9; Cooley on Torts 625; Shear. & Redf. Neg. §§ 149; *Dewey v. Detroit* 15 Mich. 307; *Barnes v. Dist. of Columbia* 91 U. S. 540; *Mayor v. Sheffield* 4 Wall. 189; *Weightman v. Washington* 1 Bl. 39; *Chicago v. Robbins* 2 Bl. 418; *Nebraska City v. Campbell* id. 590; *Omaha v. Olmstead* 5 Neb. 446: 16 Am. L. Reg. 356; *Palmer v. Lincoln* 5 Neb. 140; *Kiley v. Kansas City* 69 Mo. 102: 21 Alb. L. J. 14; *Bassett v. St. Joseph* 53 Mo. 290; Wood on Nuisances § 744; Addison on Torts 1315; *Hutson v. New York* 5 Seld. 163; *Cusick v. Norwich* 40 Conn. 375; *Boucher v. New Haven* id. 457; *Cook v. Milwaukee* 24 Wis. 270; *Perkins v. Fond du Lac* 34 Wis. 435; *Sterling v. Thomas* 60 Ill. 264; *Chicago v. Major* 18 Ill. 349;

Bloomington v. Bay 42 Ill. 503; *Browning v. Springfield* 17 Ill. 143; *Joliet v. Verley* 35 Ill. 58; *Atchison v. King* 9 Kan. 550; *Cleveland v. St. Paul* 18 Minn. 279; *Shartle v. Minneapolis* 17 Minn. 308; *Phelps v. Mankato* 23 Minn. 276; *Covington v. Bryant* 7 Bush 248; *Sawyer v. Corse* 17 Gratt. 241; *Richmond v. Long* id. 375; *Baltimore v. Pendleton* 15 Md. 12; *Baltimore v. Marriot* 9 Md. 174; *Commissioners v. Duckett* 20 Md. 468; *Mayor v. Cooley* 55 Ga. 17; *Parker v. Macon* 39 Ga. 725; *Erie v. Schwingle* 22 Penn. St. 384; *Pittsburgh v. Grier* 22 Penn. St. 54; *Rusch v. Davenport* 6 Clarke 443; *Rowell v. Williams* 29 Ia. 210; *Koester v. Ottumwa* 34 Ia. 41; *Centerville v. Woods* 57 Ind. 192; *Loury v. Delphi* 55 Ind. 250; *McDonough v. Virginia City* 6 Nev. 90; *Mack v. Salem* 6 Oregon 275; *Niblett v. Nashville* 12 Heisk. 684; *Tallahassee v. Fortune* 3 Fla. 19; *Smoot v. Wetumpka* 24 Ala. 112; *Buffalo v. Halloway* 3 Seld. 493; *Lloyd v. New York* 1 Seld. 369, *White Lead Co. v. Rochester* 3 Comst. 463; *Storrs v. Utica* 17 N. Y. 104; *Wendell v. Troy* 39 Barb. 329; *Grant v. Brooklyn* 41 Barb. 381; *Child v. Boston* 4 Allen 41; it is held liable in Michigan for injuries to property caused by private nuisances created and continued by its officers and agents, *Pennoyer v. Saginaw City* 8 Mich. 534; *Ashley v. Port Huron* 35 Mich. 296; and for injury caused by a nuisance arising from opening its sewers, *Detroit v. Corey* 9 Mich. 165.

Byron Smith and *James H. Campbell* for defendant in error. The power of a municipal corporation in laying out highways and opening and grading streets involves the exercise of discretion on the part of the authorities, *Dermont v. Mayor* 4 Mich. 442; and no action will lie for an injury resulting from the use of legislative discretion, *Detroit v. Blackeby* 21 Mich. 84; *Larkin v. Saginaw County* 11 Mich. 88; *Detroit v. Beckman* 34 Mich. 125; *Lansing v. Toolan* 37 Mich. 152: 38 Mich. 315.

Cooley, J. The record in this case presents two questions of law. The first of these is, whether a municipal corporation is liable as for misfeasance in extending the

bounds of one of its streets by widening it; thereby bringing an existing nuisance within the street limits. This question is answered by repeated decisions of this court. The action which widened the street was legislative, and no charge of misfeasance can be predicated thereon. *Larkin v. Saginaw County*, 11 Mich. 88; *Pontiac v. Carter*, 32 Mich. 164; *Detroit v. Beckman*, 34 Mich. 125; *Lansing v. Toolan*, 37 Mich. 152.

The second question is whether such a corporation is liable for the injury sustained by an individual in consequence of the neglect to put and keep one of the public ways in repair. This, it is conceded, was decided in the negative in *Detroit v. Blackeby*, 21 Mich. 84. It is said, however, that the decision in that case was by a divided court, and it is urged that it should be reviewed in the light of more recent decisions.

The case of Blackeby was very fully and carefully considered, and there can be no ground for supposing that either of the judges participating therein has since changed the opinion then deliberately formed and expressed. The case was decided on the concurring opinions of a majority of the court, and the decision is authoritative. There has been a change in the court since that time, but it would be mischievous in a high degree to permit the re-opening of controversies every time a new judge takes his place in the court, thereby encouraging speculation as to the probable effect of such changes upon principles previously declared and enforced in decided cases. Nothing is more important than that the law should be settled; and when a principle has once been authoritatively laid down by the court of last resort, it should be regarded as finally settled. If the court itself desires a reargument, it is to be presumed it will be ordered when the occasion presents itself; but unless that is done, a deliberate decision should not be regarded as open to controversy.

The judgment must be affirmed with costs.

The other Justices concurred.

MYRON C. WILDER v. HENRY F. HUBBELL, HIGHWAY COM'R AND CHARLES F. KELLOGG, CLERK OF RONALD TOWNSHIP.

Certiorari—Proceedings to lay out highways.

A writ of *certiorari* to review proceedings to lay out a highway will be dismissed with costs if notice of the intention to appeal was not promptly given after the complaining party became aware of the action taken.

CERTIORARI to Highway Commissioner and township clerk. Submitted April 27. Decided April 30.

Mitchel & Pratt for plaintiff in certiorari.

W. O. Webster for defendant in certiorari.

CAMPBELL, J. This is a certiorari to review the laying out of a highway in December, 1878. The writ was sued out in February, 1880. The objections relied on in the affidavit were the lack of notice to parties interested, the failure to find the necessity of the highway, and its location on a part only of the line petitioned for, whereby the road actually laid out was incomplete as a public passageway and no more than a private road.

The return shows that notice was duly served on plaintiff and several other persons named. He therefore knew of the proceedings, and was bound, if objecting, to act with some diligence. The excuse he gives is that a week after the action of the commissioner, and five days after the return to the town clerk, he was injured by a vicious horse and laid up some months; that after his recovery he was induced not to resist, by assurances of his friends that the commissioner would lay out the entire road. There is no statement that he received any such assurance from the commissioner.

Public policy requires that these local business arrangements should be closed up speedily, and that parties complaining should be prompt and consistent in their

opposition. Even if the excuse for not appealing is valid, there is no assertion that there was any intention to appeal, and a certiorari should have been taken out when the plaintiff had his attention called to the subject after his recovery. We think that by his delay plaintiff has lost any equity to object to these proceedings, and that the writ should be dismissed with costs.

The other Justices concurred.

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HOMER ELLSWORTH v. JOSHUA W. FREEMAN.

Ejectment—Lien for taxes.

A defendant in ejectment on suffering judgment cannot in the same case recover for the amount of taxes paid by him.

Error to Midland. Submitted April 28. Decided April 30.

EJECTMENT. Defendant brings error.

M. H. Stanford and *H. H. Hoyt* for plaintiff in error.

Burton & Hemingway for defendant in error.

MARSTON, C. J. The court erred in rendering a judgment in this case for the plaintiff for the amount of taxes paid by him on the land in dispute. The right to render such a judgment in an action of ejectment was negatived by this court in *Weimer v. Porter* 42 Mich. 569, decided at the January term.

The judgment must be reversed, with costs of both courts, and the record remanded for farther action under the statute.

The other Justices concurred.

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WILLIAM C. BROWNING ET AL. v. JOHN B. CROUSE.

Accord without satisfaction—Establishing case.

When a plaintiff in making out a case is compelled to establish an accord which has to be disposed of, he must show at least *prima facie* that there has been no satisfaction.

A defendant whose case involves proving an accord must follow it with evidence of satisfaction, or of some legal excuse for its absence.

In an action on a promissory note the plaintiff had to show, in explaining certain memoranda on the note, that a compromise had been made, but he claimed that as it had been only partly fulfilled he was entitled to recover in full. *Held* that as he did not show what the terms of the compromise were, or in what the default lay, he was only entitled to recover the amount remaining unpaid on the compromise sworn to.

Error to Superior Court of Detroit. Submitted April 28. Decided April 30.

ASSUMPSIT. Plaintiffs bring error.

William S. Edwards for plaintiffs in error. A satisfaction should be shown by express agreement, *Babcock v. Hawkins* 23 Vt. 563; 2 Story Cont. 542; Story Prom. Notes 426; a composition must be proven unequivocally and its terms should appear to have been complied with, 1 Addison Cont. §§ 380–400; 2 Dan. Neg. Inst. § 1288; 2 Chit. Pl. (16th ed.) 288; Chitty on Bills 386; *Cumber v. Wane* 1 Sm. L. C. 595; *Twitchell v. Shaw* 10 Cush. 48; *Warren v. Skinner* 20 Conn. 561; *In re Hatton* L. R. 7 Ch. 723; *Goldney v. Lording* L. R. 8 Q. B. 182; *Exp. Batson* Mont. D. & DeG. 289.

Griffin & Dickinson for defendant in error.

COOLEY, J. This suit is brought upon promissory notes. The notes, when introduced in evidence, had memoranda on their backs, showing that there had been a compromise between the parties for a settlement of the notes at

fifty per centum of their amount, and that several payments had been made on the compromise. In the finding of facts in the case it is recited that the plaintiffs introduced evidence which tended to show that the defendant had compromised with all his creditors; that he had paid them all in full except the plaintiffs; and that he had not made his payments at the time required by the terms of compromise, but offered to pay the plaintiffs the balance due. It is further recited that the plaintiffs claimed that by his default in payment defendant had lost all his rights under the compromise, and that they were entitled to recover the full amount remaining unpaid on the original notes. The plaintiffs did not show when payments were to be made under the compromise, nor the particulars of the default. The defendant gave no evidence, and the court held that plaintiffs were entitled to recover only the amount appearing to remain unpaid on the compromise.

The ruling we think was right. The plaintiffs found it necessary to their case to explain the memoranda, and in doing so, they proved a compromise partly performed by defendant. The performance was by payments, received by them from time to time; and this showed either that it was a part of the agreement of compromise that payments should be thus made, or that if payment was to be made otherwise, the plaintiffs had waived strict compliance. But the plaintiffs gave no explanation further.

The case then was this: The plaintiffs proved the original contract, and they also proved that another had been conditionally, at least, substituted for it. Upon the new contract the parties to some extent had acted. The plaintiffs say the defendant had not performed it according to its terms, and therefore they were remitted to their original rights under the other. But they did not explain what the terms were that had not been complied with, or what the default consisted in, or show that they were not assenting. The judge trying the cause was entitled to information on these points, for he and

not the plaintiffs must judge whether the defendant is in default. To enable him to do this, he must be informed—*First*, what the terms of the compromise were, and *second*, what the facts are which are supposed to constitute a default. The memoranda upon the notes imposed upon the plaintiffs the necessity of giving this information, and their evidence fell short of the requirements of the case. Instead of proving a breach of the conditional arrangement, they gave evidence only that, according to the understanding of their witness, some undisclosed terms were not complied with; and upon this they insist that the compromise arrangement was at an end. This was making the witness judge the case instead of the court, or, what was equivalent, it was asking the court to decide the case upon the conclusions drawn by the witness from the facts as he understood them, instead of placing the facts themselves before the court.

The plaintiffs have treated the case as one of accord without satisfaction; and no doubt a defense of that sort must fail. *In re Hatton* L. R. 7 Ch. App. 723; *Goldney v. Lording* L. R. 8 Q. B. 182. If the course of the case had been such as to impose upon defendant the necessity of proving the accord, it would have been incumbent upon him to follow it with evidence of satisfaction, or of some legal excuse for not completing it; but when the plaintiff is compelled in making out his own case to get rid of an accord, his evidence should go far enough to make out at least a *prima facie* case against it.

The judgment must be affirmed with costs.

The other Justices concurred.

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JACOB BROWN, ADMINSTRATOR v. IGNATZ FORSCHE.

Administration of estates—Distribution—Claims—Administrator's liability.

When a creditor of an estate proceeds in the probate court to compel the administrator to pay his claim, and the case is appealed to the circuit court, where the case involves substantially the issue *plene administravit*, the judgment of the circuit court thereon may be removed to the Supreme Court by writ of error.

When commissioners have made their report upon claims against an estate, and the administrator has paid all that was allowed, and the time has expired for presenting more, except upon special application to the probate court on cause shown, it is the duty of the administrator to turn over the property to the heirs and distributees, and he may do so without waiting for an order of the probate court requiring him to do so.

Where an administrator had turned over property to the distributees under such circumstances, but neglected to file his final account, and sometime afterwards another claim was presented and allowed by the probate judge, at which time the property had been used up by the distributees, *held* that notwithstanding his final account was not settled, the administrator was not responsible for the claim, or for the use made by the distributees of the property.

A creditor who thus delays the presentation of his demand until he can bring it in as matter of favor only, must take all risks of being able to collect it in the condition in which he finds the estate. He cannot hold the administrator responsible, except upon the ground of some personal wrong or default.

It is the right of all parties interested in an estate to settle it up by voluntary proceedings if they agree to do so; and they may do this after an administrator is appointed as well as before.

The liability of an administrator to the estate or to creditors is to be tested by equitable rules, regardless of mere technicalities; and this on appeal as well as in the probate court.

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

APPEAL from an order of the Probate Court directing the administrator of the estate of John Miller to pay certain claims. The administrator brings error.

D. Cramer and *Beakes & Cutcheon* for plaintiff in error. One who claims exemption from the bar of a statute limiting the proof of claims against an estate, must show proper diligence, *Lacey v. Loughridge* 51 Ia. 629; *Brewster v. Kendrick* 17 Ia. 481; in chancery a creditor who has failed to prove his claim within the time limited must show no laches, 2 Dan. Ch. Pr. 1204; *Waltham Bank v. Wright* 8 Allen 121; *Bemis v. Bemis* 13 Gray 559; *Bigelow v. Bemis* 2 Allen 496; where an executor has satisfied the debts and legacies and paid over the residue to the residuary legatee without precipitation and with no notice of other subsisting demands, it is sufficient answer to an action of debt on his bond, *Chelsea Water Works v. Cowper* 1 Esp. 275; though he must pay preferred debts first, *Brooking v. Jennings* 1 Mod. 175; *Hawkins v. Day* 1 Dick. 155; *Harman v. Harman* 2 Shower 492: 3 Mod. 115; *Sawyer v. Mercer* 1 Term 690; 2 Williams' Ex'rs. 926, 1155, 884, 1682; if a creditor who has a present debt omits to claim it under a decree, he is excluded, *Vernon v. Egmont* 1 Bligh N. R. 570; *Richards v. Browne* 3 Bing. N. C. 498; Ram on Assets 556; the proper remedy of a creditor after distribution of the assets is by bill in equity against the distributees, Adams' Eq. 522; Wentworth's Office of Executor 304; a creditor who files his petition after the time limited and after the order for distribution, has no claim except as to funds remaining in court, *Gillespie v. Alexander* 3 Russ. 130· *Knight v. Earl of Plymouth* 1 Dick. 126.

Millard & Bean for defendant in error. Error does not lie on an order directing an administrator to make payment, as the proceedings are not under common law.

Holbrook v. Cook 5 Mich. 225; *Conrad v. Button* 28 Mich. 365; *Cameron v. Bentley* id. 520.

COOLEY, J. The record in this case presents the following state of facts:

John Miller, a resident of Washtenaw county, died intestate November 7, 1872, leaving a widow and children, and real and personal estate to be administered. April 8, 1873, on petition of one of the children, and after due publication of notice, Jacob Brown the plaintiff in error was duly appointed administrator on the estate of said intestate, and gave bond and took upon himself the trust. On the same day commissioners were appointed by the judge of probate for the county of Washtenaw to examine and adjust the claims against said estate. The commissioners took the oath required by law, and gave the requisite notice for the presentation of claims, and on July 31, 1874, filed their report in the probate court, showing the allowance by them of claims to the amount of $350 and no more.

The estate was duly inventoried by the administrator, and was appraised as follows: real estate, $22,100; personal estate, $2,158. The real estate appears to have been subject to very large encumbrances.

After the time for the presentation of claims to the commissioners had expired, the administrator, having no knowledge or notice of further demands, allowed the widow and children of the intestate to take possession and dispose of the assets belonging to the estate, and before the proceedings hereinafter mentioned had been begun, the whole of said assets had been exhausted by the widow and children, in the payment of the claims, and in their own support. The administrator, however, had filed no account, and taken no steps to be discharged from his trust until December 5, 1876, when he applied to the probate court for the settlement of his final account, and January 9th following was assigned by the court for the hearing thereon.

The day before this hearing was to take place, namely, January 8, 1877, Ignatz Forsche presented to the probate court his petition, setting forth that he had a claim of $750 against said estate, and praying that the commission be revived for the purpose of hearing it, or that instead thereof it be heard and allowed by the judge of probate. The prayer of this petition was denied by the probate court, but on appeal to the circuit court, the claim of Forsche was heard and allowed at the sum of $902.15, with $65.10 costs.

No proceedings were had for the settlement of the administrator's account on January 9, 1877, the day fixed for a hearing thereon, and on May 29, 1878, the probate court made an order reciting that it appeared from the inventory that the personal property of the estate amounted to $2158, and that the claims allowed were $1317.25; and thereupon the administrator was directed to pay said claims within twenty days. As all the claims except that of Forsche had been previously paid, this order would apply to that claim only. The administrator appealed from the order to the circuit court, assigning various reasons for the appeal; the one chiefly relied upon being that there was no property or money belonging to the estate from which the Forsche claim could be paid.

In the circuit court the administrator was held to have the affirmative of the issue, and the trial proceeded after the usual course of common-law suits. The facts above recited appeared in proof, and the court gave judgment affirming the order of the probate court. The administrator thereupon brought error.

I. Motion was made to dismiss the writ of error, on the ground that certiorari was the proper remedy. *Holbrook v. Cook*, 5 Mich. 225; *Conrad v. Button* 28 Mich. 365. But we think the case is properly here. The substance of the issue in the circuit court was *plene administravit*, and the trial proceeded as it might have done on that issue in an original suit in the circuit court.

II. The case upon its merits requires a careful examination of the statutory provisions respecting the settlement of estates.

By section 4450 of Compiled Laws, the probate court is required, at the time of granting letters of administration, to make an order allowing to the administrator a time for disposing of the estate, and paying the debts, which in the first instance shall not exceed one year and six months. The next section permits extensions, but not so that the whole time allowed to the original administrator shall exceed four years. It does not appear that there was any extension in this case, and the one year and six months expired October 8, 1874.

By section 4424 of Compiled Laws the probate court is required, when appointing commissioners for the examination and allowance of claims, to determine the time within which claims shall be presented to them; and this in the first instance shall not exceed eighteen months, but may be extended (§ 4425), but not so that the whole time shall exceed two years. The time in this case was limited to six months. If extended to the extreme limit allowed by law it would have expired April 8, 1875.

By section 4433 of Compiled Laws, it is declared that when a claim is not presented to the commissioners within the time allowed for their action, the claimant shall be forever barred from recovering it, or from setting off the same in any action whatever. Another section nevertheless provides that on the application of a creditor who has failed to present his claim, "if made at any time before the estate is closed," the judge of probate may revive the commission for the purpose of hearing the claim. Comp. L. § 4426. Or instead of doing this, he may himself hear and adjudicate upon the claim, as was done in this instance.

From the foregoing it will appear that long before Forsche presented his claim, or notified the administrator that he had one, the time had not only expired for the presentation of claims to the commissioners, but for the

settlement of the estate also. As early as October 8, 1874, the administrator should have paid off all the claims allowed against the estate, and delivered the remaining assets to the widow and next of kin, and obtained his discharge. Had he done so, it is not pretended that any claim could afterwards have been made against him by reason of a debt owing by the estate but not until afterwards presented and allowed. If the creditor could have any remedy in such a case, he must find it in following the property into the hands of the distributees.

Section 4407 of Compiled Laws provides that "the executor or administrator shall be entitled to the possession of the personal estate of the deceased until assignment or distribution of the same to heirs, legatees, or other parsons entitled thereto, by order of the probate court, or until the estate is finally settled." This section does not render it imperative that the personal representative should take possession of the personal estate; it only empowers him to do so; and it is not expected that he will disturb the possession of the family except so far as the proper discharge of his duties may require it. *Howard v. Patrick* 38 Mich. 795.

Under section 4496 of Compiled Laws the judge of probate, after the debts are paid or provided for, may assign the residue of the estate to the persons entitled without awaiting the presentation of a final account by the administrator. There is no room for doubt that such an assignment would protect the administrator as against any claim subsequently presented and allowed. He must be protected, because there is no provision of law requiring or empowering him to recover possession of property once delivered by him to a distributee under the order of the probate court.

From the foregoing statement of facts and law the following conclusions are drawn:

1. That as early as October 8, 1874, when all the claims allowed against the estate had been paid, the widow and children of Miller were entitled to have the

residue of the estate delivered over to them, as their own property under the law, and it was the duty of the administrator to recognize this right and surrender to them the property on demand.

2. If the administrator had failed to observe this duty, the widow and children might have applied to the probate court for an order of distribution, and on a showing that the allowed claims were paid, they would have been entitled as of right to have this order made. If the administrator had met their application by showing to the court that he had personal claims for services and expenses, assets sufficient to meet these claims might have been left in his hands until the settlement of his accounts; but he could have asked and the court would have granted nothing more.

3. When the administrator, instead of being forced into action by such an order, voluntarily delivered the property over to the persons entitled, he only recognized a legal duty and performed it without waiting to have it prescribed for him in a legal proceeding. He yielded to that which was matter of strict right—to that against which he had no power of legal resistance, and in respect to which he would have been culpable, on moral grounds as well as legal, had he attempted to resist. An order of the court making the assignment and distribution might have been desirable to him, because it would have been an adjudication upon the rights of the respective parties, and would have protected him against any subsequent claims of inequality or injustice in the distribution; but if no fault is found by any one of them, the importance of such an order is not very obvious.

But it is said the estate was not settled and closed, and could not be until the administrator had presented his final account and had it allowed. He could not have his account allowed and obtain his discharge if it appeared that claims remained unpaid which there was property to meet, and therefore it was his duty to keep himself in

condition to respond to any demand that might be established. Relief from this duty is to be obtained only by a discharge in due form, and until he has taken the precaution to obtain this, he will make voluntary distribution of the property at his peril.

This is a plausible view, and was accepted by the circuit court. And it is true that in the strictest sense of that term the estate is not settled until the administrator obtains his discharge. But when the claims allowed by the commissioners are paid, only two things remain to be done to complete the settlement: one of these being the delivery of the property to the distributees, and the other, the passing of the administrator's account. Under the statute either of these may precede the other; and if distribution is first made, the settlement of the account afterwards is only for the purpose of determining that the administrator has accounted fully and obeyed the law in his payments. If the persons who would be entitled to any surplus deny this, the court must adjudicate between him and them; but if they concede it, he will have occasion for an order of discharge only as it will afford him the highest and most conclusive evidence that his trust has been fulfilled according to law. But how his failure to call for and obtain this evidence can create claims against him in favor of parties not entitled when distribution was made, is not apparent.

In this case Forsche had been so far either negligent or unfortunate that he had failed to present his claim until the time had arrived when the statute would justify the administrator in assuming that no such claim existed, and until acting upon that assumption he had delivered over the property to the parties having a legal right to demand it. On what ground can he now come in and take advantage of the administrator's neglect to call for and obtain a formal discharge, and compel the administrator to pay this debt from his own means? It surely was never the purpose of the law that the administrator should personally be charged with the debts of the intes-

tate, unless upon some ground of personal fault; and if he remains liable under such circumstances as are developed in this case, it must be essential to his protection that he retain the property in his hands until his final discharge is obtained, at whatever inconvenience to the widow and children. Thus the possibility that there may be somewhere in existence a now forgotten or lost claim that, by the favor of the probate court, may some day be proved, must force the administrator to exclude the family from the enjoyment of the ancestor's property, even when presumptively no such claim exists.

But we do not agree that the administrator's liability is thus prolonged. For all purposes except the final passing of his accounts we think the administrator is to be considered as having settled the estate, when having paid the debts reported by the commissioners, he has handed over the remaining property to the distributees. *Calkins v. Smith* 41 Mich. 409. The distributees are then entitled to the property, and the administrator fully administers when he allows them to take it in the proper proportions. The claimant who unexpectedly appears afterwards, must seek his remedy against the estate in the condition in which he then finds it. *Greig v. Somerville* 1 Russ. & M. 338. The misfortune of finding it administered is his, and not that of the administrator.

Formal proceedings for the settlement of an estate are never necessary if all parties concerned can agree to dispense with them. This is often done, and the expense of administration thereby avoided. *Needham v. Gillett* 39 Mich. 574; *Babbitt v. Bowen* 32 Vt. 437; *Hibbard v. Kent* 15 N. H. 516; *Carter v. Owens* 41 Ala. 217. Family arrangements for this purpose, it is said, are favorites of the law, and when fairly made are never allowed to be disturbed by the parties, or by any others for them. *Walworth v. Abel* 52 Penn. St. 370. Such an arrangement may be made after an administrator is appointed as well as before, and if the administrator is afterwards summoned to render his accounts, the court

will accept as satisfactory, so far as it goes, the settlement the parties concerned have made. *Clarke v. Clay* 31 N. H. 393. No doubt such a settlement will be subject to the rights of creditors in any case where the statutory proceedings have not been taken to bar their claims; but when these have been had, the right to take the property under voluntary arrangement must be commensurate with the right to compel the administrator to distribute it.

A probate case on appeal is to be tried and determined on the same principles that would be administered by the probate court itself. That court, in adjusting the accounts of adminstrators is governed by broad principles of equity; and it is at all times competent for the administrator, unimpeded by technical rules, to show the fairness of his dealings, the real nature of his transactions, and to restrict the amount for which he should be held liable to that which equity demands. Upon any other rule he might be made to bear the burden of events for which he was in no degree responsible, and when he was acting in the most conscientious discharge of duty. *Upson v. Badeau* 3 Bradf. Sur. Rep. 13, 15; *Poole v. Munday* 103 Mass. 174. In this case the defendant in error delayed the presentation of his claim until the administrator had in good faith administered fully, and until nothing remained to be done but the final accounting. The fact that he was afterwards permitted to prove his claim is evidence that he had fully explained the delay, but the fact that he was not himself in fault, can establish no equity in his favor to charge the consequences of the delay upon the administrator. The administrator, assuming as he had a right to do, that no further claims existed, has merely performed his duty in recognizing the rights of the widow and children; and the law will protect him in making the voluntary distribution of the estate which under the circumstances the law would have compelled.

The judgment is reversed, with costs of all the courts.

The other Justices concurred.

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LYDIA W. SHOWERS v. GEORGE W. ROBINSON AND JOHN STANTON.

Estates of decedents—Dower and homestead—Estoppel—Suits for recovery of land held under probate sales—Limitations.

The statute which limits the time for bringing suits for the recovery of land held under probate sales, to five years, only applies to cases in which the suit brings in controversy the validity of such a sale. If the plaintiff's title is such that the probate sale is immaterial to it, the statute has no application.

The claim of a widow to a homestead right, in behalf of herself and her children, does not bring in question the validity of an administrator's sale of the same land to pay debts of the intestate, since the sale must be deemed made subject to the homestead right.

Whether lands can rightfully be sold to pay debts of a decedent, subject to a homestead right, *quære*. If such sale is ordered and made, however, it is not absolutely void, and cannot be attacked collaterally, but is only voidable on appeal.

A widow may have dower set off in lands which are subject to a homestead right, and this will not estop her from claiming the homestead afterwards.

A widow is not estopped from claiming a homestead in lands by the fact that she desired its sale for the payment of debts, and requested a party to buy the land, and received from the proceeds the amount of a claim allowed in her favor. Estoppel *in pais* has no application to interests in lands. Moreover, it must be presumed that the sale the widow desired was a sale subject to the homestead.

The acts of the widow in moving away from the homestead for a time, or in neglecting to claim it, cannot deprive the minor children of the right to claim it. If she neglects or refuses to assert their claim, it may be done by some other proper representative.

Minor children are not necessary parties to a suit brought by the widow, their mother, to recover the homestead, though it is proper to join them.

Error to Van Buren. Submitted April 9. Decided June 9.

EJECTMENT. Plaintiff brings error.

Lester A. Tabor for plaintiff in error. Dower and homestead rights may exist in the same premises; *Chis-*

olm v. Chisolm 41 Ala. 327; *Jordan v. Strickland* 42 Ala. 315; *McCuan v. Turrentine* 48 Ala. 70; *Walsh v. Reis* 50 Ill. 477; *Bursen v. Goodspeed* 60 Ill. 281; *Bresee v. Stiles* 22 Wis. 120; *Mercier v. Chace* 11 Allen 194; *Monk v. Capen* 5 Allen 146; *Bates v. Bates* 97 Mass. 392; *Merriman v. Lacefield* 4 Heisk. 222; *Chaplin v. Sawyer* 35 Vt. 290; *Doane v. Doane* 33 Vt. 649; *Wallace v. Harris* 32 Mich. 380.

Brown, Howard & Roos for defendant in error.

COOLEY, J. The plaintiff is the widow of Jacob Showers, and the mother of his three infant children who reside with her. As such widow and mother she brings ejectment to recover that part of the southwest quarter of the southeast quarter of section thirty-two in town three south of range thirteen west, Van Buren county, which lies west of a highway running through the same. Defendants are in possession of the land, and claim it by virtue of a sale made by the administrator of Jacob Showers under a license from the probate court. The highway divides the forty-acre lot above described into two parcels, the east one of which, containing six or seven acres, is occupied by the plaintiff, it having been set off to her as her dower. The west parcel, now in controversy, contains some thirty acres.

The plaintiff was married to Jacob Showers in 1856. In the same year he became owner of this forty-acre lot, and moved with his wife upon it. From that time they occupied it as their homestead until he died in 1869. Charles M. Monell was appointed administrator on the estate of Showers soon after his death, and took possession as such of the land west of the highway. The other parcel was assigned to the widow as her dower in 1870, on her petition. In 1872 the widow moved off the parcel so assigned to her as dower, into a village half a mile distant. She claims to have done this at the request and under the advice of the judge of probate and administrator.

When Showers died he left no personal property available for the payment of his debts. The claims allowed against his estate amounted to $642.82, including one in favor of the plaintiff of $154.80. The administrator made sale of the premises in controversy in 1873, and they were bid in by defendant Robinson for $1275. There was evidence in the case that plaintiff requested Robinson to make this purchase, and she afterwards applied in the probate court and had the administrator summoned to render his account of the proceeds. Her own claim was paid to her. This suit was begun in 1878, a little over five years from the time Robinson made his purchase. The case was tried by jury, and the jury under instructions of the judge to be noticed further on, returned a verdict for defendants.

I. It is claimed on the part of the defense that the action was barred by sections 4594 and 7137 of Compiled Laws. The first of these provides that "no action for the recovery of any estate sold by an executor or administrator under the provisions of this chapter shall be maintained by any heir or other person claiming under the deceased testator or intestate, unless it be commenced within five years next after the sale." The second requires the action to be brought within five years after the right accrues, "where the defendant claims title to the land in question, by or through some deed made upon a sale thereof by an executor, administrator, or guardian, or by a sheriff or other proper ministerial officer, under the order, judgment, decree, or process of a court, or legal tribunal of competent jurisdiction within this State." These are broad provisions, and seem on first reading to embrace every possible case in which the defendants' title is derived through a probate sale. But one would be at a loss if he were in search of reasons for adopting provisions so comprehensive in meaning and scope. It cannot have been the purpose to impart any peculiar sacredness to a title derived under judicial proceedings,

and to give it a preference in protection over one that had always been transferred by the voluntary conveyances of parties assuming to be owners. If, for example, two persons were to disseize another of different parcels of his land at the same time, and the possession of one should be transferred to a purchaser by execution sale, and that of the other to a person accepting the disseizor's own conveyance, it would be impossible to assign any sensible reason why the owner should pursue his remedy against one any more speedily than against the other. Each purchaser from a trespasser would himself be a trespasser, and one could have no equity entitling him to the favor of the law more than the other. Moreover statutes of limitation have regard specially to the laches of the owner, and they deny him a remedy for the recovery of his rights because he has failed to pursue them within a reasonable time. *Toll v. Wright* 37 Mich. 93. But a time that is only reasonable for pursuing a disseizor cannot become unreasonable by the mere fact that the disseizor's possession is taken from him under a judicial sale to which the owner is in no sense a party: the law imposes upon the owner no obligation to take notice of or follow the changes and transfers which are made among those who are trespassing upon his rights. His equity is the same against the second as against the first, and survives as long; and he is only concerned in ascertaining who is the wrong-doer at the time he seeks his legal redress.

There are parties, however, who as against purchasers at judicial sales, may well be required to move with the utmost promptitude. The case of heirs whose inheritance is sold for the payment of debts of their ancestor is such a case. The heirs are parties to the proceedings which result in such sales, and they are seldom ignorant of the several steps as they take place. If they believe these steps have not been taken in conformity with the law, and desire to contest the sale, they may justly be required to do so speedily, while the proceedings

are recent and while mere errors or accidental omissions may perhaps be corrected. This is particularly true of such cases because the purchaser, if through the error of others he loses the land which he has bought in good faith, ought to have some remedy for the recovery of the money paid; and this he is not likely to find after any considerable delay. It is probable that one reason for the enactment of these short statutes of limitations was that under the former law, when the validity of judicial sales might be contested at any time within twenty years after the taking of possession under them, it sometimes happened that heirs by calculated delay first suffered the ancestor's estate to be cleared of debts by administrator's sales which they left undisputed and undisturbed until it had become too late for the purchasers to obtain indemnity, and then recovered back the land which had paid the debts, by taking advantage of errors in the proceedings. Even where this injustice was not originally contemplated, it often resulted; and it was eminently just and proper that a short statute of limitations should exist for such cases.

But to render the reason of these statutes applicable, the possessor must not only claim title through some judicial sale, but it must be the validity of this title which is in controversy between him and the plaintiff, and the subject-matter of the issue to be tried. It is when the plaintiff contests such a sale, that he is required to move promptly. But if the nature of the plaintiff's right is such that it is immaterial to him whether a probate sale is regular or irregular, and he claims to recover on grounds that leave that sale out of view, the statutes can have no application to his case, because the reasons on which they are enacted are absent. The intent of these statutes is that the sales therein enumerated shall not be brought in question and contested because of defects after the time named therein has elapsed; and they cannot be applied to a case in which the plaintiff concedes, or has no occasion to question the judicial sale.

II. The question then is whether the right asserted by the plaintiff does bring in question the validity of the administrator's sale, so that to sustain the suit will defeat the purchase. Indirectly the right to make the sale at all is involved.

The constitutional provisions exempting a homestead from forced sale for the payment of debts are given in the margin.* It will be seen on referring to them that they continue the exemption after the death of the owner during the minority of his children or during the widowhood of his surviving wife. By implication at least they recognize the estate of the late owner as having an interest in the homestead, which is assets, and which at some time and in some manner must be subject to be applied in payment of debts, but they do not indicate the time or point out the means of making the application. Neither is there any statute which makes provision for the case. It might be urged with much reason that the fee subject to the homestead is liable to be sold immediately, like any other contingent or future vested interest; and it is perhaps difficult to give full effect to all the statutory provisions respecting the settlement of the estates of deceased persons without so holding. Those provis-

*ARTICLE XVI.

SEC. 2. Every homestead of not exceeding forty acres of land, and the dwelling-house thereon, and the appurtenances to be selected by the owner thereof, and not included in any town plat, city or village; or instead thereof, at the option of the owner, any lot in any city, village, or recorded town plat, or such parts of lots as shall be equal thereto, and the dwelling-house thereon, and its appurtenances, owned and occupied by any resident of the State, not exceeding in value $1,500, shall be exempt from forced sale on execution or any other final process from a court, for any debt contracted after the adoption of this Constitution. Such exemption shall not extend to any mortgage thereon, lawfully obtained; but such mortgage or other alienation of such land by the owner thereof, if a married man, shall not be valid without the signature of the wife to the same.

SEC. 3. The homestead of a family, after the death of the owner thereof, shall be exempt from the payment of his debts contracted after the adoption of this Constitution, in all cases, during the minority of his children.

SEC. 4. If the owner of a homestead die, leaving a widow but no children, the same shall be exempt, and the rents and profits thereof shall accrue to her benefit during the time of her widowhood, unless she be the owner of a homestead in her own right.

ions require estates to be closed and the personal representatives to be discharged in a very short period; allowing only eighteen months at first (Comp. L. § 4450), and permitting extensions to four years only in all, Comp. L. § 4451. All claims against the estate are barred which are not presented and proved before the administrator is discharged (*Brown v. Forsche* ante, p. 492, just decided); and we have no statute and no precedents for afterwards pursuing the estate in the hands of distributees or others who have succeeded to it. It does not therefore appear that any method of reaching the fee subject to the exemption has been within legislative contemplation, except through a sale made within the short time allowed for the settlement of the estate.

But a sale thus made is likely in many cases to be ruinous to the estate, from the great uncertainty attending the continuance of the homestead right, and the consequent impossibility of finding elements of certainty whereby to determine the value of the fee subject to it. Selling the land under such circumstances is something like selling the contingent inheritance of the heir expectant, if that were salable: the one like the other depends partly upon the continuance of life, and partly upon the will and discretion of a party having a present interest. A widow entitled with her minor children to a homestead may live and claim the enjoyment of it for twenty or even fifty years, or she may die, leaving no children, in one year, or she may at once abandon the homestead right and remove with her children to a distant State, because she finds it for her interest to reside elsewhere. The elements of value in the fee under such circumstances are so exceedingly uncertain that it is highly improbable there could be any competition in a sale except perhaps of those who would bid for the land only what it would be worth in the contingency most unfavorable to the purchaser. A sale of anything of such uncertain value must almost of necessity be a sale at a great sacrifice. *Rottenberry v. Pipes* 53 Ala. 452.

In *Bursen v. Goodspeed* 60 Ill. 277, it was held to be proper to refuse to permit a sale of the fee by the administrator, subject to the homestead right of the widow, and that the administrator might delay until the homestead right had terminated, and obtain an order for a sale then. The lapse of time in that case between the issue of letters and the grant of license to sell was eleven years. But the administrator must move promptly after the homestead right ceases, or the claims will be declared void and license to sell be refused. *Wolf v. Ogden*, 66 Ill. 224. See also *Booth v. Goodwin* 29 Ark. 636. In *Taylor v. Thorn* 29 Ohio St. 569, a view was taken very similar to that which obtains in Illinois. In that case a homestead right existed which was left untouched by administration, and the administrator settled his accounts in 1854. But in 1876, after the homestead right had terminated, he was permitted to sell the lands as further assets to satisfy debts before unpaid. "When such assets would become available," say the court, "was to some extent uncertain; for while the homestead right would certainly end at the becoming of age of all the minor children, it might terminate by their death; and upon its termination the creditors would be entitled to the further assets to be derived from the sale of the premises which had been so occupied." In Iowa by the express terms of the statute the homestead is only subject to be sold for the debts of the deceased owner in cases where there is no surviving husband, wife or issue. *Johnson v. Gaylord* 41 Iowa 362.

In *Drake v. Kinsell* 38 Mich. 232 an administrator sold lands in which there was a homestead right, and they were bid in by the widow. The validity of the sale was attacked, but it had been duly licensed by the probate court and was therefore not void (*Woods v. Monroe* 17 Mich. 238; *Griffin v. Johnson* 37 Mich. 87, 91), and no party interested had appealed. The widow, after her purchase, had sold the land and removed from the premises, and it was not pretended that the homestead right

existed afterwards. The court, in deciding that the sale could not be attacked collaterally, say: "The statute does not exempt the fee in the land as a homestead; it exempts the land only while it is occupied as a homestead by the widow and minor children. Subject to the homestead right, therefore, the lands are assets when needed for the payment of demands against the estate. In this case the widow became the purchaser; and when she sold and left the land * * we do not see how any one was in position to raise the question of a homestead." But it was not decided in that case, nor was it necessary to decide, that the course adopted was the most suitable. It seems plain that the practice followed in Illinois and Ohio is more for the interest of all concerned, and if an application for a sale subject to the homestead right should be contested, it is probable that some method would be found, not inconsistent with the statutes, of so dealing with the case as to protect at once the interests of the family and of the creditors. But at most a sale subject to the homestead right would be voidable on appeal; it would not be void.

This case is like *Drake v. Kinsell* in some of its features, and in others it is essentially different. In this case as in that, land was sold by the administrator in which there was a homestead right. Here also there was no appeal from the order of sale, and the time for appeal had long expired. But in this case the homestead right is still insisted upon, while the purchaser insists that it was extinguished, either by the sale itself or by the concurrent or subsequent acts of the widow. That the sale alone would not cut it off we may affirm on the express provisions of the Constitution; and we have only to see whether any acts of the widow have terminated the rights of herself and of her children.

III. There are several acts of the plaintiff which, taken together or severally, are supposed to constitute a waiver of the homestead right:

First. She had her dower set off in one part of these

lands. But under our statutes the right in dower and the homestead right are not so far inconsistent that a claim of the one is a denial of the existence of the other. *Dei v. Habel* 41 Mich. 88. Dower is an estate for life, and may continue after the homestead right has ceased. It is also the subject of alienation, while the homestead interest could only be released to the owner of the fee; and the widow has therefore a sensible interest in having her dower set off, even though there be no land beside the homestead to which dower would attach. But if the two rights were inconsistent, the fact would be immaterial in this case. That portion of the forty acres not set off as dower would not lose its character as a homestead by reason of the dower being carved out of it. It would still remain a part of the home possession, for the support of the widow and children, no further removed from the mansion house, and no less a part of the homestead, in the common understanding or, as we think, in law, than it was before. *Perkins v. Quigley* 62 Mo. 498; *West River Bank v. Gale* 42 Vt. 27; *Buxton v. Dearborn* 46 N. H. 43.

Second. The plaintiff proved a claim against the estate which could only be paid by means of a sale of this land, and when the sale had taken place, she received payment from the proceeds. There is also some evidence that she urged Robinson to become the purchaser. In respect to these acts the circuit judge charged the jury that if the plaintiff induced the administrator to sell the land for the purpose of paying the indebtedness of the estate, or if she induced its purchase by Robinson, or was instrumental in inducing him to purchase, that act by itself would preclude her from recovering. She would not thereafter be suffered to claim as against him that the land constituted a homestead.

If the land was liable to be sold subject to the homestead right, this instruction must be erroneous. It must be intended in that case that plaintiff desired, solicited and induced a sale of the fee with the homestead right

left intact; that it was such a sale she had in her mind whether she was so understood or not; and that if Robinson supposed he was acquiring an unencumbered fee, he was misled by an ignorance of the law for which there is no remedy. But if this were otherwise the instruction would be equally erroneous.

The right of homestead exemption was intended by the people in adopting the Constitution to be as sacred as the right of dower, and from similar considerations of public policy. *Hoskins v. Litchfield* 31 Ill. 143; *Lœb v. McMahon* 89 Ill. 487; *Regan v. Zeeb* 28 Ohio (N. S.) 483. The Constitution indicates how it may be parted with, and negatives its being done in any other manner so long as the characteristics which make it a homestead remain. *Beecher v. Baldy* 7 Mich. 488; *Dye v. Mann* 10 Mich. 291; *Abbott v. Cromartie* 72 N. C. 292; *Littlejohn v. Egerton* 76 N. C. 468; *Warner v. Crosby* 89 Ill. 320. The most positive parol promise to sell the homestead or not to claim it is void in law even though the consideration may be ample (*Ring v. Burt* 17 Mich. 465; *Clark v. Evarts* 46 Iowa 248); and if Robinson had been assured by the plaintiff at the time he was making his purchase that she would make no claim to a homestead, she would nevertheless have been at liberty to make it, for the very manifest reason that the statute makes void all attempts to transfer interests in land without writing. *Wright v. DeGroff* 14 Mich. 164; *Hayes v. Livingston* 34 Mich. 384; *Nims v. Sherman* ante, p. 45. Even where the wife unites in the husband's deed, it will be wholly inoperative for the purposes of a release unless it conforms in its requisites to the statute. *Vanzant v. Vanzant* 23 Ill. 537; *Fisher v. Meister* 24 Mich. 447; *Connor v. McMurray* 2 Allen 202; *Hoge v. Hollister* 2 Tenn. Ch. 606; *Dickinson v. McLane* 57 N. H. 31; *Cross v. Everts* 28 Texas 532; *Barnett v. Mendenhall* 42 Iowa 296.

But if the doctrine of estoppel by acts *in pais* could be so applied in any case as to transfer or extinguish rights which the law provides shall pass by writing only,

the circumstances of this case would preclude it. One may sometimes by his conduct estop himself from claiming rights on his own behalf, but he cannot in that way cut off or take away the rights of others. And in this case the homestead right belonged to the children quite as much as to the mother: it was given as much or more for their benefit; and she could not by the most positive contract or conveyance have precluded their claiming it. It seems unnecessary to say that what she could not do by formal instruments she must be at least equally powerless to do by mere word of mouth. It is true that she might have it in her power to deprive the land of the qualities of a homestead by moving with the children away from it and making a home elsewhere, but that is altogether another matter, and presents other questions. *Miller v. Marckle* 27 Ill. 405; *Whittle v. Samuels* 54 Ga. 548; *Johnston v. Turner* 29 Ark. 280.

The defendants insist that there was an abandonment of the homestead right by the plaintiff in this case when she moved into the village. But if the plaintiff is believed in her testimony she moved under the advice of those on whom she had reason to rely in matters pertaining to the estate, and without any intention of abandoning a known right. If such was the case there was in law no abandonment. *Bunker v. Paquette* 37 Mich. 79; *Campbell v. Adair* 45 Miss. 170; *Tumlinson v. Swinney* 22 Ark. 400; *Howard v. Logan* 81 Ill. 383; *Moss v. Warner* 10 Cal. 296; *Jackson v. Reid* 32 Ohio St. 443. But an abandonment by the widow would not take from the minor children the right to occupy the land as a homestead, and they might return for the purpose. Indirectly this is recognized in *Griffin v. Johnson* 37 Mich. 87, 92, where it is said that the widow uniting with the administrator in a mortgage of the homestead will not affect the rights of minor children. In *Allen v. Shields* 72 N. C. 504, it was held that minor children should be protected in their homesteads, notwithstanding the failure of their guardian *ad litem* to claim it in a suit against

them. Still more should they be protected against any attempt of the widow to surrender their rights, when the surrender appears not to be for their interest. A step-mother might attempt this fraudulently or collusively, or the true mother from error in judgment; but even if in either case the widow refused to return, the children must be entitled to redress. With a home set apart for them by the Constitution, it cannot be at the option of a heartless or foolish mother to take it from them and render them homeless; but a guardian might recover on their behalf what she refused to demand. If, however, she comes herself for the purpose, having kept the children together as a family, she is manifestly the most proper person to act as their representative and in their interest in restoring them to the occupation of the homestead, and the enjoyment of their rights therein.

IV. It is objected that the children were necessary parties plaintiff in the suit, but we think not. There would have been no harm in joining them. *Burt v. Box* 36 Texas 114. Had the widow refused to bring suit, they might have done so. But the widow, when the children live with her, is entitled to the possession of the whole land, not of an undivided interest merely; and may sue for its recovery alone. *Miles v. Miles* 46 N. H. 261.

We find nothing in the record that should have precluded the plaintiff's recovery. The judgment must be reversed with costs and a new trial ordered.

The other Justices concurred.

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SIMON SHERRID, MARY P. BUCK AND JOHN CURTIS v. MARY JANE SOUTHWICK.

Estates of decedents—Homestead—Wife's signature to mortgage—Notice in ejectment.

A judgment will not be reversed for a defect in the judge's finding, which a stipulation in the record shows was pure inadvertence.

A homestead may be claimed in lands of a decedent which he owned in common with another *Lozo v. Sutherland*, 38 Mich. 168.

A mortgage given by a married man of his homestead requires to its validity the signature of his wife, even though at the time she is not living with him. The signature of a woman, then passing as his wife, when she is not, is merely void.

A wife driven from her home by the misconduct of her husband carries with her all her marital rights, including the right to preclude the conveyance or mortgaging of the homestead without her consent.

The mortgage of a homestead given by a married man without his wife's signature is void absolutely, and not merely as to the homestead interest. An heir at law of the mortgagor, after his death, may maintain ejectment against one holding under a foreclosure of it, and this, whether the heir is or is not a minor.

One who gets possession of a homestead under proceedings in foreclosure of a void mortgage, is not entitled to notice as tenant at will, before being sued in ejectment.

Error to Cass. Submitted April 16. Decided June 9.

TRESPASS. Defendants bring error.

E. Bacon for plaintiffs in error.

Harsen D. Smith for defendant in error. An estate in common will support a right of homestead in one of the co-tenants *McClary v. Bixby* 36 Vt. 254; *Horn v. Tufts* 39 N. H. 478; *Hewitt v. Rankin* 41 Ia. 35; *Thorn v. Thorn* 14 Ia. 49; *Tarrant v. Swain* 15 Kan. 146; *Greenwood v. Maddox* 27 Ark. 660; *McGuire v. Van Pelt* 55 Ala. 344; *Lacey v. Clements* 36 Tex. 663; *Williams v. Wethered* 37 Tex. 130; *Smith v. Deschaumes* id. 429; *Johnson v. May* 16 N. B. R. 425; *In re Swearinger* 17 id. 138; *Com-*

stock v. Comstock 27 Mich. 100; *Sears v. Hanks* 14 Ohio St. 301; *Bartholomew v. West* 2 Dil. 293; Freeman Cotenancy § 54; Thompson Homesteads § 188; 1 Am. L. Reg. 654; a mortgage of a homestead is not valid without the wife's signature even though she does not live on it with her husband, *Meader v. Place* 43 N. H. 308; *Atkinson v. Atkinson* 37 N. H. 436; *Wood v. Lord* 51 N. H. 448; *Doyle v. Coburn* 6 Allen 71; *Williams v. Swetland* 10 Ia. 51; *Henderson v. Ford* 46 Tex. 627; *Lies v. DeDiabla* 12 Cal. 329; a wife who is forced to leave her home by her husband's cruelty or neglect forfeits none of her rights even to homestead, *Baker v. Dayton* 28 Wis. 368; *Vanzant v. Vanzant* 23 Ill. 536; Thompson on Homesteads §§ 283, 504; 1 Washb. R. P. 376; Bishop Mar. & Div. 653–7; Reeves Dom. Rel. [3d ed.] 327; Tyler's Inf. and Cov. 891.

Cooley, J. Mrs. Southwick, the defendant in error, brought ejectment in the circuit court to recover certain land which she claimed as heir-at-law of John Cave deceased. The defendants below claimed under the foreclosure of a mortgage given by John Cave, which the plaintiff insisted was void for the reason that the lands described therein constituted the homestead of the mortgagor, and he had at the time a wife who did not unite with him in giving it. The facts were found by the circuit judge, and are in substance the following:

John Cave in 1856 was married to Mary E. Cave, who is still living. The plaintiff in this suit was born in 1858, and is the only issue of this marriage. October 20, 1860, John Cave became the owner in fee of the south fifteen acres of thirty acres of land off the west side of the east half of the northwest quarter of section five, town five south of range thirteen west, Cass county. In July, 1863, John Cave and the plaintiff became tenants in common of the north fifteen of the same thirty acres, which had been previously owned by Cave's mother. In December, 1864, Cave also became

owner of ten acres lying east of and adjoining the thirty acres above described. Previous to 1862 Cave had resided with his family in a log-house on the south fifteen acres, but in the latter part of that year he removed to his mother's house on the north fifteen acres, and three years later tore down the house he had lived in before. From 1862 to the time of his death in 1872 Cave occupied all three of the parcels of land above described, and cultivated the same as one farm. The fifteen acres owned by him and the plaintiff as tenants in common was never partitioned between them. While they lived together Cave treated his wife cruelly and neglected to provide for her the comforts of life, and in 1862 she separated from him and did not live with him afterwards, though they were never divorced.

The mortgage under the foreclosure of which the defendants claimed was given to one Bryant September 1, 1867, and covered all three parcels of land. Cave's wife was then living in another State, and one Lucinda M. Cave united in giving the mortgage, but for what reason is not explained. In one of the briefs it is stated that she was then living with John Cave and passed as his wife. The mortgage was foreclosed in 1872, the land sold to one Sheffield, who afterwards deeded it to Lucinda M. Cave, and she to defendant Sherrid. Under this foreclosure defendant Sherrid seems to have obtained possession of all the forty acres except seven and a-half acres in the northwest corner thereof, which remained in the occupancy of the plaintiff after her father's death. In this corner the dwelling house was situated which Cave occupied at the time of his death. The present suit was instituted in 1879 and after the plaintiff had attained to her majority.

The circuit judge on the facts found was of opinion that the mortgage under which defendants claimed was void for want of the signature of Cave's wife, and therefore that plaintiff, as heir at law, was entitled to recover.

I. The circuit judge has failed to find what the value of the mortgaged land was; and it is urged that his judgment is for that reason erroneous, since the value may have exceeded the constitutional limit of $1500. Technically this objection is well taken. But it appears by a stipulation of the parties, which is returned with the record, that the value of the land was actually under $1500, and that Cave, when he gave the mortgage, owned no other land than that which he described in it. We cannot, with this stipulation in the record, reverse the judgment, since the only result would be to send back the case for a more complete finding, which could not possibly benefit the defendants. *Slocomb v. Thatcher* 20 Mich. 52.

II. The house in which Cave lived having been situated on that part of the land which he owned in common with another, it is argued there could be no homestead as to that, because a homestead is exempted only in its entirety, *Amphlett v. Hibbard* 29 Mich. 298; and none as to the remaining twenty-five acres, since that, having no dwelling upon it, was not a homestead in fact. *Coolidge v. Wells* 20 Mich. 79. In *Lozo v. Sutherland* 38 Mich. 168, the same question of the right to claim a homestead in land held in common was raised, and decided in the affirmative. Although in some other States there are decisions to the contrary, there are also many in accord with this conclusion, some of which are cited in the opinion in that case. Text writers have also taken the same view. Freeman on Co-tenancy § 54; Thompson on Homesteads § 188; Smyth on Homestead § 127. See *In re Swearinger* 5 Sawyer 52. But even if the part held in common could not be claimed as exempt, the remainder might be. *Showers v. Robinson*, ante, p. 502, decided herewith.

III. An argument against the invalidity of the mortgage because of the want of the wife's signature, is drawn from the fact that she had then separated herself from him, and was living out of the State. It is said she

was not entitled to be consulted under such circumstances. Her separation, however, was not an abandonment, and not a surrender of any rights. The finding shows that she was driven from her home by misconduct on the part of her husband of a nature so grievous that she might have claimed a divorce under the statute. When a wife is thus driven off, she carries with her all her marital rights: the right to support, to dower, to control the disposition of the homestead. *Barker v. Dayton* 28 Wis. 367, 383. This power of control is conferred upon her as a means of conservation and protection; but if the husband could acquire independent authority to dispose of the homestead without the wife's consent, by driving her with blows from his house, or by such other conduct towards her as should altogether destroy the comfort of home, her constitutional right to withhold her consent from a sale or mortgage would be of no value whatever. Indeed as a means of restraint upon a vicious and unprincipled man it might be worse than useless, for it would benefit him, if he desired to sell or encumber his homestead, to first break up his home. *Vanzant v. Vanzant* 23 Ill. 536, 542. But what the law intends is, that she shall have in her own hands, exempt from her husband's control, an important means of protection to the home as well as to the homestead. *Meader v. Place* 43 N. H. 307; *Atkinson v. Atkinson* 40 N. H. 249, 252; *Sellon v. Reed* 5 Biss. 125, 126.

IV. The point is also made here, as it has been before in this court, that the mortgage was invalid only as against the homestead right—a right which continued after John Cave's death only till the plaintiff came of age. But the Constitution after indicating what land shall be exempted as a homestead, declares that a "mortgage or other alienation of such land by the owner thereof, if a married man, *shall not be valid* without the signature of the wife to the same." Article xvi. § 2. A thing not valid is void; and a security void is incapable of enforcement. The Constitution in terms declares that

the "land and dwelling-house thereon" constituting the homestead, shall not be sold or mortgaged unless the wife of the owner, if he have one, unite with him in the act that disposes of or encumbers it. This was expressly ruled in *Dye v. Mann* 10 Mich. 291, in which a second mortgagee, who had obtained the wife's signature to his mortgage, was held entitled to take advantage of the invalidity of a prior mortgage which she had not signed. See also *Watertown Ins. Co. v. Sewing Machine Co.* 41 Mich. 131; *Eldridge v. Pierce* 90 Ill. 474. The wife may also take advantage of it, *Comstock v. Comstock* 27 Mich. 97; and so no doubt may the husband himself, since otherwise it would become impossible for him, because of the existence of a deed or mortgage executed by himself alone, to exercise his undoubted right to dispose of one homestead in order with the proceeds to acquire another. *State v. Geddis* 44 Ia. 537; *Eldridge v. Pierce* 90 Ill. 474.

V. It is objected to the plaintiff's recovery that the defendants, if they had no other rights, were at least tenants at will, and entitled as such to the statutory notice to quit. There can be no force to this objection unless the defendants acquired possession by consent of the person entitled to it. The record instead of showing such consent negatives it. Defendants came in under adversary proceedings which were taken to enforce a void mortgage.

The judgment must be affirmed with costs.

The other Justices concurred.

THE PEOPLE V. THOMAS J. LILLEY.

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Homicide—Manslaughter—Assaults with intent, etc.

A mere intent to commit violence, accompanied by acts preparatory thereto, will not sustain conviction for an assault if it goes no farther. There must be present ability to carry out the intent, and the act done must be criminal and sufficiently proximate to the deed intended; and it is for the jury, under proper instructions, to determine whether it has proceeded far enough.

Where an act is done with intent to commit an assault, but the intent is voluntarily abandoned, or is prevented while the distance between the parties is too great to commit an actual assault, there can be no conviction as for an assault.

An assault is an inchoate violence to the person of another with the present means of carrying the intent into effect: threats are not enough; there must be violence actually offered, and within such distance that harm may follow it if the assailant is not hindered.

An assault with intent to commit manslaughter is not an offense known to the law in Michigan.

There can be no specific intent without deliberation, and as an act done on sudden impulse, like manslaughter, cannot be deliberate, there can be no such offense as an assault with intent to commit manslaughter.

In a statute treating of offenses committed with a particular intent involving deliberation, *it seems* that general language referring to assaults with intent to commit any other felony must also contemplate deliberate intent.

Manslaughter is the unlawful killing of another without malice or premeditation, though it often involves a direct intent to kill; where voluntary it arises from the sudden heat of the passions and is the result of temporary excitement wherein the reason is so disturbed or obscured by passion that an ordinary man of fair average disposition is liable to act rashly or without due deliberation or reflection and from passion rather than judgment.

A homicide is murder and not manslaughter where there is evidence of actual malice or if the provocation to it was resented in a brutal and ferocious manner evincing a malignant disposition, or if before it was committed there was time for the perpetrator's passion to subside and his blood to cool.

Exceptions before judgment from Cass. Submitted April 21. Decided June 9.

ASSAULT with intent to kill and murder. Respondent was found guilty of an assault with intent to commit manslaughter.

Harsen D. Smith, prosecuting attorney, for the People. Voluntary manslaughter may involve an unlawful intent to kill, *State v. Throckmorton* 53 Ind. 354; *Murphy v. State* 31 Ind. 511; it often involves specific intent to kill, *People v. Scott* 6 Mich. 295; *Maher v. People* 10 Mich. 212; *Hurd v. People* 25 Mich. 412; there may be an assault with intent to commit manslaughter, Bish. Stat. Cr. § 508; *State v. Calligan* 17 N. H. 253; *Wilson v. People* 24 Mich., 410; *State v. Reed* 40 Vt. 603; it is simply an assault with intent to kill unlawfully without malice, *State v. White* 45 Ia. 325; and was specified in Rev. Stat. 1838, p. 624, §20.

J. J. Van Riper and *F. J. Atwell* for respondent. Manslaughter is free from unlawful intent, Bicknell's Crim. Pr. 292; 1 Hale P. C. 455-6; 1 Russ. Cr. 520; assault with intent to commit manslaughter is a confusion of terms, as it implies deliberate intent, *Wilson v. People* 24 Mich. 411; *Wright v. People* 33 Mich. 300; *Morman v. State* 24 Miss. 54; *Barcus v. State* 49 Miss. 17; *State v. White* 41 Iowa 316; 20 Amer. 602; there was no such offense at common law, *State v. Waters* 39 Me. 54; *Rex v. Woodfall* 5 Burr. 2661.

MARSTON, C. J. The respondent was tried upon an information which charged him with having made an assault upon one Horace McKenzie, with intent then and there etc. to kill and murder him. Under instructions the respondent was found guilty of an assault with intent to commit manslaughter. The case comes here on exceptions before judgment, and while quite a large number of exceptions were taken and have been presented in this court, but few will be considered, as they reach the merits.

A difficulty had arisen between the person claimed to have been assaulted and the father of respondent as to the proper division of certain wheat then being threshed, and which led to blows. It appears the respondent was struck on the head by McKenzie, and that he thereupon "retreated" or walked towards the straw-stack some ten or twelve feet distant. There is some conflict in the evidence as to what thereupon took place, but as respondent was entitled as a matter of right to have the case submitted to the jury under instructions applicable to the evidence, favorable as well as unfavorable to him, we must for the present purpose consider the charge as given and the refusals in view of the evidence most favorable to the accused.

After respondent reached the straw-stack, he turned around, took a knife out of his pocket, made some threat and advanced towards McKenzie. After he had advanced one or two steps he was caught by a bystander, and there is some question as to whether the knife at this time was open or not, and witnesses testified that he was then ten to fifteen feet distant from McKenzie—the person assaulted,—and that respondent then put the knife in his pocket. This practically ended the matter. The court as requested by the prosecuting attorney instructed the jury:

"An assault is an attempt or offer with violence to do a corporal hurt to another; an offer to inflict bodily injury by one who is rushing upon another, is an assault although the assailant be not near enough to reach his adversary, if the distance be such as to induce a man of ordinary firmness to believe that he is in immediate danger of receiving such threatened injury, and any intent to commit violence, accompanied by acts which, if not interrupted, will be followed by bodily injury, is sufficient to constitute an assault, although the assailant may not be at any time within striking distance. And in this case, if Lilley, being within ten, fifteen or twenty feet of McKenzie, drew his knife from his pocket and commenced to open the same, and started towards McKenzie in a violent manner, threatening that he would do him bodily injury, and after advancing towards him a few steps

and while rushing towards McKenzie he was stopped by Dillman, Lilley would then be guilty of an assault."

The court declined to charge—

Sixth. "An assault in law is an effort to strike or cut within striking distance, and if the prisoner started to strike or cut McKenzie, and before he got within striking or cutting distance stopped and voluntarily abandoned his purpose, or if before coming within striking or cutting distance was stopped by others and then abandoned his purpose, it would not constitute an assault in law."

Seventh. "In order to constitute the crime of assault with intent to murder, the attempt to strike or cut must be within striking or cutting distance; and if the prisoner started to strike or cut McKenzie, and before he got within striking or cutting distance stopped and voluntarily abandoned his purpose, or before coming within striking or cutting distance was stopped by others, and then voluntarily abandoned his purpose, it would not at law constitute an assault with intent to murder, as charged in the first and second counts in the information."

Eighth. "If the jury find that the prisoner took out his knife, but did not open it, or, if opened by him, he did not attempt to cut McKenzie with it, or if they find that the prisoner, before coming within striking distance, voluntarily closed the knife or surrendered it to Dillman, there was no assault, and the offenses charged in the information were not committed."

The instructions given and those refused raise the question as to what in law constitutes an assault. Beyond this it may be very questionable whether, under any authority, the instructions as given could be fully sustained, even if applied to any facts in this case; and irrespective of what may be found to constitute an assault, it may also be a matter of some question whether the requests should not have been given.

The instruction as given would seem to lay down the general proposition "that any intent to commit violence accompanied by acts which, if not interrupted, will be followed by bodily injury, is sufficient to constitute an assault, although the assailant may not be at any time within striking distance." Now there may be an intent to commit violence, and this accompanied by acts pre-

paratory thereto, which if followed up would clearly constitute an assault, yet owing to the distance and surrounding circumstances, no possible assault would have been committed. Thus, one with a direct intent to do grievous bodily harm may purchase a deadly weapon, or having one he may, with like intent, put it in a condition to use with deadly effect. Yet if the act stop here, it may as a general proposition be said the party could not be convicted of an assault, and this irrespective of what may have caused the party to proceed no farther in the attempt. Other facts must be added, and this we shall see must be a present ability to carry out the intent. The act done must have been sufficiently proximate to the thing intended. It may be so remote, although a distinct and essential act, coupled with the intent, as to fall far short of constituting an assault. The act done must not only be criminal but it must have proceeded far enough towards a consummation thereof, and this must necessarily be a question for the jury under proper instructions. 1 Bishop Cr. L., ch. 26; also § 323. So, clearly, where the intent is formed and some act done in performance thereof, but the party voluntarily abandons his purpose, or is prevented from proceeding farther, and this while at a distance too great to make an actual assault, he could not be convicted of an assault.

What then constitutes an assault in law? It might be somewhat difficult to reconcile all the authorities upon this subject, and we shall not attempt it. Some of the tests, as putting the person assaulted in fear, cannot be relied upon, as evidently an assault may be made upon a person, even although he had no knowledge of the fact at the time.

An assault is defined to be an inchoate violence to the person of another, with the present means of carrying the intent into effect. Threats are not sufficient; there must be proof of violence actually offered, and this within such a distance as that harm might ensue if the party

was not prevented. 2 Greenl. Ev. § 82; 3 Greenl. Ev. § 59; 1 Bishop's Cr. L. § 419; 3 Bl. Com. 120, note 3.

We are of opinion, therefore, that the charge of the court as to what would constitute an assault was not sufficiently guarded and had a tendency to mislead the jury. And, in view of all the evidence in this case, we are also of opinion that the sixth, seventh and eighth requests should have been given, and this in view of the conflict as to the distance which respondent was from McKenzie, when stopped, and of the nature and character of the alleged assault. There may have been evidence in the case tending to show that when respondent was stopped, although not then within striking distance, yet so near as to cause immediate danger if not stopped, so that a jury would have been at liberty to have found that an assault was committed, yet there was evidence tending to show that none was committed, and in view thereof these requests should have been given.

The next important question is whether in this State there is such an offense known to the law as an assault with intent to commit manslaughter. If such an offense can be committed, two things are necessary to the commission thereof,—an actual assault, coupled with an intent to take life, and this under such circumstances that the accused would not be guilty of murder if death should ensue.

The specific intent is necessary to complete the offense, and raise it above the grade of a mere assault. *Wilson v. People* 24 Mich. 410. While the intent must be established, it need not be by direct evidence, as of threats: it may be drawn as an inference from all the facts. *People v. Scott* 6 Mich. 296; *People v. Potter* 5 Mich. 7.

In a case of this character we have only to deal with voluntary manslaughter. This "often involves a direct intent to kill, but the law reduces the grade of the offense because, looking at the frailty of human nature, it con-

siders great provocations sufficient to excite the passions beyond the control of reason." *People v. Scott* supra. "Manslaughter, when voluntary, arises from the sudden heat of the passions; murder, from the wickedness of the heart." Manslaughter is "the unlawful killing of another without malice, either express or implied," 4 Bl. Com. 191; 3 Greenl. Ev. § 119. The offense is one that is committed without malice and without premeditation; the "result of temporary excitement, by which the control of the reason was disturbed, rather than of any wickedness of heart, or cruelty or recklessness of disposition." The true general rule is "that reason should, at the time of the act, be disturbed or obscured by passion to an extent which might render ordinary men, of fair average disposition, liable to act rashly or without due deliberation or reflection, and from passion, rather than judgment." *Maher v. The People* 10 Mich. 220. Where the provocation falls short of this, or if there was time for the passion to subside and the blood to cool, or if there is evidence of actual malice, or if the provocation be resented in a brutal and ferocious manner, evincing a malignant disposition, in all such cases, if death ensue the offense would be murder. To reduce the offense to manslaughter all these things must be wanting, and the act must be done while reason is obscured by passion, so that the party acts rashly and without reflection. As was said in *Nye v. People* 35 Mich. 19 it would be a "perversion of terms to apply the term 'deliberate' to any act which is done on a sudden impulse," under such circumstances.

Is then an intent thus formed, without malice, deliberation or reflection, but rashly, and while the reason is obscured by passion caused by a sufficient provocation, such as the law contemplates in cases of assault with intent to commit a felony?

An examination of our statutes will show that a punishment is provided for those who shall maim or disfigure another in a certain manner, as well as those privy to

such intent. Comp. L. § 7520. Also any person who shall assault another with intent to maim or disfigure in any of the ways mentioned. § 7521. Attempts to commit the crime of murder and assaults with like intent are provided for. §§ 7522-3. Assaults made in connection with robbing, stealing and taking from the person, such robber being armed with a dangerous weapon, with intent, if resisted, to kill or maim, or being so armed shall assault another with intent to rob. So assaults with like intent, where not so armed, are provided for by §§ 7524-5-7. Malicious threats with intent to extort money or any pecuniary advantage, or with intent to compel the person threatened to do any act against his will; assaults with intent to commit the crime of rape; kidnapping with intent to sell, etc.; poisoning food with intent to kill or injure any person, or willfully placing poison in a well, etc., with like intent; enticing away a child with intent to detain or conceal; administering medicines to any woman pregnant with a quick child, with intent thereby to destroy such child; administering stupefying drugs, with intent, while such person is under the influence thereof, to induce him to enlist, are all provided for in the same chapter, 244 of the Compiled Laws.

In each and every of these cases it will be seen the intent is a deliberate one. So in the section 7537, under which it is claimed this case comes, "if any person shall assault another, with intent to commit any burglary, or any other felony,"—here the assault with intent to commit the burglary,—the intent is a deliberate one. In none of these cases can the intent be one formed under such circumstances as would reduce a voluntary homicide to manslaughter. When, therefore, in a chapter and section devoted entirely, in so far as it speaks of offenses committed with a particular intent, such intent is a deliberate one, must not the general language, referring to assaults with intent to commit any other felony, in like manner have reference to cases of deliberate intent? *McDade v. People* 29 Mich. 50.

Had the assault been committed in this case and death had ensued, the intent might have been inferred from all the circumstances. The homicide, if not excusable, would have furnished evidence of the intent. In cases of assault with intent to commit a felony, a specific intent must be found to exist, and it is very difficult to imagine how such a specific intent can be found to exist in the absence of reflection and deliberation. When once it appears that the assault was made with intent to take life, under circumstances where the killing would not be lawful or excusable, then, if under such circumstances death should ensue, the party would be guilty of murder. It seems like a contradiction of terms to say that a person can assault another with intent to commit manslaughter. See also *Wright v. People* 33 Mich. 301.

As this case now stands the respondent may be convicted of an assault, and a new trial must therefore be ordered.

The other Justices concurred.

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TAYLOR PARSHALL v. GUYON T. FISHER.

Constructive partnership—Estoppel—Good faith—Trover for goods taken on attachment.

A firm composed of two women put the husband of one in absolute charge of the business, and he thereafter made purchases on his own credit, and with his wife's knowledge and consent acted in all respects as if he instead of his wife was one of the partners. *Held* that as to creditors who had no notice to the contrary, he was to be considered as a partner; that his statements to a creditor to that effect were admissible in defense to an action of trover for goods taken on attachment; and that, unless superior equities had arisen, a judgment against the firm concluded the other partner. Such equities could not arise from the purchase alone in favor of the partner whose responsibility did not appear.

In an action of trover for goods taken on attachment against a firm, the testimony of those who had dealt with it, showing their understanding as to who composed it and the whole state of facts as to how business was done, was admissible.

Where a female member of a firm had allowed her husband to be held out as a partner in her place, a conversation concerning the payment of a claim, carried on between the husband and the attorney of an attaching creditor in the wife's absence, but in the presence of a transferee of the firm property, and before the latter had parted with any consideration, was held admissible to show the bad faith of the transferee.

An estoppel may arise against a partner from allowing another person to be put forward as the real party in interest and to be represented after dissolution of the firm as the only owner of the business.

Good faith in the purchase of partnership assets is not presumable from the payment of a valuable consideration if it appears that the purchaser knows that creditors are urgent, and that there is no change in possession or in the control of the business.

Error to Livingston. Submitted April 27. Decided June 9.

TROVER. Defendant brings error.

A. D. Cruickshank and *R. D. Person* for plaintiff in error.

H. F. Higgins and *Waddell & Montague* for defendant in error. Statements of an agent of a firm as to who compose it are not admissible unless it is shown that he was a partner or that they were made in the hearing or by the knowledge or consent of partners, Collier on Partnership [4th Am. ed.] §§ 774–780; 1 Greenl. Ev. § 177; 2 id. § 484; 4 Stark. Ev. 1072; *Heffron v. Hanaford* 40 Mich. 305; *Pleasants v. Fant* 22 Wal. 119; *Nudd v. Burrows* 91 U. S. 438–9; *Lockwood v. Beckwith* 6 Mich. 172; *Pennoyer v. David* 8 Mich. 408; *Mitchell v. Roulstone* 2 Hall 357: *Whitney v. Ferris* 10 Johns. 66; *Tuttle v. Cooper* 5 Pick. 414; *Robbins v. Willard* 6 Pick. 464; *Harris v. Wilson* 7 Wend. 57; *Dutton v. Woodman* 9 Cush. 255; *McPherson v. Rathbone* 7 Wend. 216; general reputation as to who constitute a firm is inadmissible unless credit was obtained on it, 1 Greenl. Ev. § 101; *Benjamin v.*

Covert 2 N. W. Rep. 625; Coll. Partnership § 777; *Sager v. Tupper* 38 Mich. 258.

CAMPBELL, J. Fisher sued Parshall in trover for the value of a stock of boots and shoes, on which the latter had levied attachments against Thomas C. Moss and Ella B. Fisher, formerly Smith, and then wife of one George L. Fisher. The attachments were levied July 2, 1878, and judgments were obtained and executions issued in the middle of the same month, and the goods sold under them.

The property had been in the possession and ownership of the firm of Moss & Smith. That firm was dissolved in June, 1878, and Miss Smith retired. It is claimed by Fisher that this firm was composed of Christiana Moss and Ella B. Smith, and that after the dissolution Mrs. Moss, who was wife of Thomas C. Moss, was to keep the assets and pay the debts. He further claims that on the 1st day of July, 1878, he bought this stock of Mrs. Moss for a half interest in a patent heel support, which he then transferred to Mr. and Mrs. Moss, the consideration moving only from her. Parshall claims that the real firm was composed of Thomas C. Moss and Miss Smith, and that the sale to Fisher was a fraud.

The partnership was alleged to have been formed by a writing dated May 1, 1877, between Mrs. Moss and Miss Smith, who then resided in Detroit. It was for one year. In the subsequent October they moved to Fowlerville, where the transaction complained of took place. This partnership was dissolved by a written agreement dated June 6, 1878.

It appears further that on the 1st of May, 1877, an agreement in writing was made in the name of the firm of Moss & Smith with Thomas C. Moss, whereby he was put in complete and absolute charge of the business, of which he was to conduct the operations, keep the books and render proper accounts, for eighteen dollars a week.

It appears also that he did thus control all the business and made the purchases, and that he so purchased without disclosing that his wife was a member of the firm. The goods were sold on his credit and on the assumption that he was the partner of Miss Smith. After the dissolution the notices of dissolution, printed with his wife's knowledge, recited him as the partner, who was to continue the business on his own account. A further business notice of the same purport was also distributed, and the form was known and approved by Mrs. Moss before it was got out.

Mr. Fisher's own statement shows that up to July 1, 1878, he had been employed as boot and shoe-maker by the concern; that Mrs. Moss proposed to him on that morning to exchange half of his patent for the business stock, and the bargain was closed by acceptance at nine o'clock in the morning of Monday, July 1st, the same day when it was first suggested, and the consideration transferred in the afternoon. He says he employed Mrs. Moss and her husband to manage the business at nine dollars each per week, and that he kept on at the same kind of manual work he had done before.

There was evidence on both sides bearing on whether he had actual knowledge of the pressure of creditors. Other facts appeared which need not now be dwelt upon.

One of the two judgments was in favor of A. C. McGraw & Co. It appeared that they knew nothing of Mrs. Moss, and dealt on the understanding that her husband was the party interested. One of the firm having stated that his knowledge that T. C. Moss and Miss Smith were the partners was derived from Moss himself, the court struck out the testimony.

We think this was error. They had a right to show that they dealt with a firm known as Moss & Smith, of which he was partner. As against Miss Smith it might be that his statements alone could create no liability. But the judgment concluded her. And inasmuch as

Mrs. Moss had expressly given her husband plenary powers over the business and authorized him to deal as he chose, there was no other way in which the sellers could know with whom they were dealing, except to act on his representations. They had a right to hold him as the partner representing the only firm with which they dealt, and they had a right on a judgment against that firm to levy on the property which had been sold to it, unless superior equities had arisen. As to Mrs. Moss, those equities in her favor could not arise from the original purchase alone, in which she was not known. These facts therefore were all admissible in evidence. Their conclusiveness would depend on circumstances.

The court also shut out several pieces of testimony indicating the understanding of persons in Fowlerville who had lent money to and otherwise dealt with the firm, as to who composed it. All this should have been received. The testimony was uniform that no one knew Mrs. Moss as a partner, and that Thomas C. Moss was the apparent partner and actual manager. If Mrs. Moss was a partner at all, it was kept secret designedly, and she never did any important act for the firm. The whole state of facts relating to the way in which the business was done was relevant. It bore not only on the parties who as to these outside persons might be treated as partners, but also upon the fact itself. Under this testimony, if true, there could be no doubt at all that there was as to creditors a partnership between Mr. Moss and Miss Smith. If they were partners it is not shown that there was a third.

We think the court erred in excluding proof of a conversation in Fisher's presence between Mr. Cruickshank, attorney for one of the attaching creditors, and Moss, on the morning of July 1st, concerning payment of their claim, on the ground that it was in the absence of Mrs. Moss. Not only was her interest disputed, but this conversation was before Fisher had transferred his patent interest and before, therefore, he had parted with any

consideration. It was admissible to show his bad faith.

Assuming that Mrs. Moss, as between herself and her husband and Miss Smith, was really partner, we think that if the jury were satisfied that the business was so carried on as the testimony indicated, and that Moss was put forward as the person who was apparently the real party in interest, and after dissolution represented as the only owner of the business, there was enough to create an estoppel.

In charging that Fisher if he paid a valuable consideration was presumptively a *bona fide* purchaser, it seems to have been overlooked that there was evidence tending to show personal knowledge on his part that creditors were urgent, and also that there was no apparent change in the possession or control of the stock and business.

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

The other Justices concurred.

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PETER WEBBER AND GEORGE C. WORTH, RELATORS v. ANSON TOWNLEY, REGISTER OF DEEDS.

Public records—Copies.

There is no common-law right to make copies or abstracts of public records for speculative purposes, as for the compilation of a set of abstract books for selling abstracts of title. Nor is such a right given by Act 54 of 1875, "to facilitate the inspection of the records and files in the offices of the registers of deeds."

MANDAMUS. Submitted April 27. Denied June 9.

Beakes & Cutcheon for relators. The right to inspect public records and make transcripts therefrom is a common-law right, *Herbert v. Ashburner* 1 Wils. 295; *King*

v. Shelley 3 Term 141; *Rex v. Fraternity of Hostmen* 2 Strange 1223; *Harrison v. Williams* 3 B. & C. 162; *People v. Cornell* 47 Barb. 329; *State v. Williams* 41 N. J. 332: 19 Am. L. Reg. 154; Dill. Corp. §§ 240, 684–5; Ang. & Am. Corp. § 707; Grant on Corp. § 311; High Ext. Rem. § 833; 1 Greenl. Ev. §§ 471–8; *Silver v. People* 45 Ill. 225; *State v. Meadows* 1 Kan. 90; *Hawes v. White* 66 Me. 305.

Thomas A. Wilson and *Eugene Pringle* for respondent. Records of conveyance were formerly looked upon as partaking of both a private and public character (Greenl. Ev. §§ 474–5) inspection of which was permitted to those interested and denied to strangers, *Rex v. Allgood* 7 Term 742; Gresley Ev. 170; there is no right at common law, and the claim must be supported by private interest or by a right in the public interest, *In re McLean* 9 Cent. L. J. 425; *Rex v. Merch. Taylor Co.* 2 B. & Ad. 115; mandamus has been granted to allow copyhold tenants to inspect the manorial court rolls far enough to ascertain the condition of their own titles, but not to parties claiming no interest in the land, *Rex v. Lucas* 10 East 235; *Rex v. Tower* 4 M. & S. 162; *Rex v. Justice of Staffordshire* 6 Ad. & El. 268; *Rogers v. Jones* 4 D. & R. 484; 2 Phil. Ev. 312; mandamus to compel the clerk in charge of records to allow a person employed by the board of supervisors to make new indexes for the public use was denied, *People v. Welch* 10 Hun 535.

MARSTON, C. J. The relators show by their petition that in November, 1879, they entered into copartnership for the purpose of making and owning a complete abstract of the title to all the lands in Jackson county, and for the purpose of carrying on the abstract business at Jackson in said county; that they had called upon the respondent, who was and is register of deeds in said county, and stated to him fully and fairly the purpose of petitioners, and asked permission to put a table in one of the rooms in the office of said register, which was

granted; that petitioners thereupon contracted for certain blank books and incurred considerable expense, and commenced copying from the public records into such books, and continued so to do until about January 15, 1880, and that this was done without the slightest interference with or hindrance to the business of the office of said register; that at the date last mentioned the respondent informed a clerk then in the employ of said relators at such work that respondent would not allow him to work any more, because it would be unfair to the owner of another set of abstract books in which respondent was interested, and that since then relators have been unable to farther prosecute their said work. The relators farther set forth that in doing such work they have not used pen or ink, or permitted their clerks to, using pencils only, and are willing to comply with all reasonable rules and regulations which the register may prescribe. They farther allege that the public records of said office embrace one hundred books of records of deeds and about sixty of records of mortgages, to be abstracted; that the making of a proper abstract will be a work of great labor, and if done by one person without assistance would require several years for completion. They allege an intention to make a complete abstract, which would be of great benefit to the public and themselves. The relators ask for a peremptory writ of mandamus to compel the register to permit them and their clerks to inspect and copy or abstract the public records, files and papers in the office of the register, subject to reasonable rules and regulations as to time, facilities, etc.

An answer was put in by the respondent to which a number of exceptions have been taken by relators' counsel, but which we shall not consider, preferring to dispose of the application upon its merits, and without any reference to side issues, assuming for this purpose that sufficient facilities could be afforded relators in the register's office to make an abstract, even although, as stated

in the answer, it would require two persons five years to make such abstract.

The relators place their right to the relief asked upon two grounds—*first*, that the right to inspect public records and make transcript therefrom is given them by the common law; *second*, under Act No. 54 of the Session Laws of 1875, p. 51.

We are of opinion that under the common law relators have not the right claimed. The right to an inspection and copy or abstract of a public record is not given indiscriminately to each and all who may, from curiosity or otherwise, desire the same, but is limited to those who have some interest therein. What this interest must be we are not called upon in the present case to determine. The question has usually arisen where the right claimed was to inspect or obtain a copy of some particular document, or those relating to a given transaction or title. We have not been referred to any authority which recognizes the right of a person under the common law to a copy or abstract of the entire records of a public office in which he had no special interest, the object in view being simply private gain from the possession and use thereof.

The object sought by the relators may be considered as of such modern origin as not to have been contemplated or covered by the common law authorities relating to the inspection of public records, and the reason upon which those authorities rest would exclude relators from the right claimed. What is the right which relators seek, and the result thereof? But first let us see what it is not. It is not for a public purpose. They do not seek these abstracts for purposes of publication for the use, benefit, or information of the public, even if such an unlimited publication could be justified. Relators do not ask for an inspection of a record and abstract thereof relating to lands in which they claim to have any title or interest, or concerning which they desire information in contemplation of acquiring

some right or interest, either by purchase or otherwise. It is not as the agents or attorneys of parties seeking information because interested or likely to become so. On the contrary, the right is based upon neither a present nor prospective interest in the lands, either personally or as a representative of others who have, but is for the future private gain and emolument of relators in furnishing information therefrom to third parties for a compensation then to be paid. It is a request for the law to grant them the right to inspect the record of the title to every person's land in the county, and obtain copies or abstracts thereof, to enable them hereafter, for a fee or reward, to furnish copies to such as may desire the same, whether interested or not, and irrespective of the object or motive such persons may have in view in seeking such information. In other words, relators ask the right of copying or abstracting the entire records of the county for private and speculative purposes, they having no other interest whatever therein.

Conceding to them this right under such circumstances, and the same must be accorded to all others asking it. Every resident of Jackson county may of right claim a similar privilege. Indeed, the right for such purpose, if it exists at all, cannot be restricted by the residence of the party, so that the result may be more applicants than the register's office could afford room to. Farther than this, to make such abstracts being thus open to all, and being a matter of right, must be granted in such a manner, and such reasonable facilities must be afforded, that the right claimed and exercised will not be barren but profitable. If none but the applicants are permitted to work, the time consumed in making the abstract will, in many counties, be so long that the full fruits thereof cannot be reaped during the life-time of the parties. An opportunity, therefore, should be afforded to all to have the work done within a reasonable time. If, therefore, each applicant, with a corps of assistants and clerks, makes demand upon the register for facilities to prepare

abstracts, may not that officer find his position a somewhat embarrassing one, and his office uncomfortably crowded, to his inconvenience and that of the public? If, however, this is a matter of right, open and common to all, and which may be enforced by *mandamus*, must not the proper authorities in such county furnish suitable room and facilities to accommodate all who may desire to exercise this right? If not, and there is to be any discrimination, who shall be favored—who shall be admitted and who excluded? How many clerks or assistants shall each applicant have the right to employ? Who shall determine what shall be considered a reasonable time within which each may complete his abstract? And, as the use of the public records cannot thus be handed over to the indiscriminate use of those not interested in their future preservation, how shall the register protect them from mutilation? This he cannot do personally without neglecting his official duties, and if he must employ clerks or appoint deputies for such purposes, at whose expense shall it be, the law having made no provision for such emergencies?

These and many other embarrassing questions must arise if this right is found to exist.

It would not, however, end here. This being a right which we might term one not coupled with an interest, must apply equally to the records in each and every public office. True the copies or abstracts from each of the several public offices might not be so profitable to the parties making the same as would those from the register's office, but this would not go to the right to make the abstract. May then parties in no way interested, other than as are these relators, insist upon the right to inspect and copy or abstract the records of our courts,—of the treasurers of our counties,—of the several county offices; and indeed why with equal propriety may it not be extended to a like right in each of the several State offices? The right once conceded, there is no limit to it until every public office is exhausted. The inconven-

iencies which such a system would engraft upon public officers; the dangers, both of a public and private nature, from abuses which would inevitably follow in the carrying out of such a right, are conclusive against the existence thereof.

It may be said that, even admitting the right to exist, there would be no such number of persons desirous of making abstracts, and that the dangers pointed out would not therefore arise, and in corroboration thereof the past may be referred to. How far the uncertainty of the existence of such an unlimited right in the past may have kept the number of applicants within proper bounds, may have some bearing upon the question, and it may be true that the demand for abstracts of title would have some effect upon the supply offered for sale. We must bear in mind, however, that the larger and more populous the county, the greater would be the demand, and because of the larger number of volumes of records in such a county, a correspondingly increased time and force would be required for each person to perfect his abstract, and the greater danger from abuses exist. Besides in ascertaining whether the right exists, we have a right to inquire into the evils which it would be likely to lead to, and may for this purpose follow up the natural and probable consequences likely to result therefrom, and thereby determine whether justified by the principles of the common-law decisions.

From what has been said, a very brief reference to the statute will be sufficient. The language of the act referred to does not in clear and unmistakable terms include a case like the present, and such an one should not be conferred by construction. The object of the act was to enable persons having occasion to make examination of the records for any lawful purpose,—and what would be we have already indicated,—to have suitable facilities therefor, to point out their rights and limitations therein, and the right and duty of the official custodian of the records in connection therewith. This was right

and proper, in order to define the respective rights and prevent conflict or confusion, but clearly this act does not extend to a case like the present.

It follows that the writ must be denied with costs to respondent.

The other Justices concurred.

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WILLIAM SPEARS v. EDWARD CHAPMAN.
WILLIAM SPEARS v. BRIDGET RILEY.

Garnishment—Proof—Disclosure.

A garnishee's disclosure will not sustain judgment in a justice's court if it is too ambiguous to show whether any indebtedness exists, or if so, to whom. The garnishee is a witness for the plaintiff, who has the burden of making out by him a *prima facie* case.

Cases made after judgment from Wayne. Submitted April 27. Decided June 9.

GARNISHMENT. Spears having recovered judgment before a justice for fifty dollars against Charlotte Issler, garnished Chapman and Mrs. Riley, and took judgments against them, from which they appealed to the circuit court, which affirmed the judgments. The garnishees' disclosure showed that although they had bought goods from Mrs. Issler, they did not know whether they were indebted for them to her or to her husband, who testified for the defendant that he was a grocer, and that his wife, who helped him in the store, never owned the goods. The garnishment proceedings are brought up for review by the Supreme Court upon cases made after judgment.

Edward Minock for plaintiff.

Miller & Clarke for defendants. A garnishee cannot

be held unless it affirmatively appears from his answer and collateral proofs that he is chargeable, *Porter v. Stevens* 9 Cush. 530; *Richards v. Stephenson* 99 Mass. 311; *Reagan v. Pacific R. R.* 21 Mo. 34; *Farwell v. Howard* 26 Ia. 381; *Smith v. Clarke* 9 Ia. 241; *Williams v. Housel* 2 Ia. 154; *Driscoll v. Hoyt* 11 Gray 404; *Lorman v. Phœnix Ins. Co.* 33 Mich. 65.

MARSTON, C. J. These cases are substantially alike, and in each the judgment must be reversed. This court has held recently in several cases that the garnishee's disclosure in justice's court must show a liability to the principal defendant before a judgment can be rendered thereon. If the disclosure is ambiguous, leaving it uncertain whether any indebtedness exists, or if so, to whom, and the case substantially rests upon that, the plaintiff must fail. The garnishee is the plaintiff's witness, and the burden of proof is upon him to make out by that witness a *prima facie* case.

Judgments reversed with costs.

The other Justices concurred.

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LAFAYETTE BUNCE v. STEPHEN BIDWELL.

Homestead—Ejectment—Adverse possession—Boundary.

When a married man lives upon forty acres of land, and an adjoining strip of land is in dispute between him and a neighbor, the latter, in bringing ejectment for the strip, need not join the defendant's wife in the suit, as presumptively she has no homestead interest in the land in dispute.

Where by reason of an adverse possession of lands for twenty years, the occupant has acquired a perfect right in the law to defend his possession, he has for all practical purposes a title, and may maintain suits upon it against parties afterwards found upon the land.

An error was made in running a division line between two farms. The parties respectively occupied up to the erroneous line for more than twenty years. Afterwards the correct line was run. *Held* (1) that if the parties occupied up to the erroneous line, supposing it to be the true boundary, and relying upon it, such line could not be disturbed afterwards, and a mere oral agreement to run a new line could not disturb the title thus fixed. But (2) if the parties did not rely upon the first survey, but expected to settle the line by another when convenient to make it, the mere possession for twenty years, according to the erroneous line, would not give title; (3) the question of the nature of the possession, and of the claims of the respective parties, is one of fact for the jury exclusively.

Error to Jackson. Submitted April 27. Decided June 9.

EJECTMENT. Defendant brings error.

John D. Conely for plaintiff in error. Where ejectment is brought for a homestead, the wife is a necessary party defendant, *Hodson v. Van Fossen* 26 Mich. 68; *Henry v. Gregory* 29 Mich. 68; *Crane v. Seitz* 30 Mich. 453; a boundary acquiesced in for more than twenty years cannot be disturbed (*Smith v. Hamilton* 20 Mich. 433; *Joyce v. Williams* 26 Mich. 332; *Diehl v. Zanger* 39 Mich. 601; *Dupont v. Starring* 42 Mich. 492; *Chapman v. Crooks* 41 Mich. 595; *Baldwin v. Brown* 16 N. Y. 374); even by a new survey, *Jackson v. Dieffendorf* 3 Johns. 269; *Reed v. Farr* 35 N. Y. 113.

Thomas E. Barkworth and *Thomas A. Wilson* for defendant in error.

COOLEY, J. The land which Bidwell sought to recover in this case is a strip twenty-seven feet in width across the north end of the south half of the east half of the southwest quarter of section seventeen in township four south of range one west in Jackson county. Bidwell has a paper title to this forty-acre lot, which he acquired in 1879, and he owns and has resided for many years on the forty acres adjoining it on the west. Bunce owns the north half of the east half of said southwest quarter, and resides upon it.

The narrow strip is in controversy by reason of an error in a survey by which the parties concerned undertook to establish the dividing line between the north and south forties of this east half of the quarter section. This survey was made in 1846. William Spencer then owned the north forty and Leonard Huntley the south forty. One Van De Bogert made the survey for them, and through some mistake placed the dividing line twenty-seven feet too far south. The line thus run was not questioned at the time, and the parties interested built a fence upon it which remained as the dividing line of their possessions for twenty-five years.

In 1869, however, while Mrs. Sexton owned the south forty of the east half of the quarter section, Bidwell and herself desired a new survey, and called in one Crowl to make it. There is some evidence that Bunce assented to this survey, but none that he agreed to be bound by it, and he did not actually take any part in it. It was made however, and the error in the former survey was discovered, and the true line marked out. Bidwell claims and offered some evidence to show that Bunce subsequently recognized the true line, assented to a division fence being erected upon it, and drew stone for building a part of the fence himself. Bunce denied this. It was shown that Bidwell moved over a part of the fence to the line of the Crowl survey, but Bunce moved it back again. Bidwell afterwards brought this suit.

I. Bunce testified on the trial that he claimed the land on which he resided as his homestead; and it was thereupon objected by his counsel that the suit was defective for want of parties; the wife having rights in the homestead, inalienable except by her own act, and which made it necessary that she should be joined in any suit involving the homestead or any part of it, since otherwise the dispossession of the husband must dispossess her also without an opportunity to defend her rights, or compel a separation of the family. *Hodson v. Van Fossen* 26 Mich. 68. But as the Constitution and statutes only

exempt forty acres as a homestead, and it is not claimed or pretended that Bunce has less than the full forty acres without this disputed strip, this objection would seem to have no force. It is of no importance that the parties previous to the discovery of the mistake in the survey supposed and acted upon the belief that this narrow strip was within the limits of the north forty acres: a mistake of the sort cannot enlarge the homestead exemption, which is unalterably limited to a definite quantity, and can be enlarged neither by contracts nor blunders.

But it is said that inasmuch as this strip of land might be claimed by the wife as a part of her homestead, there can be no right to adjudge her claim to be unfounded in a suit to which she is not a party and in which she has no opportunity to present her view of the facts. But if the mere fact that a woman may assert a homestead right renders her a necessary party to an ejectment suit, the wife of a defendant, or a woman living in his house and falsely assuming or claiming to be his wife, might become a necessary party in any case. However baseless or absurd the claim may be in a particular case it may always be made; and if it must always be tried in a suit against the woman herself when she sees fit to make it, she must always have the power to make herself a necessary party. This would seriously embarrass legal proceedings without any corresponding advantage to any one; for no one pretends that a judgment against the husband alone for that which constitutes the homestead or any portion of it, can be made use of as an estoppel against the wife. Her remedies, including the right to retain possession as against any one claiming under or adversely to her husband, remain the same as before, and the just protection of her rights does not therefore require that she should always be a party to suits against her husband. It would be prudent, perhaps, to join her in all cases in

which a homestead right may be asserted with any show of reason; but such was not this case.

II. The principal question in the case arises upon the adverse possession of Bunce, and the charge of the court upon the effect of his recognition and acquiescence in the survey made by Crowl. It is conceded that if Bunce occupied the disputed strip of land for twenty years, adversely to the owner of the south forty—the real owner of the strip,—he thereby acquired a right thereto which he could defend notwithstanding the possession originated in error. *Smith v. Hamilton* 20 Mich. 433; *Dupont v. Starring* 42 Mich. 492; *Chapman v. Crooks* 41 Mich. 595. And it is now settled that this is not a right of defense merely, but it is for all practical purposes a title, and affirmative remedies might be had upon it as against the original owner should he afterwards succeed in obtaining possession. *Brent v. Chapman* 5 Cranch 358; *Leffingwell v. Warren* 2 Black 599; *Jackson v. Dieffendorf* 3 Johns. 269; *Reed v. Farr* 35 N. Y. 113; *Reformed Church v. Schoolcraft* 65 N. Y. 134; *Moore v. Luce* 29 Penn. St. 260. A subsequent survey should not have undertaken to disturb the lines possession had thus fixed. *Diehl v. Zanger* 39 Mich. 601.

The circuit judge instructed the jury that if the defendant and those under whom he claimed had occupied the disputed strip adversely for twenty years previous to the commencement of suit, the plaintiff could not recover; that the occupancy to be sufficient for the purpose must have been actual, visible, notorious, continuous, and hostile to the right of the owner of the south forty for the whole period, and should have been under a claim of right. If the jury found such an occupancy they were told it was of no consequence that it originated in mistake. On the other hand they were instructed that if they found that the defendant agreed or assented to the line designated in the Crowl survey, as the true line, and consented that the plaintiff should construct his part of the

fence on that line, and drew stone himself along that line intending thereby to restore the plaintiff to the full possession and enjoyment of this strip of land, then that would amount to an abandonment of his right under the former occupancy. This last instruction is excepted to. It is said that the effect is that Bunce, who before had acquired an undoubted title by adverse possession, is deprived of it by mere acts *in pais*, unaccompanied or followed by acquiescence in possession by Bidwell.

All the evidence is returned with the record, and we do not think it shows that the defendant had established an undoubted right to the land in controversy by adverse possession. It shows beyond doubt, apparently, that the parties for twenty-five years acted on the supposition that the Van De Bogert survey was correct, but it does not show that they ever assented to abide by it, or that they occupied on the respective sides of it claiming it to be accurate. It is consistent with everything shown in the case that the parties contemplated that at some future time, when it should be convenient, or when the value of this little strip should be sufficient to make it worth while, they would have a more careful survey made. If such were the case, mere occupancy of the disputed strip would not be sufficient to give title, and the judge would be correct in instructing the jury that when the mistake was discovered and the possession voluntarily restored to the owner of the paper title, the right of the previous possessor to claim by adverse possession would be gone. We are inclined to think the instruction given was justified upon the evidence in the case. Enough was shown to warrant the jury in finding title in Bunce by adverse possession, but it was not conclusive, and might be met and overcome by evidence that Bunce did not claim or rely upon such a title. And his acquiescence in the new survey would be very cogent evidence to that effect. It seems highly probable that the jury erred in the conclusion they reached, but that was not the fault of the court.

The judgment must be affirmed, with costs. The record will be remanded to give the plaintiff in error an opportunity to take a new trial under the statute.

The other Justices concurred.

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FRANCES D. WOODRUFF v. ELIZABETH YOUNG, SETH N. HEDGES ET AL.

Appearance to demur—Multifariousness—Misjoinder of persons charged with fraud—Estates of decedents—Jurisdiction.

An appearance for the exclusive purpose of demurring to the jurisdiction does not admit it if the substantial matter of the bill is improper for the cognizance of the court.

A bill is multifarious that seeks to compel an accounting as to the management of an estate, and to enforce complainant's right as devisee, and which charges the executrix with fraud in obtaining from complainant a deed of property, and a co-defendant with individual frauds. It is also demurrable for the misjoinder of defendants, as separate individual frauds cannot sustain a joint litigation, since neither is answerable for the frauds of the other.

Where certain tribunals have acquired jurisdiction over an estate and its representative within their territory, the representative is bound to account to them only for all assets, and the courts of other States cannot interfere. Otherwise, intervening claimants within different foreign jurisdictions may claim through different courts the right of controlling the management of the estate.

Appeal from Jackson. Submitted April 27. Decided June 9.

BILL for accounting, etc. Complainant appeals.

J. C. Lowell and *Thomas A. Wilson* for complainant. Foreign executors coming into the forum are liable to suit for assets received in the foreign jurisdiction, *Swearinger v. Pendleton* 4 S. & R. 389; *Evans v. Tatem* 9 S. & R. 252; *Bryan v. M'Gee* 2 Wash. C. C. 337; *Campbell*

v. Tousey 7 Cow. 64; *Julian v. Reynolds* 8 Ala. 680; *Slatter v. Carroll* 2 Sandf. Ch. 573; *Scruggs v. Driver* 31 Ala. 274; *McNamara v. Dwyer* 7 Paige 239.

John D. Conely and *Alfred Lucking* for defendants Young and Hedges. The jurisdiction to compel an executrix to account is exclusive in the courts of the State where appointed, *Brown v. Brown* 4 Edw. Ch. 343; *Campbell v. Sheldon* 13 Pick. 8; *Campbell v. Wallace* 10 Gray 162; *Fay v. Haven* 3 Met. 114; *Boston v. Boylston* 2 Mass. 384; *Norton v. Palmer* 7 Cush. 523: 2 Redf. Wills 12; Whart. Confl. of Laws §§ 616, 619, 634; Story on Confl. of Laws § 424.

GRAVES, J. This is an appeal in equity against the allowance of a general demurrer and dismissal of the bill. The question whether the appearance, which was expressed as being for no other purpose than to dispute the jurisdiction, did or did not admit it, is hardly worth discussing. If the substantial matter of the bill was manifestly improper for the cognizance of the court, an appearance by solicitor, made expressly for the exclusive purpose of submitting the objection by demurrer, could not render the matter proper.

The complainant sets up that until June, 1857, her father, James Young, together with her mother Elizabeth and herself, and her sister Mary L., and her brother James A. Young, resided in the county of Livingston in the State of New York, where her father owned a large real and personal estate; that he then and there died, leaving a will by which he gave her mother an equal one-third of the entire property, and the residue in equal parts to herself, her brother and sister, and appointed her mother sole executrix; that the will was duly established in the surrogate's court for the county of Livingston, and its execution duly committed to her mother as sole executrix by the usual letters testamentary, and that she "entered upon the discharge of her duties as such executrix, and

has continued to act as such from thence hitherto;" that up to November, 1863, the family, including complainant, lived together in Livingston county and used the estate in common, the executrix exercising full control and having the entire management; that complainant then married her present husband, Charles P. Woodruff, and with him removed from the estate, and some years later established a residence here, and that she now lives in Jackson; that in 1870 her sister married Seth N. Hedges, an attorney at law, and that he, together with his wife and the executrix, have continued to reside in New York; that the estate is still unsettled and her full share not yet paid, whilst her right to anything further is denied; that her brother-in-law Hedges has obtained a complete ascendency over her mother, and holds entire dominion over the estate and refuses to recognize complainant's right, and that no accounting with her has been had or any settlement with her effected. She expressly declares that she files the bill "against the said Elizabeth Young and one Seth N. Hedges, as defendants herein to compel them, and each of them, to account to and with her in relation to their management of said estate, and to enforce and recover her rights as devisee and legatee under the said last will and testament."

But the bill does not stop with the complaints referred to. It introduces separate transactions, and charges complainant's mother with fraudulent practice in obtaining a deed from complainant of property in Dexter, and also charges her brother-in-law Hedges with distinct and individual frauds upon her.

It is quite unnecessary to descend to particulars and repeat the statements found in the bill. That the case it presents, so far as it exhibits anything definite, is one the court cannot tolerate, is extremely plain. In the first place, it undertakes to combine incongruous matters of complaint, and is strictly exposed to the charge of being multifarious; and moreover, in addition to the blending of distinct and independent grievances, it has

the vice of misjoinder of defendants. The separate individual frauds of the executrix and of her son-in-law, if capable of investigation in the same case with the demand for an accounting, are not compatible with each other for joint litigation. Neither the executrix nor Hedges is a proper defendant in respect to the fraud of the other, and it is not apparent that the state of facts would justify the joinder of Hedges in the case for an accounting by the executrix. But beyond these difficulties, the leading purpose of the bill is wholly inadmissible.

The only authority competent to deal with the administration of the estate, in view of its situation and that of the representative, is that of the courts of New York. The estate and the representative are there, and within the scope of the authority of her tribunals, one of which has gained and holds lawful cognizance; and it is to her tribunals that the executrix is exclusively bound to account for all the assets, and no foreign tribunal under the circumstances disclosed has any right to interfere. *Spoon v. Baxter* 31 Mich. 279; *Vaughan v. Northup* 15 Pet. 1, and authorities cited by defendants' counsel.

Many reasons might be cited. Once admit the right of interference in such a case at the instance of a single claimant, and the consequence follows that every foreign jurisdiction having a resident able to set up a claim may intervene at the same time and assume the right to supervise the administration, and require accounting and settlement according to its own views. Any number of intervening claimants may be reaching out at the same time, through as many different tribunals, for the exclusive supervision and winding up of the administration or some part of it, and each entitled equally with every other. A bare reference to some of the possible, and indeed probable consequences, is sufficient to expose the erroneousness of the claim.

The charge against Hedges, of having used complainant's money to buy land in Jackson county in his name, if sufficient to answer any purpose by way of statement

of a cause of action in equity, is confined to Hedges, and does not touch Mrs. Young. It is not necessary to add more.

The decree is right, and must be affirmed with costs.

The other Justices concurred.

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MILTON H. BUTLER v. CITY OF DETROIT AND ROBERT E. ROBERTS, RECEIVER OF TAXES.

Detroit Public Works Act—Paving assessments—Extension of contract.

The Public Works Act of Detroit requires proposed public improvements to be submitted to the Board of Public Works for estimates and recommendations. *Held* that bids for paving contracts could not properly be invited until such reference and report.

The constitutional requirement that the title of an act must express its purpose, is not violated by a provision in an act "to establish a Board of Public Works" whereby proposed public improvements must be referred to such Board before the common council can carry them out; nor does such a provision unduly limit the legislative authority of the council.

Local legislative authority is not infringed by having boards or other executive servants to do, under proper conditions, what is not legislative work.

Under the charter of Detroit a paving contract cannot be extended unless work has been actually begun upon it in good faith.

An injunction against the sale of property on a paving assessment was allowed where the common council advertised for bids before the proposed improvement had been referred, as required by law, to the Board of Public Works, and because the contract had been extended in violation of the charter, before any work had been done.

Appeal from the Superior Court of Detroit. Submitted April 27. Decided June 9.

INJUNCTION to restrain tax-sale. Bill dismissed. Complainant appeals.

Geo. H. Prentis and *D. C. Holbrook* for complainant.

City Counselor *F. A. Baker* for defendant.

CAMPBELL, J. The bill in this case was filed to restrain the sale of certain lots of complainant on Michigan avenue, in the city of Detroit, for an assessment for repaving that avenue. The case is so presented as to raise only three questions, and while it is claimed other grounds of illegality exist, we are not called on to consider them. For the purposes of the present suit, therefore, the parties assume that the common council had power to order the repaving, and has only failed to provide for it in a legal manner. The inquiry is narrowed very materially.

The three objections relied on are, *first*, that the council took measures in advance of any proper reference to and report from the Board of Public Works; *second*, that the contract was let before any assessment was provided for; and *third*, that the contract had expired of its own original limitation before any work was done under it, and was extended before any work was done.

The course of procedure, as bearing on the first of these objections, was as follows: On the 2d of June, 1876, a resolution was passed directing the Board of Public Works to prepare and submit the proper resolution for repaving Michigan avenue from Woodward avenue to the west line of Trumbull avenue. On the 20th day of June, 1876, the board made a report, which expressed no opinion except that if the street was repaved it should be done as far as Thirteen-and-a-half street, and which stated further that inasmuch as the resolution was imperative the board abstained from acting on various remonstrances, and returned them without recommendation. Resolutions were enclosed which provided for paving, in separate districts, from Woodward avenue to the west line of the Forsyth farm, with cedar blocks fifty-four feet wide in the center, and with stone six feet wide on either side; and three other districts with pavements of forty-four and thirty-four feet wide of cedar in the

center, and six feet on either side of stone. No reference was made in these resolutions to the street railway tracks, which it appears were to be paved by the railway company, with material furnished by the city.

These resolutions declared the action of the council to be taken under the clause in the city charter allowing $200,000 to be appropriated annually without the petition of a majority of property holders. They also directed the city engineer to report to the Board of Public Works the quantity of work, showing the amount of cross-walks and of paving, etc., in the intersections of streets and alleys, and required the board, when they received the engineer's report, to advertise for proposals. A further resolution declared that payment should be according to the charter amendment of 1871, permitting the issue of bonds to the extent of three-fourths of the expense.

June 23d these resolutions were taken up and amended so as to make the whole pavement wood instead of stone, and on the 27th they were passed as amended.

There is nothing in the record to show what was done by the city engineer, but no point is made on it. On the 27th of July the board advertised for proposals for the work to be done, excluding the quantities between the rails of the railway tracks, and calling for bids on separate estimates by square yards of paving and feet of curbs, and cross-walks, of all wood, and of part wood and part stone, and for material for paving the railway track.

On August 4th the bids were reported to the common council, and it was subsequently determined by the council that Edgar S. De Golyer was lowest bidder; and the board was ordered to contract with him. This contract was reported and confirmed August 25th. It required the work to be begun September 4th and completed November 15th.

By section 12 of the Public Works Act (3 Sess. L. 1873, p. 180), it is provided that "When any public improvement (except the opening of public streets), or public work is proposed, the common council shall,

before proceeding with the same, refer the matter to said Board of Public Works, and the board last named shall forthwith proceed to examine the same, and shall, as soon as practicable, report thereon to the common council, giving detailed estimates of the costs of such works or improvements (if any cost there will be), and shall make such recommendation as said Board of Public Works shall deem expedient."

There is nothing which has been pointed out to us, or which we have discovered, that makes this section inapplicable to paving. The two constitutional objections that the section is not within the title of the act, and that it unduly limits the power of the council, do not strike us as correct. An act to establish a Board of Public Works must necessarily define what the board is to do, and must in some way indicate its relations with the city government. The obvious purpose of the act was to place public improvements under the oversight of a responsible board, not independent of the council but auxiliary to it. There is nothing inconsistent with local legislation in having either boards or other executive servants to do under proper conditions what is in no sense legislative work. In the present instance the action of the board is not final, but merely designed to enable the council to act understandingly. There is surely nothing unlawful in this.

But it is claimed that if valid, this section is only directory, and not so binding that disobedience to it is any objection to the action disregarding it. The plain purpose of the section is to prevent the council from going forward with any work involving the expenditure of money without first considering both its expediency and its probable cost. It is not likely that the council can have adequate knowledge of all the streets and their condition, or of the wishes of the persons living on them. If this section is not in force, there is nothing to prevent the council from at once, and without any further publicity than is given by holding over a resolution a few days, committing the city and subjecting lot

owners to the expense of a paving job that may benefit no one but contractors, and that may be ruinous. If they can take no definite steps and expend no money until they have had laid before them the views of a board especially familiar with the subject, and a reliable estimate of the extent of the burdens to be created, each one voting upon the scheme will do it with his eyes open, and can have no excuse in ignorance or mistake; and the public will know what merits there are in the action, and who is responsible for it. The paving contracts are the most important of the current undertakings, and the guards against fraud and abuse will not amount to much if these are not protected.

The suggestion that the council may refuse to confirm the contracts does not meet the evil. It is not to be expected that after all the preliminaries have been completed and bids received, any step will usually be taken to recede on grounds of impolicy. And the section referred to recognizes this danger by requiring the whole merits to be looked into before the council is committed to any measure, or has spent any money on the plan.

In the present case the board felt itself precluded from expressing any opinion upon the policy of the repaving. If a street already paved is to be repaved at public and private charge, there should be properly some plain occasion for it. We do not now consider any question of power which might arise. But the Legislature never meant to allow this without knowledge and reflection. Here the council had no knowledge on the subject until the board had made its estimates on the engineer's figures, and had incurred all the expenses of advertising for bids, and reported the bids. It seems to us that the action of the council in directing the invitation of bids should not have been taken without a previous report and estimates.

The objection that no contract can be let until after

an assessment has been levied, as provided for in section 11 of the chapter on taxation and finance, is removed by a subsequent amendment of section 38 of the same chapter, which authorizes contracts for paving to be made beforehand. Act 270, 2 Sess. Laws of 1873, p. 1279. As this was passed in immediate connection with the Public Works Act, it is probable that the preliminary examination and report by that body were regarded as securing the same kind of protection against abuse.

There is more force to the objection to the contract as inoperative from default. The statute is express that every paving contract shall require the work to be commenced and completed within six months next preceding the first day of December in the year of the making of the contract. Chapter 8, § 8. It also authorizes extensions of time for completion of any such contract "where the work under the same has been begun in good faith, but not fully completed within the time." Id.

This section limits the amount of expenditure for each year, and these restrictions are evidently designed to prevent any excess of liability in any one year beyond the fixed amount. The Constitution requires the taxing power of cities to be limited, and under the charter, although paving is to be paid for by special assessments, yet it may be required up to $200,000 without consulting land owners, and the faith and credit of the city may be pledged for three-fourths of the cost. Chapter 8, § 46. It is contrary to the policy of the charter to allow contractors, who have done nothing towards fulfilling their contracts, to get indefinite extensions. It would open a wide door to corruption, and create great inconvenience to property-holders.

Here the contract made it necessary to begin on the 4th of September, and finish by the 15th of November, 1876. An extension was made on the 6th of October, 1876, until the following August. Nothing had been done, and more than a month remained of the original time.

The excuse given is that an injunction had been granted against making an assessment, and that although it had been dissolved as to the contractor's paving, it created such equities as to render an extension proper. This might be true, if any such power existed. But the validity of the proceedings was as easily determinable then as afterwards, and if it was thought best to do no more paving until a legal decision was reached, the natural method was to drop the contract and if afterwards found desirable to let the work over again. All of the subsequent action was had under the distinct protest of the municipal advisers and the Board of Public Works, and all equities are against it. But we have nothing to do with these equities one way or the other. We think the contract expired in November, 1876.

Some other questions were waived, and require no reference.

We think complainant is entitled to an injunction against the sale of his lots. The decree below should be reversed, and a decree granted accordingly with costs of both courts.

The other Justices concurred.

MARY COLLINS v. HARRISON W. JACKSON AND LEVI M. BATES.

Evidence taken by commissioner—Verdict—Bill to set aside conveyance—Irrelevant matters.

Objections to evidence taken by a commissioner are reserved until final hearing, and the evidence is all received; and where a verdict has been influenced by improper evidence, which has thus been admitted, a decree based thereon may be properly reversed.

A jury cannot pass upon the competency of testimony, but must consider all the testimony before them and come to a conclusion thereon.

The purchaser of goods being dissatisfied negotiated for a re-sale to the vendor, but notes which he had given fell due and he became embarrassed and made an assignment. In the course of the settlement of his affairs the vendor took back the goods and received a deed of them and gave a mortgage on them to a stranger. In later proceedings to set these aside as having been obtained by fraud, testimony to the original transfer was irrelevant except for the purpose of showing how complainant became indebted and how defendant became interested in the settlement of his debts.

Appeal from Marquette. Submitted April 28. Decided June 9.

BILL to set aside deed, and to restrain interference with complainant's possession of the premises. Defendants appeal.

E. J. Mapes for complainant.

Griffin & Dickinson for defendant Bates.

MARSTON, C. J. Mary Collins, June 14th, 1877, filed her bill of complaint to have a certain deed of real estate, executed by her April 25, 1877, to Harrison W. Jackson, and a mortgage given thereon by Jackson to Bates, declared null and void because such deed was obtained by the grantee fraudulently.

An issue was framed in the case and submitted to a jury who found that the deed was not delivered to the grantee; that no consideration was given complainant or her husband for the conveyance; and that the possession of the deed was obtained by fraud.

Were it not for this finding of the jury the case would not warrant any extended discussion, as the evidence would seem to warrant no such conclusions to be drawn or found by the court.

From the testimony given in the case it appears that in November, 1876, Charles C. Collins, the husband of Mary, purchased from Mrs. Jackson of Marquette, through her husband, Harrison W. Jackson, a stock of merchandise, dry goods, millinery, etc., for a consideration as per inventory of some $26,000, and for this sum Collins

gave his notes, some of them payable to the order of Mrs. Jackson, and some of them payable to the order of certain of her New York creditors.

Soon after obtaining full possession of the stock Collins concluded that the goods were not such as had been represented, and some negotiations took place between Harrison W. Jackson and himself, looking towards a resale to defendant Jackson on payment to him of a bonus. While such negotiations were being carried on some of the paper given by Collins became due, and, being unpaid, was sued. This, with other difficulties, actual or threatened, caused Collins to make an assignment for the benefit of his creditors.

Jackson, about the time this assignment was made, but having then no knowledge of that fact, was in New York, and certain arrangements were made with the New York creditors with a view to a settlement with Collins. Jackson returned home to Marquette, and A. D. Dickinson of Detroit, representing the firm of Levi M. Bates & Co., went to Marquette at the same time. The deed in question was drafted by Dickinson, and properly executed, with a view to a settlement. As to this there is no dispute, and the assignee turned over the entire stock of goods then on hand, together with the proceeds of sales subsequent to the assignment, less expenses, to Jackson, and received all the unpaid notes of Collins. Thus a settlement was effected and Collins released from all farther liability. The claim now made, and upon which all dispute of any consequence arises, is that after the execution of the deed in question it was handed to Mr. Dickinson for him to give Mr. Maynard, Collins' assignee, but that instead of so doing Dickinson drafted the mortgage from Jackson, the grantee named in the deed, had it executed, and on the next morning gave both deed and mortgage to Peter White to have recorded. That Dickinson received the deed, drafted the mortgage, had it executed, and handed them to White for record, is admitted; and it is claimed that this was with the

full knowledge and consent of the grantors, and in accordance with the previous agreement under which the settlement and delivery up of Collins' notes was made.

We have no doubt whatever, from the evidence in the case relevant to this question, but that the deed was delivered to Dickinson for the grantee named therein, and as a part of the settlement afterwards made. The clear weight of testimony shows such to have been the fact.

How came the jury to find otherwise? This is very easily answered. Under our practice, whether the evidence is taken before a circuit court commissioner or in open court, all objections made to the competency, materiality or relevancy of the testimony offered must be reserved until the final hearing. This avoids sending the case back because of the rejection of evidence which the circuit or appellate court might consider proper and material. That such practice enables counsel, sometimes in good faith, to offer and introduce evidence clearly incompetent there is no doubt; but as the evidence must be passed upon by the court, no harm is done, except in the matter of costs, which the court can generally so regulate as to prevent any very great abuse of the practice.

It is very different, however, with a jury. When they retire to deliberate they cannot pass upon the competency of the evidence in the case; they can but consider and come to a conclusion from all the evidence before them. The issue in this case confined the testimony to somewhat narrow bounds. The sale of the stock of merchandise to Collins in November previous, and especially whether Collins was then defrauded in making that purchase, could have no legitimate bearing upon the question in issue and could throw no light whatever upon that transaction. Beyond the mere fact that such a sale was made, for the purpose of showing how Collins' indebtedness was created, and Jackson's interest, as an indorser or as being originally liable to

the New York creditors, for the purpose of showing how he came to be interested in a settlement, that transaction, occurring some five months previous, should not have been gone into. We can very easily see from the character of the testimony the influence and effect it would inevitably have upon the jury. A verdict based in whole or in part upon such testimony would be entitled upon the final hearing to no weight or effect whatever.

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

The other Justices concurred.

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ROBERT HOLMES AND EDWIN F. WEBSTER v. LAURA E. S. BRONSON.

Wife's liability for work done by husband's order.

A married woman is not liable for the cost of improvements put into her own house, where the work is done in reliance on the responsibility of her husband and by his directions.

Error to Superior Court of Detroit. Submitted April 28. Decided June 9.

ASSUMPSIT by Holmes and Webster against Mrs. Bronson upon a contract for a furnace placed by them in her house. The evidence showed that defendant's husband had ordered the furnace, and had given his note for it; that the plaintiffs had granted him several renewals, and that he had paid the interest and part of the principal; that after the last renewal note had been given the plaintiffs found that the house had belonged to Mrs. Bronson, and had thereupon returned the husband's note, and after demanding payment sued the defendant.

The court below directed a verdict in her favor, and the plaintiffs bring error.

Griffin & Dickinson for plaintiff in error. A wife is liable for improvements made on her own property, *Lovell v. Williams* 125 Mass. 439; *Bickford v. Dane* 57 N. H. 320; *Spafford v. Warren* 47 Ia. 51; *Bodine v. Killeen* 53 N. Y. 93; a husband may act as his wife's agent and she will be bound by contracts which he makes for her benefit, *Knapp v. Smith* 27 N. Y. 277; *Woodworth v. Sweet* 51 N. Y. 8; *Rowell v. Klein* 44 Ind. 291; *McLaren v. Hall* 26 Ia. 297; *Buckley v. Wells* 33 N. Y. 518; *Ready v. Bragg* 1 Head 511.

Willard M. Lillibridge for defendant in error. A wife is not bound for expenses incurred by her husband on her own property against her remonstrance, *Emery v. Lord* 26 Mich. 432; *Powers v. Russell* id. 183; *Willard v. Magoon* 30 Mich. 280; *Ainsley v. Mead* 3 Lans. 116; *Jones v. Walker* 63 N. Y. 612; *Miller v. Hollingsworth* 33 Ia. 225; *Druhe v. De Lassus* 51 Mo. 165; *Johnson v. Tutewiler* 35 Ind. 353; *Lauer v. Bandow* 48 Wis. 638.

GRAVES, J. We are unable to make any distinction in principle between this case and *Morrison v. Berry* 42 Mich. 389.

So far as any difference is discoverable in the facts, it is not to the advantage of the plaintiffs in error. And see *Newcomb v. Andrews* 41 Mich. 518; *Vanneman v. Powers* 56 N. Y. 39; *Woodruff Iron Works v. Adams* 37 Conn. 233; *Wright v. Hood* 49 Wis. 235.

The judgment must be affirmed with costs.

The other Justices concurred.

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KENTON INSURANCE COMPANY OF KENTUCKY v. JOHANNA McCLELLAN.

Affidavit denying execution—Married woman's note—Agency.

The omission to file an affidavit denying the execution of a note precludes the right to dispute its execution. Circuit Court Rule 79. But it does not waive defendant's right to show want of capacity to execute the note except for a particular consideration.

In Michigan a married woman cannot be personally liable on an existing promise unless it concerns her separate estate; and her note given for any other consideration is void.

A married woman's promissory note cannot be presumed valid, and a binding consideration must always be proved whether the note is negotiable or not, and probably so even if value is expressed.

A married woman's power to contract is only statutory and cannot be extended beyond the constitutional and statutory limits.

The disabilities of coverture prevail against a *bona fide* holder as well as against others.

A married woman cannot give her agent any powers which she does not possess herself, and her agent cannot bind her except as to her separate property. Persons dealing with such agents must inquire into their powers.

Error to Superior Court of Detroit. Submitted April 28. Decided June 9.

ASSUMPSIT. Plaintiff brings error.

Fraser & Gates for plaintiff in error. Where the execution of a note has not been denied by affidavit attached to the plea in an action thereon the note cannot be avoided by showing lack of capacity to execute it. *Curran v. Rogers* 35 Mich. 221; *Chic. & N. E. R. R. v. Edson* 41 Mich. 673; *Boughton v. Manchester Water Co.* 3 B. & Ald. 1; *Hall v. Auburn Turnpike Co.* 27 Cal. 255.

Otto Kirchner for defendant in error.

CAMPBELL, J. Plaintiff sued defendant, who is a married woman, upon a promissory note made by her and

payable to the order of plaintiff for $290.42, dated September 4, 1877, and payable at nine months. She defends on the ground that the note was not given on such a consideration as binds her.

A preliminary objection that this defense was waived by failure to file affidavit under Rule 79 has no force. Defendant does not dispute the execution of the note. Her defense is want of capacity to make it, except on a particular consideration.

It has been held uniformly by this court that our statutes do not authorize a married woman to become personally liable on an executory promise except concerning her separate estate. A note given for any other consideration is void. *De Vries v. Conklin* 22 Mich. 255; *West v. Laraway* 28 Mich. 464; *Emery v. Lord* 26 Mich. 431; *Ross v. Walker* 31 Mich. 120; *Jenne v. Marble* 37 Mich. 319; *Kitchell v. Mudgetl* 37 Mich. 81; *Carley v. Fox* 38 Mich. 387; *Johnson v. Sutherland* 39 Mich. 579; *Russel v. People's Savings Bank* 39 Mich. 671; *Gantz v. Toles* 40 Mich. 725.

It has also been settled that there is never any presumption of validity of such an undertaking, whether negotiable or not, and that proof must always be given of such a consideration as will bind her. We think that the rule must apply whether value received is expressed or not, because the power is not general but statutory, and cannot be extended beyond the constitutional and statutory limits. See *Powers v. Russell* 26 Mich. 179; *Emery v. Lord* 26 Mich. 431; *West v. Laraway* 28 Mich. 464; *Johnson v. Sutherland* 39 Mich. 579.

It was held in the latter case that a *bona fide* holder was no better off than any one else, as against the disability of coverture. But inasmuch as plaintiff here is the original payee it is not a *bona fide* holder. *Rickle v. Dow* 39 Mich. 91.

The evidence showed without contradiction that this note was given by defendant to her son, August Kuenzel, to use as security for a debt of a firm of Wright & Kuen-

zel, in which he was a partner. That he gave it to one Jackson, plaintiff's agent, and took back from him an assignment to defendant from plaintiff of that debt, which had already been executed by plaintiff and was in Jackson's hands. Defendant never knew of this and never authorized it.

A married woman cannot give to an agent any power which she does not possess herself, and cannot therefore appoint any agents that could bind her except concerning her property. Persons dealing with them must inquire into their powers. In the present case there is no evidence tending to show that any such inquiry was made, or that plaintiff or its agent acted in reliance upon any supposed authority, or in ignorance of the facts. The record is not inconsistent with the possibility that Jackson and the plaintiff made the assignment as a mere sham. There is no evidence of any bargain for an assignment supposed to have been made on the credit of defendant. All that appears is a delivery of an assignment which had already been executed, in exchange for defendant's paper. It does not appear that the bargain was made at this time if it was made at all, and there is no pretense that any earlier bargain or negotiation was made really or ostensibly on defendant's behalf.

When the case was closed, therefore, no cause of action was made out, and the court properly directed a verdict for defendant.

The judgment must be affirmed with costs.

The other Justices concurred.

JOHN B. WHITE ET AL. v. EAST SAGINAW.

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Sheriff's bond—Default as tax-collector—Surety's liability.

Duties not yet existing and not germane to an office are not within the contemplation of sureties on the official bond, nor properly covered by their obligation. To bind the sureties the duties must plainly belong to the office.

The collection of taxes by the sheriff is assumed to be a duty foreign to his position by Comp. L. § 1027, which provides for independent security for its performance.

A sheriff's duties relate to the execution of orders, judgments and process of courts; the preservation of the peace; the arrest and detention of persons charged with the commission of public offenses; the service of papers in actions etc.; they are connected with the administration of justice and not with the collection of the revenue.

Sureties on an official bond are discharged when the duties and obligations of the office are essentially changed by statute and their risk increased.

The imposition of new duties upon an officer does not change his office, but invests him with a new office.

Error to Saginaw. Submitted April 29. Decided June 9.

ASSUMPSIT on official bond. Defendants bring error.

Benton Hanchett and *Albert Trask* for plaintiffs in error. Sureties are not liable upon an official bond for default in the performance of duties that do not properly belong to the office and were imposed after the bond was given, *Pybus v. Gibb* 88 E. C. L. 902; *U. S. v. Kirkpatrick* 9 Wheat. 720; *People v. Moon* 3 Scam. 123; *Reynolds v. Hall* 1 Scam. 35; *Compher v. People* 12 Ill. 290; *Governor v. Ridgway* id. 14; *State v. Robards* 7 Rep. 594; Brandt on Suretyship §§ 469, 483.

Timothy E. Tarsney for defendant in error. Illegality of a tax is no defense to an action against the collector and the sureties on his bond, on refusing to pay over, *Sandwich v. Fish* 2 Gray 298; *Great Barrington v. Austin*

8 Gray 444; *Wendell v. Fleming* 8 Gray 613; *Cheshire v. Howland* 13 Gray 321; *Williamstown v. Willis* 15 Gray 427; *Johnson v. Goodridge* 15 Me. 29; *Kellar v. Savage* 20 Me. 199; *Orono v. Wedgewood* 44 Me. 49; *Trescott v. Moan* 50 Me. 347; *Fake v. Whipple* 39 Barb. 339; *Mason v. Sch. District* 34 Mich. 228; the money need not be demanded before suit, *Nelson v. Kerr* 59 N. Y. 224; *Dygert v. Crane* 1 Wend. 534; *Prairie v. Jenkins* 75 N. C. 546; Crocker Sheriffs § 856; the sheriff's official bond covers all the duties of his office as they may from time to time be regulated by law, *People v. Vilas* 36 N. Y. 469; *People v. Curry* 59 Ill. 35; *State v. Powell* 44 Mo. 436; *Mahaska County v. Ingalls* 14 Ia. 170; *Prairie v. Worth* 78 N. C. 169; *Cherry v. Wilson* id. 166; *State v. Kelley* 43 Tex. 667; *Bartlett v. Governor* 2 Bibb 586; *Colter v. Morgan* 12 B. Mon. 278; *Marney v. State* 13 Mo. 7; *People v. Tompkins* 74 Ill. 482; *Smith v. Peoria* 59 Ill. 412; *White v. Fox* 9 Shepley 341.

GRAVES, J. The plaintiff in error White, being coroner of Saginaw county and there being no sheriff nor under-sheriff, was designated pursuant to law on the 29th of January, 1875, to perform the duties of sheriff, and within twenty days he qualified by taking the prescribed oath and giving the usual bond required by Comp. L. §§ 550, 551, the other plaintiffs in error being his sureties.

On the 3d of May thereafter, the act for taxing the business of manufacturing and selling spirituous and intoxicating liquors was approved and became a law, and in that year and the next there were large assessments in the city of East Saginaw, and in each the sheriff was called on to collect considerable amounts under warrants issued by the county treasurer agreeably to the act. He proceeded and made extensive collections, but failing to pay over this suit was instituted on his bond before mentioned to realize the money for which he was delinquent.

The case was referred, and the referee found against the plaintiffs in error, and the court overruled their exceptions and awarded judgment according to the finding.

The substantial question propounded is whether the duties apportioned to the sheriff by the act of May 3d were such as to fall within the scope of the official bond, which was executed several weeks before the act came into existence. And the answer, as will be admitted, must turn on whether these new superadded duties were from their inherent quality fairly appurtenant to the office of sheriff. Because the law will not intend that duties not yet existing and not germane to the office were within the contemplation of the sureties, or within the proper scope of their undertaking. *Gaussen v. United States* 97 U. S. 584; *Converse v. United States* 21 How. 463; *Commonwealth v. Holmes* 25 Gratt. 771. And it must be observed further that in proceeding to ascertain whether the new duties were or were not adventitious, they cannot be considered otherwise as against these sureties unless their affinity to the office is plain and obvious. The rule is one of manifest justice. *St. Louis v. Sickles* 52 Mo. 122; *Mayor etc. of Rahway v. Crowell* 11 Vroom 207; *Citizens' Loan Association of the City of Newark v. Nugent* id. 215; *Amherst Bank v. Root* 2 Met. 536; *Kitson v. Julian* 4 El. & Bl. 854: 30 E. L. & E. 326.

When an obligation of this kind is created, the parties, unless they express themselves very clearly to the contrary, must be understood as referring to the kind of duties which are fairly appropriate to the office as it then exists, distinct from others. In case something beyond is meant to be provided for, the provision should be made so plain as to leave no reasonable ground for sureties to allege the failure to understand it.

Now it is a noteworthy circumstance that at the time of this bond there had been one, and only one authentic precedent in the State for the collection of taxes by the sheriff, and that the Legislature in enacting that provis-

ion, proceeded on the assumption that the duty was foreign to the proper business of the office and would not be protected by the usual official bond. They accordingly made express provision for independent security. Comp. L. § 1027. The existence of this regulation if sufficient to suggest that new duties of the same nature might possibly be added, was at the same time sufficient to shut out the idea that any claim would be made of their being covered by the common bond.

The case before us does not appear to call for extended discussion. Indeed, there is hardly room for it. The duties prescribed by the act of May 3d were not equivocal. Their character could not be mistaken. They were those of a tax collector, and as distinguishable from such as are properly incident to the office of sheriff as are the common functions of a township treasurer from those of a constable. As stated by Mr. Justice Field "the duties of sheriff, as such, relate to the execution of the orders, judgments, and process of the courts; the preservation of the peace; the arrest and detention of persons charged with the commission of a public offense; the service of papers in actions, and the like; they are more or less directly connected with the administration of justice; they have no relation to the collection of revenue." *People v. Edwards* 9 Cal. 286. There are late English decisions to the effect that in case the duties and obligations of the office are essentially changed by statute and the risk of the sureties increased thereby, they are discharged. Such are the cases of *Pybus v. Gibb* 6 E. L. & Bl. 902: 88 E. C. L. 902; 38 E. L. & E. 57; and *Oswald v. Mayor of Berwick* 5 H. L. Cas. 856: 26 E. L. & E. 85.

The principle of these decisions is not pertinent here, and there is hence no occasion to inquire into their soundness. As previously explained, the point in controversy on this record is whether the delinquency set up as breach of the bond was within the scope of the obligation, and the reasoning of the judges in *Skillett v.*

Fletcher comes nearer being applicable. There the imposition of the new duties was deemed not to alter the old office, but to invest the old officer with a new office. L. R. 2 C. P. 469. The default of White as collector of the taxes was not a breach of his regular official bond in his office of sheriff, and the judgment to the contrary is not supported by the finding.

The judgment must be reversed and one entered here for plaintiffs in error with the costs of both courts.

The other Justices concurred.

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THE DETROIT & BAY CITY RAILROAD COMPANY v. WILLIAM C. BUSCH.

Trover for property annexed to land.

Where ties were taken and used by the sub-contractor for building a railroad, and the road was in use before it was delivered to the company, the owner of the ties, after waiting until they had become realty, cannot bring trover against the company as for their conversion.

Error to Saginaw. Submitted April 29. Decided June 9.

TROVER. Defendant brings error.

Benton Hanchett and *G. M. Stark* for plaintiff in error. Trover will not lie against a railroad company for ties placed in the bed of the roadway before the road was delivered to the company, *Woodruff v. Adams* 37 Conn. 233; *Hunt v. Bay State Iron Co.* 97 Mass. 279; *Strickland v. Parker* 54 Me. 263; Cooley on Torts 55.

John A. Edget for defendant in error. The annexation of chattels to the realty by a wrong doer will not deprive the owner of his remedy in trover, *Cochran v.*

Flint 57 N. H. 514; *Shoemaker v. Simpson* 16 Kan. 43; *Ford v. Cobb* 20 N. Y. 346; *Railroad Company v. Kaulbrumer* 59 Ill. 152; if they are so firmly annexed that they cannot be removed without remedy, the owner cannot retake them, but may recover their value in their original condition, *Wetherbee v. Green* 22 Mich. 311; *Winchester v. Craig* 33 Mich. 205; *Isle Royale Mining Co. v. Hertin* 37 Mich. 332; the intent to annex them permanently to the freehold must be that of the owner, to change their character, *D'Eyncourt v. Gregory* L. R. 3 Eq. Cas. 397; *Reese v. Jared* 15 Ind. 142; *Crippen v. Morrison* 13 Mich. 34; *Wheeler v. Bedell* 40 Mich. 673.

CAMPBELL, J. Busch sued plaintiff in error in trover for the conversion of a number of railroad ties. The case he made out on his own behalf was that parties employed as sub-contractors under Walton & Lacy, contractors to build the Caro branch of the Detroit & Bay City Railroad, used 251 ties owned by Busch, and put them here and there among the other ties used in forming the superstructure of the railway, spiking rails to them in the usual manner. He gave testimony tending to show that the ties could after that have been identified, and that they could be removed and others substituted without damage to the road. The ties, as he claimed, were used before June 12, 1878, and about that time he "notified the president of defendants of the fact." The road was not delivered up to the company complete and ballasted until October or November, 1878, although used somewhat earlier. This suit was commenced in January, 1879. Before its commencement Busch made a demand of the ties on the president of the company.

Under the charge of the court below he was allowed to recover the value of the ties, the court holding that their use by the company after demand was a conversion.

If Busch had brought replevin when he discovered the disposition made of his ties without his consent, and before the delivery of the road to the company, the ques-

tion whether he could have removed them might perhaps stand on a somewhat different ground from the present suit. Here, as he shows, he knew of the use of the ties before the railway had passed from the contractors to the company, and knew that they were where the company when it received them would receive them as realty. He knew also that the company was not the party that converted or was to convert them into realty. Whatever might have been his original possessory remedy, he has by this action sued for the conversion. The only conversion took place before the company had any control over the property. Receiving it as realty, it cannot be held that a subsequent neglect or refusal to detach it is a conversion. Having deliberately chosen to wait until the property not only changed custody but was also annexed still more firmly by ballasting, he cannot now treat as personalty in the hands of the railroad company converted by a mere failure to give it up on demand, what became to his knowledge a part of realty in the hands of the contractors, against whom he had a remedy for the only conversion that ever took place. *Morrison v. Berry* 42 Mich. 389; *Peirce v. Goddard* 22 Pick 559; *Fryatt v. Sullivan Company* 5 Hill 116: 7 Hill 529; Cooley on Torts 55.

The court should have directed that Busch could not recover. The judgment must be reversed with costs, and a new trial granted.

The other Justices concurred.

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HENRY SHELDON ET AL. v. JAMES STEWART.

Attachments—Right to dissolve not affected by subsequent attachments—Findings of commissioner.

The right of a defendant in attachment to the possession of the attached property is not determined by the levy of subsequent attachments, so as to preclude him from moving to dissolve the earlier levy. It cannot be assumed that he had lost his right to a return.

The special findings of fact made by a circuit court commissioner in a proceeding to dissolve an attachment are conclusive if there was any evidence to support them.

Where an officer has a particular authority to exercise on his judgment upon an investigation of facts of which he is made the judge, his finding of the facts in the absence of any controlling provision is final as to their existence.

CERTIORARI to John E. Nolan, circuit court commissioner. Submitted April 29. Decided June 9.

Wheeler & McKnight and *Griffin & Dickinson* for plaintiffs in certiorari. A circuit court commissioner cannot dissolve an attachment unless his order will restore the property to the defendant, *Johnson v. DeWitt* 36 Mich. 95; *Chandler v. Nash* 5 Mich. 409; *Price v. Reed* 20 Mich. 72; *Zook v. Blough* 42 Mich. 487; the commissioner's finding cannot stand if it is against the evidence, (*Brown v. Blanchard* 39 Mich. 790) and the appellate court will examine to see whether the finding is justified by the facts, *Jackson v. People* 9 Mich. 111.

Wisner & Draper for defendant in certiorari.

GRAVES, J. The purpose of this proceeding is to obtain a reversal of the adjudication of the circuit court commissioner dissolving an attachment sued out by the plaintiffs against the property of the defendant, upon the charge that he had disposed of certain of his property with intent to defraud his creditors.

It appeared on the hearing that the attached property was under levy of a large number of other attachments, and the objection is made that it hence resulted that the defendant was not entitled to possession, and so was not in a condition to prosecute the proceeding to dissolve. But we think the existence of other attachment levies was not such an impediment as ought to bar the defendant from the remedy and compel him to submit to an *ex parte* allegation of fraudulent misconduct.

The contrary doctrine would directly lead to injustice. It would admit a ready method for defeating the benign purpose intended by the legislature when they devised this remedy for the speedy trial of the truth of affidavits made to obtain attachments. Nothing would be easier in the vast majority of cases than a duplication of levies to preclude any attempt against the seizure, and as the defendant could not force parties to a joint hearing, he could by such means be summarily deprived of relief. By taking advantage of a particular construction of the remedy, the remedy itself, in a very large proportion of cases, could be defeated altogether. The idea is repugnant to the spirit and design of the statute.

The defendant is entitled to his opportunity to impeach the cases against him one by one as they were instituted, unless a different course is stipulated, and it is not to be assumed that the extrinsic cases are immutable. The statute, in allowing them to be questioned before a circuit court commissioner, admits they may not be. Before the defendant can be debarred his remedy where double levies exist, the court must be able to say he has lost his right to a return, and it has no right to make an arbitrary assumption of that sort. *State Bank of Fenton v. Whittle* 41 Mich. 365; *Schall v. Bly* ante p. 401.

The present occasion calls for no remarks concerning the effect which outstanding levies by execution, or a custody maintained under color of federal process, would

have on the defendant's ability to prosecute a petition under the statute.

The plaintiffs asked the commissioner to find specially and he very properly complied, and we are satisfied there was evidence for his judgment in favor of each proposition of fact. Such being the case the findings are conclusive. *State Bank of Fenton v. Whittle* supra; *Watson v. Hinchman* 42 Mich. 27; *Brown v. Blanchard* 39 Mich. 790.

The general rule applies that where an officer has a particular authority to exercise on his judgment upon an investigation of facts of which he is made the judge, his finding of the facts, in the absence of any controlling provision, is final as to their existence. *Allen v. Blunt* 3 Story 742; *United States v. Wright* 11 Wall. 648; *Horn, relator v. Wayne Circuit Judge* 39 Mich. 15.

Loder v. Littlefield 39 Mich. 512 is referred to as implying a right to review upon the facts. But the decision was not so intended. The case proceeded on the idea that the facts were ascertained and were all one way, and that the conclusion of law expressed by the order of the commissioner was the other, and was not supported. It is not our province to inquire into the accuracy of the commissioner's deductions from the testimony or the justness of his conclusions in weighing evidence. The law at one stroke leaves all that to him and excludes the judgment of the appellate court, and in its general operation the regulation is wise.

Sufficient has been said to dispose of the case. No ground is shown for disturbing the commissioner's order and it must stand affirmed with costs to defendant.

The other Justices concurred.

Richard W. Bagot, relator v. Board of Supervisors of Antrim County.

Removal of County Seat.

Under the Constitution and laws of Michigan, the proposition for the removal of a county seat may originate with the board of supervisors. No previous action of the legislature is necessary to give the board authority to act. It is immaterial that in the particular case the county seat was permanently located by the legislature when the county was organized. The permanent location is only until a removal takes place in accordance with law.

Certiorari to the Board of Supervisors. Submitted April 30. Decided June 9.

Fitch R. Williams, Gibson & Parkinson and *Ashley Pond* for plaintiff in certiorari. County seats have been established directly by the Legislature in the following acts: Grand Traverse 141 of 1851; Oceana, 114 (1851); Cheboygan, 20 (1853); Alpena, 65 (1857); Iosco, 130 (1857), 221 (1859); Mecosta, 99 (1859); Muskegon 55 (1859); Mason, 79 (1861); Keweenaw, 118 (1861); Houghton, 128 (1861); Antrim, 78 (1863); Menominee, 163, (1863); Washington, 252 (1867); Osceola, 301 (1869); Wexford, 386 (1869); Clare, 345 (1871); Baraga, 14 (1875); Ogemaw, 132 (1875); by commissioners named in the act or to be appointed by the Governor in these: Mecosta, 42 (1857); Isabella, 157 (1855); Huron, 6 (1859); Delta, 129 (1861); Kalkaska, 294 (1871); Gladwin, 69 (1875); the Legislature established temporary county seats to remain until removed by the supervisors according to law in the following instances: Alcona, 266 (1869); Presque Isle, 398 (1871); they provided for temporary county seats and withheld jurisdiction over the question of removal for a certain period from the local authorities in the following acts: Gratiot, 16 (1855); Bay, 171 (1857); Missaukee, 336 (1871); Isle Royale, 18 (1875); Otsego, 32 (1875);

Roscommon, 41 (1875), 137 (1877), 17 (1879); the Board of Supervisors was directed to establish the county seat in the following acts: Emmet, 18 (1853); Midland, 36 (1855); Manitou, 92 (1855); Oceana, Mason, and Manistee, 171 (1855); Charlevoix, 390 (1869); Schoolcraft, 373 (1871); and the electors in the following cases: Leelanaw, 48 (1863); Benzie, 385 (1869); Lake, 357 (1871).

Roswell Leavitt and *C. I. Walker* for defendants in certiorari. The power of the board of supervisors to remove county seats is recognized in *Harrington v. Wands* 23 Mich. 385; *Att'y General v. St. Clair Supervisors* 11 Mich. 63; *Att'y General v. Lake Supervisors* 33 Mich. 292; they have power to organize new towns from the towns within the county, Const. art. x. § 11; Comp. L. § 480; *Scrafford v. Gladwin Supervisors* 41 Mich. 647; *Att'y General v. Page* 38 Mich. 286.

Cooley, J. The purpose of this application is to determine the validity of the proceedings instituted and carried through by the supervisors of Antrim county for the removal of the county seat from Elk Rapids where it was located by the Legislature when the county was organized, to a place recently platted as a village and named Belleair. The return brings before us an immense record, presenting the action of the board of supervisors in organizing townships for several years back, in making provision for county buildings, in issuing evidences of debt, and finally in removing the county seat. It is charged that in much of the action of the board there has been a fraudulent purpose; that townships have been prematurely organized in order to have the votes of their supervisors in aid of the removal of the county seat; that there was corruption among the supervisors in the first movements to select the new site; that extraordinary and unlawful powers have been conferred upon committees, and that the proceedings generally have been conducted in disregard of the public interest

and from motives improper in their nature. It was conceded on the argument that the most of these things could have no bearing on the legal controversy here. The premature and improper organization of townships might render the supervisors participating in it censurable, but it is not pretended that the validity of their action could depend upon the motives which brought it about. Neither are the proceedings in the final location of the county seat affected by the fact that there was corruption in the first movements; there being no claim that there is evidence showing corruption in any act of the board of supervisors constituting an essential part of the proceedings. Nor have we in our examination of the record found any question presented by it which appears to us to require discussion, except the question of the power of the board to act at all. The relator denies their power; and it is upon this that he mainly relies.

The power of the board depends upon the proper construction of constitutional and statutory provisions. The Constitution provides that "No county seat once established shall be removed until the place to which it is proposed to be removed shall be designated by two-thirds of the board of supervisors of the county, and a majority of the electors voting thereon shall have voted in favor of the proposed location, in such manner as shall be prescribed by law." Article 10, § 8. It is justly said that this provision is a limitation upon the power of the Legislature. But for this the Legislature might remove a county seat at discretion. The location is a matter of general public concern, and neither the county authorities nor the voters would be entitled of right to a voice in it, if the right were not conferred by the Constitution. And we agree with counsel for the relator that this provision must leave in the Legislature all power over the general subject which can be exercised consistently with it.

The first Legislature which convened after the adop-

tion of the Constitution undertook to define and regulate the powers and duties of the supervisors on various subjects, and among others, on this of the removal of county seats. Section seventeen of the general act for the purpose provides that "Whenever a county seat is proposed to be removed, the board of supervisors for such county shall have power, by a vote of two-thirds of all the members elect, to designate a place to which such proposed removal is to be made, and after a majority of the electors of such county voting thereon shall have voted in favor of the proposed location, as hereinafter provided, to make and establish such county seat." The next section provides for submitting the proposition of removal to the voters of the county, and the nineteenth section regulates the election and the canvass of the votes, and declares that "in case the result shall be in favor of the proposed removal, [the board] shall provide for such removal, together with all the records and papers of such county, within one year after such result shall be ascertained and determined as aforesaid by them, and shall remove the same as soon as suitable buildings shall have been provided for the reception thereof, and they shall enter upon their records the time when such removal shall be deemed to have taken place, and from and after that time the place so designated shall be and continue the county seat of said county for all purposes whatsoever." Comp. L. §§ 483, 484, 485.

Now it is said on behalf of the relator that while the Constitution prohibits the removal of a county seat without the approval of the county, it neither confers upon the county the right to remove, nor impairs the power of the Legislature to prevent a removal, nor imposes obligation on the Legislature to sanction or approve or provide for removal to any designated place, nor take from the Legislature the power to say how the removal shall be made, or when, nor in any way impair the power of the Legislature to establish the county seat in the first instance, for a definite or an indefinite time. On

the contrary the supervisory jurisdiction of the Legislature over the question of removal is not less than it was prior to the adoption of the Constitution, and its discretion as to the wisdom or policy of removal in any given case was not impaired thereby. It can still withhold its approval in any case, or delay the accomplishment of such removal, for a definite or indefinite period, as in the exercise of its wisdom and discretion it deems best for the general interest of the State at large, or the special interest of the locality to be affected thereby.

It is also denied that the Legislature by the general law has divested itself of its original jurisdiction over this subject. Reference is made in the brief to the general course of legislation, and it is shown that since the Constitution was adopted the Legislature has in eighteen cases established county seats by direct act; that in six cases it has provided for their establishment by commissioners; that in two cases it has assumed to establish county seats for the time being, and until removed by the board of supervisors pursuant to law; that in ten cases the supervisors or the electors of the county have been directed to establish county seats; while in the case of six counties the Legislature has not only located the county seat, or provided for its location by some other authority than that of the supervisors, but has expressly withheld jurisdiction over the question of removal from the local authorities for a definite period. If the Legislature can withhold this jurisdiction for a definite period, it is said it can do so permanently, and it is argued that this has been done in every case where, as in the case of Antrim county, the Legislature has established the permanent county seat, without the intervention of the supervisors or electors, and has not afterwards submitted any proposition of removal, or expressly authorized any other body to originate one.

If this view is correct, there are many counties in the State whose supervisors may in their discretion originate proceedings for the removal of county seats, and

there are many others in which the steps for a removal must begin with a proposal submitted to the supervisors by the Legislature. The difference in local authority will be due in most cases to a difference in the legislation under which the respective counties have been organized. If we were at liberty to assume that the differences to which attention has been called were always deliberate, and were intended to indicate differences in policy, we might give more weight to the argument than we do now. But we know that temporary circumstances have much to do in shaping the provisions of acts organizing counties, and we should be misled in construction if we left this fact out of view. Because in Antrim county, which had one and only one active business place, the Legislature named that place as the county seat, while in Leelanaw which was not thus favored, the choice was left to the electors, we could hardly with much safety draw the conclusion that a different policy in respect to the two was intended for permanence. It would be wiser to assume that the Legislature acted directly in the one case because it could do so without risk of error, while in the other it needed the judgment of the people as a guide, and therefore proceeded to take it.

We have not found it necessary to express an opinion whether the constitutional provision so far delegates the complete authority over the subject of removal to the supervisors as to preclude the Legislature from retaining in its own hands the power to originate the proposition. Unquestionably if the Legislature may propose the removal, it may also delegate the authority to propose it; and it cannot be doubted that, ever since 1851, the people have supposed the supervisors had that authority; though perhaps they never stopped to consider whether it came from the Constitution or from the statute prescribing the powers and duties of supervisors. Cases have arisen in which the removal of county seats has been vigorously contested without raising this question, though it was in

the case and the objection if sound would have been fatal. But the question after twenty-nine years under the Constitution, is raised in this case for the first time. And what we are called upon to decide is whether up to this time, the people have been mistaken in supposing that the authority of each county over the removal of its county seat was the same with that of all others.

But we think the common view on this subject has been the legislative view also. It is true the statute does not in terms say the supervisors shall or may propose the removal, but the designation of the place to which removal is proposed is to be made by the supervisors, and this designation of itself includes a proposal of removal. If it was intended that the designation should be preceded by a formal proposal submitted by the Legislature, it is reasonable to suppose the law would have so declared. Instead of doing so it proceeds to say that when the designated site has been approved by the people, the supervisors shall perform the necessary acts to perfect the removal, and the removal shall thereby be effected. Not a word appears in the statute anywhere which indicates that legislative intervention was supposed to be necessary at any stage.

Nor is it likely that the Legislature ever supposed that the retention in its own hands of a restraining authority upon the action of the county would be either useful or convenient. The Constitution itself imposed important restraints, and it must be rare indeed that any great wrong could be done by a removal which had the assent of two-thirds of the supervisors and of a majority of all the electors. The wrong, if there was one, would generally consist in the refusal of a minority of the board, being over one-third of all, to submit the question to the people. A further check would seem likely to be more mischievous than useful, and we ought to find somewhere clear evidence of its existence. We do not find such evidence either in legislative expression, or in the common understanding of the people, or in

practical construction, and must assume that none was intended.

The writ of certiorari will be quashed, with costs.

The other Justices concurred.

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Alfred F. Wilcox v. Toledo & Ann Arbor Railroad Co.

Justices' Courts—Pleadings—Description of plaintiff—Suit on assignment—Corporation de facto.

Pleadings in justices' courts are to be viewed with liberality; and where a declaration, though informal, fairly apprises the defendant of the claim made against him, it will be held sufficient if not demurred to.

Suit on a conditional promise to pay money to the order of a railroad company. The promise was in writing, and was filed with the justice as the sole cause of action. Upon it was endorsed the name of a person who added to his name the word "assignee." The defendant pleaded the general issue, and went to trial. It was shown on the trial that the payee in the promise had been put in bankruptcy, and the endorser of the paper was assignee in bankruptcy thereof. *Held*, that the objection that the plaintiff did not by its declaration aver its right to recover as assignee, would not be sustained on the final submission of the case.

Where the assets of a railroad company are sold in bankruptcy, and the purchaser of its assets transfers them to another who organizes a new company, and in the papers expressly recognizes the new company as assignee from him of the assets, this is a sufficient assignment to enable the new company to bring suits upon obligations given to the old company.

A railroad company having completed a railroad, and being engaged in operating it, must be deemed, in suits brought by it, a corporation *de facto*, and a private individual thus sued cannot contest its legal organization. *Swartwout v. Railroad Co.* 24 Mich. 389.

Error to Washtenaw. Submitted Jan. 7. Decided June 11.

Assumpsit on certiorari from before a justice. Plaintiff brings error.

Henry Z. Potter for plaintiff in error.

Frazer & Hamilton for defendant in error. An assignment of a claim to the plaintiff is sufficiently averred in an action before a justice by the indorsement of the assignment on the instrument sued upon, signed by the assignee. *Snell v. Gregory* 37 Mich. 500; *Kelly v. Waters* 31 Mich. 404; *Draper v. Fletcher* 26 Mich. 154.

COOLEY, J. This case had its origin in justice's court, where the railroad company brought suit upon the following paper writing as its sole cause of action:

"$300. MILAN, MICHIGAN, August 21, 1871.

For the purpose of promoting and aiding the construction of the Toledo, Ann Arbor & Northern Railroad, and in consideration of the benefits to be derived therefrom, I do hereby pledge and agree to pay to the order of the Toledo, Ann Arbor & Northern Railroad Company the sum of three hundred dollars in installments of twenty per cent. on each eight miles of iron laid on the line of said road, except the last installment, which shall be payable on the ironing of the said road from the State line to Ann Arbor, and upon the further condition that said road shall be built within one-half mile of the Whiting hotel in the village of Milan.

[Signed] A. F. WILCOX."

Endorsed on the back, "E. D. KINNE, Assignee."

The judgment was removed to the circuit court by certiorari, the plaintiff in error assigning six errors. The first three of these go to the order in which evidence was admitted in justice's court. As the order was discretionary with the justice, these assignments of error need not be further noticed. The others were as follows:

"4. That said justice erred in admitting any evidence of an assignment or assignments under plaintiff's declaration upon said special contract, which was not transferable except by assignment, since no assignment was suggested or averred in said declaration.

5. That said justice erred in admitting said contract declared upon in evidence, there appearing upon the face to be no privity of contract between plaintiff and defendant, since defendant was apprised neither by suggestion or averment that plaintiff obtained as assignee, and because there was no averment and no evidence of ownership by plaintiff of said contract.

6. That said justice erred in denying defendant's motion to non-suit the plaintiff for the variance between the cause of action set forth in his declaration and his proofs upon the trial."

The declaration was oral, and was entered by the justice on his docket as follows: "On the common counts in assumpsit, and on note or contract, now here filed as a part of the declaration, and claims damages three hundred dollars." The plaintiff also notified defendant that the paper writing was the sole cause of action. The defense is entered as follows: "The defendant demands trial of the matter set forth in the plaintiff's declaration, and gives notice that he will show, under his plea of the general issue, a failure of consideration in this, to-wit: That the said contract declared on, if performed at all, on the part of the promisee, was not performed within a reasonable time, by reason of which the defendant received no benefit on its performance, in this, to-wit: At the date of said contract defendant was owner of and possessed of lands of great value, to-wit, of the value of five thousand dollars, which said lands it was contemplated by said contract would, by its performance within a reasonable time, be benefited and rendered of greater value to defendant, to-wit, by the performance of the promises on the part of said promisee. And by reason of the delay in the performance on the part of the said promisee said lands were not increased in value, and said defendant was not benefited." There was no denial under oath, by the defendant, of the execution of the paper writing, and therefore under the law it was admitted.

On the trial, the plaintiff proved by one Crane that the Toledo, Ann Arbor & Northern Railroad Company was thrown into bankruptcy on his petition August 13, 1875; that E. D. Kinne was appointed assignee thereof, and as such sold the assets of the company, including the paper sued upon, and that witness became the purchaser of said assets, including the writing sued upon, and that Kinne endorsed his name as assignee upon such writing. Plaintiff also proved a deed from said Kinne,

as assignee in bankruptcy of said railroad company to said Crane of the real estate, property and franchises of said company, including among other things about $40,000 in promises to pay money, conditioned upon the laying of the iron of the road-bed, which deed bore date October 6, 1875. Also a deed from said Crane to James M. Ashley of the same real estate, property and franchises bearing date June 26, 1877. The foregoing evidence was objected to for irrelevancy, and also because Kinne's title as assignee was not proved. This last objection was obviated afterwards by record evidence.

Plaintiff also put in evidence an authenticated copy of the declaration of incorporation of the Toledo & Ann Arbor Railroad Company, filed in the office of the Secretary of State November 23, 1877, and proved by James M. Ashley, Jr., that this company had fully completed and ironed the road from Toledo to Ann Arbor, and was operating it. Also by another witness that the completed road runs within a hundred rods of the Whiting hotel in Milan. Also that demand of payment had been made of defendant, which he had refused to make. The writing was then put in evidence, and plaintiff rested. Defendant then moved for a non-suit on the following grounds:

"1. That the declaration does not allege any assignment of the instrument declared on, and the evidence shows its right to recover as assignee only, if it shows right to recover at all.

2. That plaintiff's declaration does not aver an assignment from the Toledo, Ann Arbor & Northern Railroad Company, to the plaintiff, or to its assignor, and the evidence establishes its right to recover only under such assignment or assignments."

The third was substantially the same as the second. The justice denied the motion, and defendant offering no evidence the plaintiff had judgment.

Other objections were made in this court, but these were all to which the attention of the circuit court was called, and we can consider no others.

The fourth and sixth assignments of error cover the

same ground as the defendant's motion for a nonsuit before the justice, and they go no further. Their complaint is that the plaintiff was allowed to recover as assignee, without having alleged an assignment in his declaration. The complaint is therefore to the form of the plaintiff's pleading.

It is no new thing to have an objection of this sort to the pleadings in justices' courts raised before us. As the proceedings in those courts are commonly managed by parties unlearned in the law, defects in their allegations, when tested by the rules of art, are to be expected in almost every case which is at all complicated. If every such objection were disregarded, pleadings in justices' courts would, in effect, be dispensed with. Every plaintiff might allege as much or as little as he pleased, and recover without regard to his allegations. If every one were sustained which would be good if made to pleadings in courts of record, the parties in justices' courts would be driven to the employment of legal assistance in every case, and these courts, which are intended for the easy and inexpensive redress of wrongs not of great magnitude, would cease to accomplish their purpose. This court has adopted neither the one course nor the other. It has required the plaintiff in justices' court to apprise the defendant fairly of the cause of action relied upon, but when this has been done, the court has refused to regard formalities or technicalities. The object of the declaration is fully accomplished when the defendant is fairly apprised by it of the grounds of the plaintiff's claim, so that he need be under no misapprehension as to what matters are to be litigated on the trial. *Hurtford v. Holmes* 3 Mich. 460; *Daniels v. Clegg* 28 Mich. 32.

Does the declaration in this case accomplish this purpose? It certainly informs the defendant what he is sued upon. The contract is recited, and defendant is notified that claim is made against him upon it, and upon nothing else. The contract itself specifies the conditions of liability, so that defendant knows there can

be no recovery unless performance of these is proved. It is said the declaration does not count upon an assignment. But it counts upon a promise made to another, and upon which there could be no recovery except upon the proof of an assignment. The very claim to recover upon the paper was a claim as assignee, for it was only as assignee that plaintiff could have a right to it. Moreover, the paper was made payable to the railroad company or order, and there was an indorsement upon it by E. D. Kinne, as assignee, which fairly notified the defendant that Mr. Kinne claimed to have become entitled in some manner to order the payment to be made to a transferee. It is true this indorsement might have been more formally made; it might and ought to have assumed the form of an assignment, with such recitals as would have shown Mr. Kinne's authority; but the question now is whether the defendant was thrown off his guard or misled by any defects, and not whether the pleadings might have been made more perfect. We must judge of this upon all the facts, and not upon the face of the papers alone.

What the defendant ought to do in every case in which the declaration is supposed to be fatally defective, is to demur, and thereby bring the defect at once to the attention of the court, before parties have been put to trouble and expense in preparing for trial. No doubt he has a legal right to abstain from doing this, when the defects, in substance, are such as cannot by any intendment be supplied or overlooked, but this course is not conducive to justice, and courts will not countenance it any farther than they may feel compelled to do so. When the defendant fails to demur, he tacitly concedes the sufficiency of the declaration, and the court will hold him to this concession, whenever this can be done without probable injustice.

There was no demurrer in this case. When the evidence was put in, it appeared that Mr. Kinne was assignee in bankruptcy of the railroad company, and as such had

a right to assign the paper writing. Now a fact so notorious as must be the bankruptcy of a railroad company, we are not at liberty to suppose was unknown to one of its debtors. It is the most reasonable inference in the world that defendant was familiar with the facts, and that it was because he knew them that he refrained from demanding more perfect pleadings. It is the duty of the court to draw this inference, and to act upon it under the circumstances.

The fifth assignment of error is somewhat broader than the others. It complains of the admission of the paper writing in evidence, "there appearing upon the face to be no privity of contract between the plaintiff and defendant, since defendant was apprised, neither by suggestion or an averment, that plaintiff obtained as assignee, and because there was no averment and no evidence of ownership by plaintiff of said contract." Here is the same objection to the declaration, but there is also the further objection that plaintiff had not shown its ownership by evidence.

It has already been stated that there was a formal assignment by deed from Kinne as assignee to Crane, and from Crane to Ashley. The evidence of the assignment from Ashley to the plaintiff is to be found in the certificate of organization of the plaintiff as a corporation, which is signed by Ashley, and expressly declares that all the assets of the bankrupt corporation, so as aforesaid assigned to him, including the $40,000 conditional promises, "are declared to be and hereby become" the property of the new company. It can scarcely be pretended that Ashley, after this, could claim them.

But it is objected in this court that the plaintiff was never lawfully and legally organized. It was certainly organized, went on and completed the road, was operating it at the time the suit was tried, and still is operating it, so far as we know. If there was any usurpation of franchises here, the State should be left to complain of it. *Swartwout v. Michigan etc. R. R. Co.* 24 Mich. 389. There

was no pretense in the court below that plaintiff, as successor of the original company, had not complied with the conditions of the promise.

In our opinion the plaintiff in error has failed to point out any error in the rulings of the justice of the peace, and therefore the affirmance of the justice's judgment by the circuit court must be affirmed with costs.

MARSTON, C. J., and GRAVES, J., concurred.

CAMPBELL, J. (dissenting). This case depends, so far as its merits go, on a very simple state of facts. While I am not clear that there are not fatal defects of proof, yet I do not think it necessary to consider them.

In 1871 a corporation was in existence under the name of the Toledo, Ann Arbor & Northern Railroad Company. Plaintiff in error and several other persons signed papers which were severally obligatory, and in the following form: "For the purpose of promoting and aiding the construction of the Toledo, Ann Arbor & Northern Railroad, and in consideration of the benefits to be derived therefrom, I do hereby pledge and agree to pay to the order of the Toledo, Ann Arbor & Northern Railroad Company, the sum of $300, in instalments of 20 per cent on each eight miles of iron laid on the line of said road, except the last instalment, which shall be payable on the ironing of the said road from State line to Ann Arbor, and upon the further condition that said road shall be built within one-half mile of the Whiting Hotel in the village of Milan." This was dated August 21, 1871. The corporation did considerable grading and other work, but finished no part of the railroad in Michigan, and laid no iron. In the early part of 1874 it was prosecuted in bankruptcy in the eastern district of Michigan, and in June, 1874, E. D. Kinne became assignee in bankruptcy. There is no adequate proof of these proceedings, but enough appears to show the steps taken by the assignee.

In August, 1875, Kinne advertised for sale a list of assets which was made up as follows: (1) Of stock subscriptions, and agreements to take stock, and of promissory notes and judgments for stock subscriptions. (2) Of the road-bed and right of way. (3) Certain wood and

ties. (4) Certain promissory notes conditioned on placing the iron. (7) Certain land.

In September, 1875, Kinne sold the property set forth in this inventory or list to Benjamin P. Crane. The sale, as Mr. Kinne shows, and so it appears from the papers, covered only this list. The list undoubtedly contained enough to reach the paper now in suit.

Mr. Crane in 1877 transferred his purchase to James M. Ashley. On the twenty-third of November, 1877, Mr. Ashley made and filed with the Secretary of State a certificate as purchaser, undertaking to organize a new corporation, which is the plaintiff in this case, purporting to be made under Act No. 198 of 1873, article 1, section 2, and asserting the intention of exercising the functions of the older corporation.

The plaintiff corporation built a railroad from the State line to Ann Arbor, which, if built by the old company seasonably would have fulfilled the condition of the paper sued on.

The question therefore is whether the plaintiff, without any dealings with defendant, could assume the place of the old corporation, and by building this road compel Wilcox to pay his subscription, when nothing had occurred before the bankruptcy to earn any portion of it.

I do not see how the fact that this is a railroad agreement puts it on any different footing from any other conditional agreement. Any money actually earned by the old corporation could be assigned. But I do not think there is any rule of law which will authorize a party who has had an offer made to him of payment of a certain premium if he performs a certain condition, to substitute some one else in his stead, not as agent, but as a new principal. No authority was produced for any such doctrine, and I do not believe such a principle is tenable. No doubt it is competent in some cases to merge an old corporation in a new one, and we have had several charters as well as general laws, under which the corporate identity has been kept up in a new name, and with larger as well as smaller powers. But

there can be no shifting of corporate identity except by statute, and I am not able to find any such statutory change here. I think the case fails on any such claim. If there is no corporate identity the failure of the old company and its bankruptcy before any money was earned put an end to the relations of the parties. Such a liability could not be kept up indefinitely. Interests might and probably did change when there was no assurance that the plaintiff in error's property could be benefited. The original road could claim no rights after seven years from its organization. Comp. L. § 47.

It is plain that the bankrupt law favored no such doctrine. There is nothing in that act which attempts to transfer to the assignee in bankruptcy any of the corporate franchises. The power to exercise corporation franchises in a state, derived from the corporate charter, is preserved expressly so as to prevent dissolution. The law, while it provided for disposing of corporate assets, distinctly declares that no discharge shall be granted to any corporation. The bankrupt company must continue to exist as a corporation, and still exists for all purposes north of Ann Arbor.

There has never been any difficulty in obtaining corporate powers to make use of or finish a purchased road, as well as to build a new one. By Act No. 190 of the laws of 1873, which is set up in the brief of counsel for the railroad as covering this case, a railroad company is allowed, under certain restrictions and conditions, to sell all or part of its road to another existing incorporated company. That statute, however, does not reach sales in bankruptcy, but requires confirmatory action by the stockholders. It requires the sale to be to an existing company, which thereby becomes liable to duties. And it does not merge the selling in the buying company. 1 Sess. L. 1873, page 478.

Act 198 of 1873, which is the general revisory act concerning railways, is the one under which the new company was actually organized. It was done under section

2 of article 1. That section, however, applies by its terms, as the previous analogous statute of 1859 did (Laws 1859, p. 252), only to sales under mortgages and trust deeds, and allows purchasers of all and any specific part of a railroad to organize for the purpose of its management with the same powers as to such purchased property as were possessed by the mortgaging company. This statute does not purport to reach sales on execution or in bankruptcy, and it does not refer to purchases of anything but a road or a part of one. It has no reference to general assets or personalty, and it does not purport to extinguish the old company or to merge it wholly or partially. The new company is not bound to any of the liabilities of the old one, or substituted in its place.

The statute makes no provision for incorporating by the purchaser's certificate, except as to the purchase of the road itself; and if the new corporation obtains any other assets, it is only on the footing of any other assignee, and with no greater or different interest from that which might be retained by a private purchaser without any attempt to incorporate.

I think the judgment against Wilcox should be reversed.

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City of Detroit v. Mutual Gas Company and Mutual Gaslight Company.

Mortgage of franchises by corporation—Forfeiture of franchises for violation of charter.

A corporation regularly organized under the laws of Michigan can mortgage or convey its rights, property and franchises acquired thereunder as though it were a private individual, subject only to the restrictions which the Legislature may have imposed; and it may do so whether the rights were conferred on the original incorporators, or on subsequent stockholders.

Corporate rights are granted to the corporation and not to the individuals interested therein; the stockholders may separately assign and transfer their stock, and apart from their rights the corporation can mortgage its property, rights and franchises.

On foreclosure sale of a mortgage of the property, rights and franchises of a corporation, the purchaser acquires the same rights and privileges as were held by the corporation and subject to the same terms and conditions, and he may transfer them to any other corporation capable of taking and exercising such franchises.

An ordinance authorizing a gas company to supply the city, declared that if it should enter into any combination with any company concerning rates, the ordinance should be void, and if it sold its property, franchises or privileges to any other gas company, it should forfeit its property. The company mortgaged its property and afterwards made an arrangement with another company to divide the city between them. On foreclosure of the mortgage the company's property, rights and franchises were bought in by an individual who transferred it to a new corporation. On a bill to enjoin both companies from supplying the city, it was *held* that they could not be subjected to the forfeiture of the city's consent to supply gas, or of their property, as such a measure of damages was not recognized either at law or in equity, and the bill was accordingly dismissed.

Appeal from the Superior Court of Detroit. Submitted April 6 and 7. Decided June 11.

INJUNCTION. Bill dismissed. Complainant appeals.

City Counselor *F. A. Baker* for complainant. A corporation organized for the accommodation of the public and enjoying peculiar privileges granted by the Legislature, cannot alienate or mortgage its permanent property without legislative authority, *Richardson v. Sibley* 11 Allen 65; a gas company may execute a mortgage to accomplish the legitimate objects of its creation, *Hayes v. Gas Company* 29 Ohio St. 330; the consent of municipal authorities is in the nature of a license, *Maybury v. Mutual Gas Light Co.* 38 Mich. 154; and a license cannot be assigned, *The Maverick* 1. Sprague 23; *Morrill v. Mackman* 24 Mich. 279; *Mendenhall v. Klinck* 51 N. Y. 246; *Cowles v. Kidder* 24 N. H. 364; *Dark v. Johnston* 55 Penn.

St. 164; the privilege of using city streets for the objects of a gas company is an easement, *Prov. Gas Co. v. Thurber* 2 R. I. 15; but is not appurtenant to any estate or premises and is not assignable, 2 Cooley's Bl. 19, 22, 34, 35, n. 19; Washb. Easements 3, 11, 12; Woolrych on Ways 16; *Ackroyd v. Smith* 10 C. B. 188; *Garrison v. Rudd* 19 Ill. 558; *Spensley v. Valentine* 34 Wis. 154; *Tinicum Fishing Co. v. Carter* 61 Penn. St. 38; *Wagner v. Hanna* 38 Cal. 111; *Dennis v. Wilson* 107 Mass. 591; *Case of a Private Road* 1 Ash. 417; but easements in gross, consisting in a right of *profit a prendre*, such as taking soil from another's land, are assignable, *Post v. Pearsall* 22 Wend. 433; the right to take water, however, from a natural fountain, is a mere easement (*Manning v. Wasdale* 5 A. & E. 758; *Race v. Ward* 4 E. & B. 702; *Hill v. Lord* 48 Me. 99), but it is an interest in land (*Tyler v. Bennett* 5 A. & E. 377), and though granted and held in gross, may be assigned (*Goodrich v. Burbank* 12 Allen 459; *Owen v. Field* 102 Mass. 108) and annexed to or severed from the land by conveyance with or without it, *Lonsdale v. Moies* 21 L. Rep. 664; *French v. Morris* 101 Mass. 68.

Meddaugh & Driggs and *Ashley Pond* for defendants. Equity will not aid to enforce a forfeiture, *Crane v. Dwyer* 9 Mich. 350; *White v. Port Huron R. R.* 13 Mich. 356; *Fitzhugh v. Maxwell* 34 Mich. 138; nor restrain the violation of city ordinances, *St. Johns v. McFarlan* 33 Mich. 73; nor interfere where there is a remedy at law unless the injury is continuous, *Att'y Gen. v. Cambridge etc. Company* 4 Ch. App. Cas. 71: 3 DeG. M. & G. 304; injunction will not lie unless there is substantial injury requiring prompt redress, *Gilbert v. Showerman* 23 Mich. 452; a corporation, if not restrained by its charter, can mortgage its franchises, *Joy v. Jackson P. R. Co.* 11 Mich. 168; *Town v. Bank of River Raisin* 2 Doug. (Mich.) 548; *White Water Valley Co. v. Vallette* 21 How. 425; a prohibition of a sale of a whole is not violated by a sale of

a part, *Hasbrook v. Paddock* 1 Barb. 635; a provision in a city ordinance forfeiting the works of a corporation for a sale of its franchises is in excess of the powers of the common council, and is void, *Grand Rapids v. Hughes* 15 Mich. 54; *Phillips v. Allen* 41 Penn. St. 481; *White v. Tallman* 2 Dutch. 67; power to impose any but money forfeitures is not given by the Detroit charter, *q. v.* p. 72.

MARSTON, C. J. The defendants are corporations organized under the laws of this State. In November, 1871, the complainant city, by ordinance, authorized the Mutual Gas-Light Company to lay pipes and mains in the streets and alleys of the city, upon the terms and conditions therein set forth, which ordinance was accepted, and gas works constructed near the city, pipes laid in the city, and the work of manufacturing and supplying gas regularly entered upon. While so engaged the company mortgaged its property and franchises. On the twenty-eighth day of June, 1877, it is alleged the company, contrary to the provisions of said ordinance, entered into a combination with the Detroit Gas-Light Company concerning rates to be charged for gas, and did sell its property, franchises and privileges to said company, by entering into a contract with said last named company to divide the city between them. December 14, 1877, the common council of said city repealed the first named ordinance, and declared that said Mutual Gas-Light Company had forfeited to the city all its gas pipes and property in the city, and authorized the comptroller to assume and take possession thereof, all of which appears more fully from a copy of such ordinances and agreements appended in a note hereto.* On the 15th of April, 1878,

*AN ORDINANCE

To permit certain persons to lay gas pipes, mains, conductors and service pipes in the streets, alleys, lanes, avenues, squares, parks and public grounds of the city of Detroit, to establish a manufactory of and to vend gas-light in the said city.

WHEREAS, David Preston, H. Moffat, T. K. Adams, Robert Hosie, J. F. Antisdel, Ransom Curtis, H. C.

under mortgage foreclosure proceedings, the property of said Mutual Gas-Light Company was sold by a master in chancery to Thompson Dean, and he about the same date conveyed the same to the Mutual Gas Company, and under this conveyance the last-named corporation claims to be entitled to enjoy the rights and privileges granted to the Mutual Gas-Light Company. The city at no time consented in any way to these mortgages, sales,

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Hodges, Philip Thurber, E. Kanter, J. Heffron, H. Weber, A. Wilkins, Thompson Dean, John P. Kennedy and Wm. H. Fitch, Jr., their associates and successors, propose to organize as a body politic and corporate, under "An act to authorize the formation of Gas-Light Companies," approved February 12, 1855 (Laws of 1855, p. 243), and an act and acts amendatory thereto, for the purpose of building and operating gas-works in the city of Detroit, the said corporation to be known as "The Mutual Gas-Light Company" of the city of Detroit, therefore,

It is hereby ordained by the Common Council of the City of Detroit:

SECTION 1. That consent, permission and authority are hereby given, granted and duly vested in David Preston, H. Moffat, T. K. Adams, Robert Hosie, J. F. Antisdel, Ransom Curtis, H. C. Hodges, Philip Thurber, E. Kanter, J. Heffron, H. Weber, A. Wilkins, Thompson Dean, John P. Kennedy, Wm. H. Fitch, Jr., and their associates, their successors and assigns, organized into a corporation under the laws of the State of Michigan, as aforesaid, to lay gas pipes, mains, conductors and service pipes in any of the avenues, streets, lanes, highways, alleys, public parks or squares, throughout said city, subject, however, at all times to any and all restrictions and regulations imposed upon "The Detroit Gas-Light Company," and the following, to wit:

1. The said corporation shall do no permanent injury to any street, alley, avenue, square or park, or shade tree, nor in any manner disturb or interfere with any water pipe, sewer or gas pipe, now or hereafter laid by any authorized person or corporation, but when they shall open ground in the same to lay any pipe or for any other purpose whatever, they shall forthwith restore the streets, pavements, sidewalks, or ground, to a condition equally as good as before, and shall promptly comply with any order or resolution of the common council, or other proper authority in reference thereto.

2. The said corporation shall open or encumber no

agreements or conveyances; nor has it recognized said Mutual Gas Company. Some of the questions raised relate to the rights of the city under the facts, and the rights of the last-named company under the conveyance from Dean.

When a corporation is regularly organized under the laws of this State, and acquires rights, property and

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more of any street, alley or public ground at any one time, or in any one place, than may be strictly necessary to enable them to proceed with advantage to the work of supplying private or public demand for gas-light; nor shall any street, avenue or alley be allowed to remain open or encumbered for a longer period than shall be necessary to execute the work for which the same shall have been opened.

3. The said corporation shall be liable to compensate the city of Detroit, and any individual owner or owners of property adjacent to the street or alley opened and injured by them, for all damages which may result from leaky pipes, or by reason of their having opened or encumbered any street, avenue, alley, sidewalks or public grounds in said city of Detroit. Said corporation shall at all times be subject to the city ordinances now in existence, or which may hereafter be passed relative to the keeping or storing within the city limits of naphtha, petroleum, or other inflammable substances, and shall also be subject to all ordinances relating to inspection of gas, gas-meters and nuisances, and shall be subject to all other ordinances of the city.

SEC. 2. In case the said corporation, within one year from the passage of this ordinance, shall not have built and completed gas-works in this city sufficiently extensive to enable it to manufacture gas to a reasonable amount, or if it shall at any time enter into any combination with any gas-light company concerning rates to be charged for gas, either to the city or private consumers, then the consent given by this ordinance shall cease, and this ordinance shall become null and void. And the said corporation is hereby expressly forbidden to sell its property, franchises or privileges, to any other gas-light company, under a penalty of a forfeiture to this city of its works, mains and other property; and an acceptance of this ordinance shall be deemed a consent by said corporation that the title of said property shall vest in the city at once in case of such sale.

SEC. 3. While there exists competition in the supply and sale of gas-light in the said city of Detroit, the said corporation shall have the privilege of supplying it at

franchises thereunder, such rights, property and franchises may be mortgaged or conveyed in the same manner as the property of an individual, subject only to such restrictions as the Legislature may have imposed; and it makes no difference to whom the rights conferred may have been granted, whether the persons named in the charter or subsequent stockholders, the rights granted are to the

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such rates less than charged by the Detroit Gas-Light Company as may be agreed upon between it and consumers, public and private. Said corporation shall in no instance, nor under any circumstances whatever, charge either public or private consumers higher rates for the supply of light than an average of the rates charged such public and private consumers, and paid in the cities of Buffalo, Chicago, Cleveland, Toledo and Sandusky.

SEC. 4. It is further ordained that in all streets where the said corporation has not laid mains or conductors within two years from the passage of this ordinance, upon petition of at least two applicants or occupants of buildings on such streets for a supply of gas-light, averaging two buildings in every 200 feet of main pipe required to supply the same, the company shall, when directed by the common council, lay mains in such streets, the common council ordering therein the usual proportion of lamp-post service. And in case the company neglects to lay mains when directed by the common council, they shall be subject to the forfeiture contained in section 2.

SEC. 5. The said corporation shall supply gas-light under uniform and sufficient pressure between sunset and sunrise, and the quality of the same shall be as nearly uniform as practicable, averaging for each month not less than sixteen candles, to be determined by authorized photometrical tests.

SEC. 6. Within sixty days after the approval of this ordinance, the said grantees shall perfect their incorporation with the full sum of $500,000 of capital stock subscribed, and their articles of association shall be filed in accordance with the law in such cases made and provided; and the said corporation so formed shall execute good and acceptable bonds to the city of Detroit, in the sum of $100,000, conditioned to perform the obligations imposed upon it by section 2 of this ordinance, and all other conditions imposed upon it by this ordinance.

SEC. 7. This ordinance shall take effect at the expiration of sixty days from the date of its passage.

Approved November 28, 1871.

WILLIAM W. WHEATON, *Mayor.*

corporation and not the individuals interested therein. They, the stockholders, may separately assign and transfer their stock; others may take their places; so that while the corporation remains the same, yet the stockholders therein and the officers thereof may be wholly changed. What limitation, if any, can be placed upon this right of the stockholders we need not at present determine. Apart from the right of the stockholders, as already said, the corporation could mortgage its property,

AN ORDINANCE

To revoke and repeal the consent, permission, and authority granted by the common council of the city of Detroit to the "Mutual Gas-Light Company of Detroit," to lay gas pipes, mains, conductors and service pipes, in any of the avenues, streets, lanes, highways, alleys, public parks and squares throughout said city, and to declare a forfeiture to the city of Detroit of all the gas pipes, mains, conductors, service pipes, and all other property of the said company situated and being within the avenues, streets, lanes, highways, alleys, public parks and squares within the city of Detroit, and also all its other property situated within the limits of said city.

WHEREAS, In the year 1871, and for a long time prior thereto, there was only one company, to-wit, the Detroit Gas-Light Company, engaged in the manufacture and sale of gas-light in the city of Detroit; and,

WHEREAS, On the 15th day of September, 1871, David Preston, H. Moffat, T. K. Adams, Robert Hosie, J. F. Antisdel, Ransom Curtis, H. C. Hodges, Philip Thurber, E. Kanter, J. Heffron, H. Weber, A. Wilkins, Thompson Dean, John P. Kennedy, and William H. Fitch, Jr., presented a petition to the common council of the city of Detroit, stating therein that they and their associates and successors proposed to organize as a body corporate and politic under "An act to authorize the formation of gas-light companies," approved February 12, 1855, for the purpose of building and operating gas-works in the city of Detroit, the said corporation to be known as "The Mutual Gas-Light Company" of the City of Detroit, and praying, in said petition, for permission to lay pipes in the streets, alleys and public grounds of the city of Detroit, for the purpose of supplying the city and citizens with gas; and

WHEREAS, The common council, under and by virtue of the power in them vested by the statute above referred to, did grant the permission prayed for by said petitioners, by the following ordinance, viz.:

[Here follows a copy of the foregoing ordinance.]

AND WHEREAS, The persons named in said ordinance,

rights and franchises, and it follows therefrom, in order to render valuable such security, that such mortgage could be foreclosed, and the rights and property mortgaged thereby acquired by others. And if by an individual, he could convey what he had thus acquired to some other corporation, capable of taking and exercising such rights, franchises and privileges. It would now seem that these positions are no longer open to question. Their recognition is necessary to the protection of the rights of

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their associates and successors, did under said statute, and within sixty days after the approval of said ordinance, organize a body corporate and politic, with the sum of $500,000 of capital stock subscribed, and designated and known as "The Mutual Gas-Light Company of Detroit," as more fully appears by their articles of association, filed and recorded in the office of the register of deeds for the county of Wayne, on the 20th day of December, 1871, and to which record now remaining in said office reference is hereby made; and,

WHEREAS, The said corporation so formed, within sixty days after the approval of said ordinance, did execute and deliver a bond to the city of Detroit in the sum of $100,000, and which said bond, together with the certificate therein referred to, is in the words and figures following, to-wit:

Know all men by these presents, that the Mutual Gas-Light Company of Detroit, in the county of Wayne and State of Michigan, as principal, and Thompson Dean and John P. Kennedy, both of the city, county and State of New York, and William H. Fitch, Jr., E. W. Meddaugh and Luther Beecher, of said city of Detroit, in the State of Michigan, as sureties, are held and firmly bound unto the said city of Detroit in the just and full sum of $100,000, lawful money of the United States, to be paid to the said city of Detroit, its successors (or assigns), to which payment well and truly to be made the said Mutual Gas-Light Company of Detroit does hereby bind itself and its successors, and the said Thompson Dean, John P. Kennedy, William H. Fitch, Jr., E. W. Meddaugh and Luther Beecher do hereby bind themselves, their heirs, administrators and executors, firmly by these presents.

In testimony whereof, the said Mutual Gas-Light Company of Detroit has caused this instrument to be signed by its president and duly authorized executive agent, and has caused its corporate seal to be hereunto affixed, and the said sureties have also signed and sealed the same, on this twenty-third day of January, A. D. 1872.

The condition of the foregoing instrument is such that whereas the common council of the said city of Detroit, on the 24th day of November, A. D. 1871, passed an ordinance entitled "An ordinance to permit certain persons to lay gas pipes, mains, conductors and service pipes in the streets, alleys, lanes, avenues, squares, parks and public grounds of the city of Detroit, to establish a manufactory of and to vend gas-light in said city, which said

stockholders, and of parties dealing with the corporation. The right of a corporation to mortgage its property and franchises,—a right we might say now almost if not universally conceded,—carries with it the usual and customary legal and equitable rights pertaining to mortgages.

If because of such mortgage, foreclosure, sale and

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ordinance was, on the 28th day of November, duly approved by the mayor of said city; and whereas, among other things it was provided in and by said ordinance, by section two thereof, as follows: "Sec. 2. In case the said corporation within one year from the passage of this ordinance shall not have built and completed gas works in the city sufficiently extensive to enable it to manufacture gas to a reasonable amount, or if at any time it shall enter into any combination with any gas-light company concerning rates to be charged for gas either to the city or private consumers, then the consent given by this ordinance shall cease, and this ordinance shall become null and void, and the said corporation is hereby expressly forbidden to sell its property, franchises or privileges to any other gas-light company under the penalty of a forfeiture to this city of its works, mains and other property, and an acceptance of this ordinance shall be deemed a consent by said corporation that the title to said property shall vest in the city at once in case of such sale;" and whereas, it was also provided in said ordinance that within sixty days after the approval thereof, the said grantees therein named should perfect their incorporation, with the full sum of $500,000 of capital stock subscribed, and their articles of association should be filed in accordance with the law in such cases made and provided; and the said corporation so formed should execute a good and acceptable bond to the city of Detroit in the sum of $100,000, conditioned to perform the obligations imposed upon it by section 2 of said ordinance, and all other conditions imposed upon it by said ordinance; and whereas, the grantees named in said ordinance and their associates have perfected their said incorporation with the full sum of $500,000 of capital stock subscribed, and have organized as a body politic and corporate, under and by the name of the Mutual Gas-Light Company of Detroit, and have caused their articles of association to be filed as required by law in the offices of the Secretary of State and the Wayne county clerk, and to be recorded in the office of register of deeds for Wayne county (certificates of which said filing and record are hereto attached); Now, therefore, the condition of this obligation is such, that if the above bounden Mutual Gas-Light Company of Detroit shall perform the obligations imposed upon it by said section 2 of said ordinance, and all other conditions imposed upon it by said ordinance, then this obligation to be void, otherwise to be and remain in full force and virtue.

Signed, sealed and delivered in presence of
WILLIAM C. LUSK and
CHARLES NETTLETON,
As to Dean and J. P. Kennedy.

WM. H. FITCH, JR., [L. S.]
President Mutual Gas-Light Company.
MUTUAL GAS-LIGHT COMPANY. [L. S.]
T. DEAN. [L. S.]
JOHN P. KENNEDY. [L. S.]
WM. H. FITCH, JR. [L. S.]
E. W. MEDDAUGH. [L. S.]
LUTHER BEECHER. [L. S.]

transfers thereunder, the common council could forfeit the rights of the corporation or the purchaser, and assume possession of the property, the security given by such a mortgage would be a somewhat uncertain and scanty one, and the effect of such a doctrine would be to destroy or at least impair the value of the property of the cor-

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STATE OF NEW YORK, } ss.
CITY AND COUNTY OF NEW YORK, }

On this 23d day of January, A. D. 1872, before me, a commissioner of deeds for the State of Michigan, personally appeared the within named Thompson Dean and John P. Kennedy, known to me to be the persons described in and who executed the following instrument, and severally acknowledged the same to be their free act and deed.

In witness whereof I have hereunto set my hand and affixed my official seal.

CHARLES NETTLETON,
Commissioner for Michigan in New York,
117 Broadway, New York City.

STATE OF MICHIGAN, } ss.
COUNTY OF WAYNE, }

I, Stephen P. Purdy, clerk of said county, do hereby certify that on the 20th day of December, A. D. 1871, articles of association of the Mutual Gas-Light Company of Detroit were duly filed in this office, according to law, in and by which said articles it appears that the whole capital stock of said company, $500,000, had been subscribed and taken.

In testimony whereof, I have hereunto set my hand and affixed the seal of this court, this 6th day of January, A. D. 1872.

STEPHEN P. PURDY,
Clerk.

By M. J. MOYNAHAN,
Deputy Clerk.

STATE OF MICHIGAN, } ss.
COUNTY OF WAYNE, }

I, Alonzo Eaton, register of deeds in and for said county, hereby certify that on the 20th day of December, A. D. 1871, articles of association of the Mutual Gas-Light Company of Detroit were duly filed and recorded in this office, as required by law.

January 6, 1872.

ALONZO EATON,
Register of Deeds, Wayne County, Mich.

CERTIFICATE OF FILING.

STATE DEPARTMENT, MICHIGAN, } ss.
SECRETARY'S OFFICE, }

I, Daniel Striker, Secretary of State of the State of Michigan, do hereby certify that on the twenty-second day of December, in the year one thousand eight hundred and seventy-one, the articles of association of the Mutual Gas-Light Company of Detroit were duly filed in this office, agreeable to the provisions of law.

In testimony whereof, I have hereunto set my hand and affixed the great seal of the State of Michigan, at Lansing, this 22d day of December, in the year of our Lord one thousand eight hundred and seventy-one.

G. M. HASTY,
Deputy Secretary of State.

poration and of the mortgagees, a position which the law will not yet justify. The purchaser under such a sale and his grantee would acquire the same rights and privileges which the original corporation had, and subject to the same terms and conditions. Such a conveyance was not prohibited by the ordinance of the city, even if it could have been—a point we do not now pass upon.

The effect of the contract entered into with the Detroit Gas-Light Company remains to be considered.

Under section two of the ordinance the company was forbidden to enter into any combination with any gas-light company concerning rates to be charged for gas, and it is claimed that the agreement of June 28, divid-

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AND WHEREAS, The said corporation did thereupon proceed, and from thence hitherto have continued to lay mains and pipes in and through the streets, alleys and public grounds of the city of Detroit, and to conduct gas through the same, and to carry on the business of manufacturing and selling gas-light in said city; and,

WHEREAS, The said corporation did not, within one year from the passage of said ordinance, or at any other time, build and complete gas-works within said city sufficiently extensive to enable it to manufacture gas to a reasonable amount, but did, in violation of said ordinance, build its gas-works without the limits of said city, to-wit, in the township of Hamtramck; and

WHEREAS, Heretofore, to-wit, on the 28th day of June, 1877, for the purpose of destroying competition between it and the Detroit Gas-Light Company, the said Mutual Gas-Light Company did, contrary to the provisions of said ordinance, enter into a combination with the said Detroit Gas-Light Company, concerning rates to be charged for gas to the city of Detroit and to private consumers; and,

WHEREAS, The said corporation, on the day and year last aforesaid, in violation of the provisions of section two of said ordinance, did enter into a contract and agreement with said Detroit Gas-Light Company, which agreement has been performed by the parties thereto, the same being in the words and figures following, to-wit:

Memorandum of agreement between the Detroit Gas-Light Company, party of the first part, and the Mutual Gas-Light Company, party of the second part, both of the city of Detroit, and the State of Michigan, made and entered into the 28th day of June, 1877, witnesseth as follows:

1. The party of the first part hereby sells, transfers and conveys

ing the city, was in violation of this provision. In my opinion this position is well taken. To my mind it seems very clear that such agreement was a carefully studied attempt to evade in spirit, but not in letter, the provision referred to. The effect of such an agreement is precisely the same as a combination concerning rates. The object sought under the ordinance was active competition, which would keep rates within reasonable limits; the result of this agreement is to remove all competition, and permit the rival companies to enjoy each its territory unmolested and freed from all danger of competition. The Mutual Gas Company could have confined itself as well to one street or one block as to one-half the city.

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to the said party of the second part, all mains, service pipe, feeding meters and connections of every kind and description now owned by it, and lying and being in the city of Detroit, easterly of the center of Woodward avenue, including its gas holder on the easterly side of Chene street, and the land enclosed therewith, for the conveyance of which latter property a good and sufficient warranty deed is to be made.

2. The party of the second part hereby sells, transfers and conveys to the party of the first part all the mains, service pipe, feeding meters and connections of every description thereunto belonging or pertaining, now owned by it, and being and lying westerly of the center of Woodward avenue, in the city of Detroit.

3. As the difference in the value of the property so as aforesaid transferred each to the other has been agreed upon at the sum of $140,000 in favor of the said party of the first part, said party of the second part hereby covenants and agrees to pay said sum to the said party of the first part, in the manner following, to-wit: $20,000 on the execution of this paper; $45,000 when the connection of the pipes of the party of the first part, for supplying gas in the city of Detroit, easterly of the center of Woodward avenue, are ready to be severed, when this paper and the notes and mortgages hereinafter specified shall be delivered; and the remainder in five equal instalments, with interest at seven per cent per annum, the first instalment to be payable on the ——— day of ———, 187–, these five instalments to be secured by a promissory note of the party of the second part, payable to the order of Thompson Dean, of New York.

4. And said parties mutually agree with each other and bind themselves, that from and after the delivery and receipt of the property as herein covenanted, they will neither of them lay gas mains or pipes across Woodward avenue, and that the party of the first part will not supply gas to that part of the city lying easterly of the line of the middle of Woodward avenue, hereinbefore described, nor will the party of the second part thereafter supply gas to that part of the city lying westerly of the line aforesaid, only as said companies respectively shall at any time be found, against their own will, legally liable and bound to do, and in such case only in the manner and subject to the conditions hereinafter provided. Each party hereto respectfully reserves to itself the right to perform in any part of the city of Detroit any acts or duties which it shall at

Corporations like individuals should observe in good faith the letter and spirit of their agreement, and of the accepted terms and conditions imposed upon them, and they should not be permitted, while exercising the right conferred, to make careful study and effort to evade the responsibilities and restrictions imposed upon them; and if any doubt exists as to the right claimed by the corporation, that doubt should be solved in favor of the public.

It does not, however, follow that the city can have the relief prayed for in this case. The violation of such an agreement would not be a forfeiture of the consent given by the city, nor of the property of the corporation acquired thereunder. This would be a measure of damages for the violation of an agreement recognized neither

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any time be found, against its own will, legally bound and liable to do. And in the case of supplying any gas contrary to the provisions hereinbefore contained, the parties so supplying shall be subject to the provisions hereinafter contained, to-wit:

And the parties respectively agree and bind themselves each to the other, for every foot of gas supplied by the party of the first part easterly of the line on the middle of Woodward avenue, hereinbefore described, after the delivery of the property herein contemplated has been made, the said party of the first part shall and will pay to the party of the second part such rate for each 1,000 cubic feet so supplied as the said party of the second part shows to be its net gain per thousand feet on its aggregate supply of gas to private consumers during and for the time such supply is being made by said party of the first part, or at the rate of profit per thousand cubic feet made by said party of the first part on its aggregate consumption by private consumers during such time as the said party of the second part may elect; and from and after the delivering and receiving of the property aforesaid, the party of the second part, for every foot of gas supplied by it westerly of the line of the middle of Woodward avenue, hereinbefore described, shall and will pay to the party of the first part such rate per thousand cubic feet for each thousand feet so supplied as the party of the first part shows to be its net gain per thousand feet on its aggregate supply of gas to private consumers, during and for the time such supply is being made by the said party of the second part, or the rate of profit per thousand cubic feet, made by the party of the second part on its aggregate consumption by private consumers during such time as the party of the first part may elect, and all such payments, if any, are to be determined and paid monthly, one to the other.

In witness whereof, the said parties have hereunto caused their respective names to be written and their corporate seals to be attached.

[Signed] THE DETROIT GAS-LIGHT COMPANY.
SAMUEL LEWIS, *President.*
FOR THE MUTUAL GAS-LIGHT CO.,
T. DEAN, *Special Agent.*

in courts of law nor of chancery. Section 6 of the ordinance required bonds to be given to secure performance of the obligations imposed by section 2. Whether the remedy of the city may not be found here, or in some other manner, or what appropriate remedy the city may have for the violation of the agreement, we do not say, while we concur in saying that the bill was rightly dismissed, and that the decree must be affirmed with costs.

COOLEY, J. I agree in the conclusion reached by the Chief Justice, while not agreeing in what he says about the division of territory between the two companies being in effect a combination as to prices.

GRAVES and CAMPBELL, JJ., concurred.

AND WHEREAS, The said corporation has at all times, from the acceptance by it of said ordinance, utterly and wholly neglected and refused to comply with the provisions of section 4 of said ordinance; now, therefore,

It is hereby ordained by the Common Council of the City of Detroit:

SECTION 1. That the consent, permission and authority granted by the common council of the city of Detroit to the said "The Mutual Gas-Light Company of Detroit," to lay gas-pipes, mains, conductors and service pipes in any of the avenues, streets, lanes, highways, alleys, public parks and squares throughout said city, be and the same is hereby revoked, and from and after the approval of this ordinance the same shall cease and be null and void.

SEC. 2. The said "The Mutual Gas-Light Company of Detroit" is hereby declared to have forfeited to the City of Detroit all its gas-pipes, mains, conductors, service pipes, and all its other property situated and being within the avenues, streets, lanes, highways, alleys, public parks and squares within the city of Detroit, and also all its other property situated within the limits of said city, and the title to all and singular the property above described and mentioned is hereby declared to have vested in the city of Detroit.

SEC. 3. The controller is hereby authorized and directed to take and assume possession and control of all the property mentioned and described in the next preceding section, and to notify the Mutual Gas-Light Company thereof; and also to serve upon said company a certified copy of this ordinance.

SEC. 4. This ordinance shall take immediate effect.

DETROIT & BAY CITY RAILWAY COMPANY v. JAMES MCKENZIE.

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Railroad companies—Carriage beyond terminus—Unreasonable delay—Action to recover back excessive charge for transportation.

A railroad company receiving and receipting goods for transportation to a point beyond the terminus of its road, is not to be understood as undertaking to carry the goods beyond such terminus, unless there is an express promise to that effect.

But if the company receipts the goods to be transported to a point beyond its line for a definite sum named, and the consignor is charged a larger sum therefor, the receipting company is responsible to the consignor for the excess.

In an action to recover such excess, a variance in describing the defendant's undertaking as one for the carriage of the goods for the whole distance, is immaterial.

In an action against a carrier, when unreasonable delay is complained of, and the loss of a market is claimed, it is not sufficient for the plaintiff to prove delay, and also a damage, when it appears from his proofs that there was other delay not chargeable to the defendant; but some damage must be traced to the delay for which the defendant was in fault.

When unexpected difficulties occur in the transportation of property by a carrier, and the consignor agrees, in view of them, to pay a sum for the carriage, in addition to what had been previously fixed upon, and pays the same, he cannot recover it back as paid without consideration.

Error to Lapeer. Submitted April 9. Decided June 11.

ASSUMPSIT. Defendant brings error.

J. B. Moore and *G. V. N. Lothrop* for plaintiff in error, as to the carrier's freedom from obligation to do more than deliver goods at the destination marked on them, unless there are special directions, cited *Wibert v. N. Y. & Erie R. R.* 12 N. Y. 245; *Nutting v. Conn. R. R. R.* 1 Gray 502; *Jenneson v. C. & A. R. R.* 4 Am. L. Reg. 234.

W. W. & M. N. Stickney and *Wm. T. Mitchell* for defendant in error.

COOLEY, J. In this action McKenzie recovered dam-

ages of the railroad company in respect to three several consignments of spars or masts, transported for him over its road. Different questions arise upon the record in respect to each of them, and they will therefore be considered separately.

I. The first consignment was of 12 cars of masts or spars from Fish Lake station, for which receipts were given of the following form:

"Detroit & Bay City Railroad Company. Fish Lake Station, August 12, 1873. Received from Jas. McKenzie in apparent good order two cars spars, 4612, 6206, marked Jas. McKenzie, Yarmouth Junction, Maine. Rate paid per car, Fish Lake to Port Huron, $22 per car. Marked and described as above; contents and value otherwise unknown; for transportation by the Detroit & Bay City Railroad Company to their warehouse at ——.

Notice. See rules of transportation on back hereof.

[Signed] J. KERN, *Agent.*"

Among the rules endorsed on the back was the following:

"Goods or property consigned to any place off the company's line of road, or to any point or place beyond its terminus, will be sent forward by a carrier or freightman, when there is such, in the usual manner, the company acting for the purpose of delivery to such carrier as the agents of the consignor or consignee, and not as carriers. This company will not be responsible for any loss or damage to the property after the same shall have been sent from any warehouse or station of the company."

It is alleged by McKenzie in the first count of his declaration that the railroad company undertook to transport these twelve cars of masts or spars from Fish Lake station to Port Huron for the price of $22 per car, but that on their arrival at Port Huron the company demanded and exacted $45 per car. The questions that arise on this count are, *first*, whether the contract of the company was a contract to carry to Port Huron; and *second*, whether there is evidence that the company exacted and received the excessive charges.

Port Huron is not a station on the Detroit & Bay City Railroad, but is the connecting point of the Port Huron & Chicago with the Grand Trunk Railway. The

Port Huron & Chicago Railway crosses the Detroit & Bay City Railroad at Lapeer, and the line of transportation for these cars would be by the Detroit & Bay City road to Lapeer, and by the Port Huron & Chicago road to Port Huron. The defendant contended in the court below that its obligation was only to transport the cars over its own road and deliver them to the connecting road at the point of intersection, and that consequently the undertaking of the defendant was incorrectly set out in the declaration. This is probably true. *Gass v. New York etc. R. R. Co.* 99 Mass. 220; *Schneider v. Evans* 25 Wis. 241; *Cincinnati etc. R. R. Co. v. Pontiurs* 19 Ohio St. 221. But this is an immaterial variance. The gist of the action is that the defendant undertook that the price for the carriage should be a certain sum, but that when the carriage was completed a larger sum was exacted. It is of no importance that the declaration fails to state that the carriage for a portion of the distance was to be by a connecting road, or that it alleges something different.

The evidence of the payment of the excessive charge is that of the agent of the Grand Trunk Railway at Port Huron, that he paid $505 as freight charges to that point, by giving credit on the books of his company to the Port Huron & Chicago Railroad Company in the usual course. This, in connection with evidence that defendant made the Port Huron & Chicago Railroad Company its agent for the purpose of collecting and receiving its charges when property was sent subject to them was sufficient. The plaintiff had a right to look to the defendant for the whole excess, whether received by itself or by another company. *Schneider v. Evans* 25 Wis. 241.

II. The second consignment was of large masts which the plaintiff claims were to be carried from Lapeer to Detroit over the road of the defendant for $300, but for the carriage of which the defendant demanded and received $700. He also alleges "that the defendant did not nor would deliver said spars or masts at Detroit aforesaid in a reasonable time after so undertaking to do so; but so

negligently and wrongfully delayed the transportation and delivery of the same that said plaintiff lost the sale of the same."

These masts, it appears, were to be and were delivered by defendant to the Canada Southern Railroad Company to be transported to the seaboard in Maine. If defendant agreed to transport them over its road for $300, there is no evidence in the record that any larger sum was ever paid to or received for it. There was serious difficulty in the transportation; some breaking down of cars and some reloading; and the superintendent of the road testified that plaintiff agreed to pay $500, besides certain charges for assistance and repairs; and it might be inferred that all of these were included in back charges afterwards paid to the Canada Southern by a company receiving the masts at Buffalo. But this would be inferred only from the fact that it is testified that the payment was agreed upon by the plaintiff; and if it was he is entitled to have none of it refunded. *Moore v. Detroit Locomotive Works* 14 Mich. 266.

That the transportation of the masts from Lapeer to Detroit was seriously delayed appears in the evidence, and the causes are stated. But there is no showing that plaintiff lost a sale in consequence, or indeed that he had ever negotiated a sale. Some witnesses testify to a depreciation in the market value of such timber between the time when the masts should have been received at the seaboard if they had gone through without delay, and the time when they actually arrived there; but the plaintiff's evidence clearly showed that there was considerable delay not at all attributable to the defendant, and it is consistent with the whole record that if there had been no other delays, that which occurred between Lapeer and Detroit would have caused no loss. The plaintiff therefore made out no cause of action in respect to this part of his case.

III. The third consignment was of masts to be taken for a short distance on the road of defendant to its junction

with the Port Huron and Chicago road. For the transportation of these the plaintiff claims to have made special terms with one Fell, a local agent of defendant, at three dollars a car. Ten cars were moved, and $30 paid for the service, but when the fact came to the knowledge of the superintendent, he repudiated this arrangement, denied the authority of Fell to make it, and exacted $15 a car for the ten before moved, and for such as were moved thereafter. The only question on this part of the case is, whether Fell was vested with the authority he assumed to exercise, or whether the circumstances were such as to justify the plaintiff in dealing with him on the assumption that he possessed it.

Unfortunately the record presents somewhat blindly the facts which bear upon this question, and the members of this court do not agree in their construction of them. It would not prove useful to attempt an expression of our views under such circumstances, and as the case must go back for a new trial, this branch of the case will not be referred to further at this time.

The judgment is reversed for the error above pointed out, and the plaintiff in error will recover costs in this court.

The other Justices concurred.

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STEPHEN BARNEBEE ET AL., ADM'RS OF HOSEA BARNEBEE v. DAVID R. BECKLEY, HENRY H. BROWN ET AL.

Accounting—Practice—Waiver of irregularities by consenting to farther action.

When a case of accounting is brought to the Supreme Court without any regular accounting having taken place below, the court will refuse to hear it, and remand it for proper proceedings.

The proper course on accounting is for parties to appear before a commissioner, with charge and discharge accounts, and after full

hearing before and report by him, to file exceptions to his report, and bring the case to a hearing upon them.

The circuit judge has a right to hear a case of accounting without a reference to a commissioner, but when he does so, he should proceed as a commissioner would, and the parties should make their complaints of his action in such form that, if the case is appealed to this court, the precise matters in controversy will be indicated by the record.

Irregularities in proceedings before a commissioner are waived by the parties afterwards appearing in court and consenting that the circuit judge may himself take up and proceed with the reference in the course of which the irregularities occurred.

Appeal from Kalamazoo. Submitted April 15 and 16. Decided June 11.

BILL for accounting. Complainants and defendant Beckley appeal.

Germain H. Mason and *John B. Shipman* for complainants.

O. J. Fast and *Charles Upson* for defendant Beckley. An exception to a commissioner's report after notice of irregularities in the proceeding before him, waives the irregularity, *Tyler v. Simmons* 6 Paige 127; *Suydam v. Dequindre* Walk. Ch. 23; *Ward v. Jewett* id. 45; *Emerson v. Atwater* 12 Mich. 323; where exception is taken to an account which contains items of charges, he must specify the specific charges of which he complains, 2 Smith Ch. Pr. 372; 2 Dan. Ch. Pr. (4th Am. ed.) 1315, n. 4; *Foster v. Goddard* 1 Bl. 509; *Dexter v. Arnold* 2 Sumn. 108; *Holcomb v. Holcomb* 3 Stockt. 281; *Smalley v. Corliss* 37 Vt. 486; *Wilkes v. Rogers* 6 Johns. 566; *Emerson v. Atwater* 12 Mich. 314.

COOLEY, J. This is a bill for an accounting. The facts are complicated, but it will be sufficient for our purposes to state the following:

The co-partnership of H. Barnebee & Co., consisting of Eldridge Brown, Henry H. Bourn and Hosea Barnebee, was formed in the month of June, 1873, for the

purpose of carrying on at Mendon, in St. Joseph county, the business of manufacturing sash, doors, blinds and agricultural implements, the foundry business and the selling of lumber. In June, 1874, the co-partnership was dissolved and terminated by the mutual consent of the parties, and the assets were assigned to the defendant Beckley in trust, that out of the avails and proceeds he should pay his expenses as trustee, and all the debts of the copartnership, and then return the balance to the assignors. At the same time Barnebee sold his interest in the copartnership to Bourn. Beckley accepted the trust under the assignment, and proceeded to collect dues, sell property and pay debts. In January, 1875, Barnebee died intestate, and complainants were appointed administrators upon his estate. Meanwhile the trust had not been fully discharged by Beckley, or the debts paid, and demands amounting to several thousand dollars, which were debts of H. Barnebee & Co., were presented and allowed against the estate of Hosea Barnebee. For the purpose of protecting the estate, and securing the payment of these claims from the assets of H. Barnebee & Co., this bill is filed. It charges neglect of duty, mismanagement and failure to account on the part of Beckley as assignee, and calls for an accounting. An issue was formed on this bill, and voluminous testimony has been taken, but it is not necessary to give any further statement of the pleadings. As the case now stands no questions are presented for decision except those arising upon or connected with the accounting, and those alone will be referred to.

An interlocutory decree for an accounting was made by the circuit judge in July, 1877, and it was referred to S. M. Sadler, a circuit court commissioner, to make and state an account from the pleadings and proofs. The commissioner was also empowered by the decree to take further testimony in writing if he should deem it necessary to enable him to understand and state the account. Under this decree the parties respectively

appeared before the commissioner and presented their charge and discharge accounts, and a hearing was had upon them and further evidence taken. December 28, 1878, the commissioner made up and signed his report, in which he found chargeable to Beckley in all the sum of $7959.11. As against this he found him entitled to credits to the sum of $9927.15, leaving due to him $1978.04.

The complainants took a large number of exceptions to the commissioner's report, some of which were to irregularity in his proceedings, and others to the allowance or disallowance of items in the respective accounts. So far as these related to irregularities, they were not well taken, because irregularities are not corrected in that mode. The complainant should have applied to the court for the proper order requiring the commissioner to correct his action in the particulars complained of; *Schwarz v. Sears* Walk. Ch. 19; *Emerson v. Atwater* 12 Mich. 314; or, as the commissioner in this case went out of office immediately on filing his report, the complainants should have applied for a new reference.

But the complainants neither applied for an order, nor did they bring the case to a hearing upon the report and exceptions. Instead of pursuing either course, the suggestion seems to have been made to the circuit judge that he proceed himself to state an account and dispose of the case without further action of a commissioner, and by consent of parties this course was adopted, or at least entered upon. The complainants filed a second charge account of items, which they claim were already established by evidence, and the judge proceeded to an examination of the case, and embodied his conclusions in the decree appealed from.

From the decree it appears that there was no regular accounting whatever before the circuit judge, and it is not apparent that either party expected or requested it. The judge begins the statement of his conclusions in the decree by reciting that certain sums, amounting in all to $8968.06, "are admitted by said David R. Beckley to

have been received by him, and are of the value stated, and the said David R. Beckley is properly charged with the amount in this accounting." He also finds certain other items, amounting to $1542.71, properly chargeable to Beckley, making the total amount of his debits $10,510.77. Some of these were items contained in the second charge account above mentioned. As against these debits the judge finds Beckley entitled to credits amounting to $7127.23. This leaves a balance of $3,383.54, and for the payment of this by Beckley a decree was entered. Beckley appealed, and so also did the complainants, though the latter seem to have been satisfied with the decree as it stood.

If, when the parties request a circuit judge to dispose of a case of accounting in the mode adopted in this case, it were certain that they would accept and abide by his conclusions, there might be no objections to that course. But as such a case is always open to an appeal, and cases of accounting are very likely to involve much personal feeling which leads to persistency in litigation, it is a mistake when the circuit judge yields to the wishes of parties and undertakes to settle a case of accounting otherwise than in the usual way. The customary and regular method will give us a regular accounting upon charge and discharge accounts, a commissioner's report showing what is allowed and what disallowed, exceptions to this report pointing out the particular items in respect to which the commissioner is supposed to have erred, and the ruling of the court upon these exceptions. If then an appeal is taken by either party, the questions on the hearing will commonly be simple, and can be disposed of without the necessity of examining and considering the mass of evidence relating to items which, if they were ever subject to controversy, ceased to be so when no exception was taken to the commissioner's conclusions respecting them. In several cases in which appeals have been brought before us, an immense mass of testimony, exhibits and account books,

and in which the decree showed only that a certain amount, arrived at in an unexplained way, was found due from one party to another, we have been compelled to remand the record and order a proper accounting. Justice to the parties, no less than to the court, demands this course; for an accounting upon complicated transactions, involving as it usually must a vast number of small and obscure transactions, may require the constant presence and frequent explanations of parties, clerks and servants for many days or even weeks, while the judicial officer is going through with the details; and it is only in the commissioner's office that this sort of investigation can be gone through with. We do not mean that the circuit judge may not at his option, with entire propriety, state the accounts himself instead of ordering a reference to a commissioner; but when he does so, he will proceed as a commissioner would, upon charge and discharge accounts; and when he states the account, the parties by exceptions should bring to his attention such of his conclusions as they object to, not only that he may have the opportunity to make corrections, but also that, in case of appeal, it may be understood by this court exactly what remains to be contested.

This case is different from any we have remanded, in that by the decree we are enabled for the most part to single out the items which are in contest. But the evils of an irregular hearing are sufficiently apparent here, for neither party understands exactly what may be contested on this record. This is apparent from the briefs. The complainants discuss the exceptions taken to the commissioner's report, and his irregularities in action, while Beckley complains that a second charge account was permitted to be brought in against him at the hearing, without an opportunity to answer it, and that the judge erroneously finds that he has admitted debits amounting to the large sum first stated in the decree. In view of the objections that are taken on both sides, we might

perhaps with entire propriety remand this case also; but as the consequence must be considerable delay, expense and annoyance, without any great certainty of reaching more satisfactory results, it has been decided to conclude the case now. In doing so we shall state briefly our conclusions.

I. All questions of irregularity in the commissioner's action, and all the exceptions to his report, were rendered immaterial by the failure to require any ruling of the circuit judge upon them, and by submitting the case to him in the method adopted. The report itself became then immaterial, except as it might furnish some assistance to the judge in reaching his own conclusions.

II. If defendant was embarrassed or injured by the bringing in of a new charge account at the hearing, or by any failure to give him an opportunity to meet it, he should have made some proper motion for relief, either in the circuit court or in this court. He cannot make his objection for the first time now, on an appeal from a decree on the merits.

III. In reviewing the allowances made by the circuit judge, we consider ourselves necessitated to take the sum of $8968.06, which the judge says is made up of items admitted by Beckley, as an established demand. It is insisted on behalf of Beckley that no such admission is made; that the judge deduces his conclusions from the evidence and the commissioner's report, and that these do not justify him; and an argument is made to convince us of his error. It is not unlikely that this view of the judge's statement may be correct; but as it was competent for the parties to make admissions and concessions at the hearing, we do not consider ourselves at liberty to disregard the judge's statement.

In some other particulars we are satisfied the judge did not allow to Beckley all he was entitled to. These cases will be mentioned, but without going into explanations or argument.

He was charged with lumber received at Mendon to

the amount of $1064.91 more than we think there is any satisfactory evidence he received.

He was refused allowance for $580.74 paid on debts of H. Barnebee & Co., and $47 interest, because the payments were made by Bourn, and not by Beckley himself. But we think the evidence sufficiently shows that the payment by Bourn was only an indirect payment by Beckley, and that it was made with assets of the copartnership which were charged to Bourn when received.

The circuit judge disallowed the sum of $125.70 paid by Beckley to satisfy a judgment in Allegan against one Kellicutt. The objections to the allowance of this were that the copartnership had made and delivered to Beckley a schedule of the demands for him to pay, not including this among them, and that it was not in fact their debt. But the schedule was only a guide to him: he was not restricted to it if other debts appeared. And as to this demand it appeared that H. Barnabee & Co. were under obligations to indemnify Kellicutt, and it ought therefore to have been regarded as their debt.

Beckley in his discharge account credited himself with $524.31, errors in inventorying lumber to him. This was disallowed, as we think, erroneously.

Beckley also claimed an allowance for logs returned by him to the amount of $149 more than was credited. This claim should have been acceded to. There is no reason for believing that he used, made way with, or was fairly chargeable with any more logs than he debited to himself.

If an accounting is made up with these allowances, it will stand as follows:

Debited to Beckley by the circuit judge		$10,510 77
Deduct lumber	$1,064 91	
Payments by Bourn	580 74	
Allegan judgment	125 70	
Loss on lumber	524 31	
Logs not used	149 00	
Allowed by the judge	7,127 28	
		9,571 94
Balance against Beckley		$938 83

In this, some considerable sums paid by Beckley for moving lumber are disallowed. As the lumber was moved for convenience in selling, it may reasonably be supposed the expense was added to the price; and as the lumber is accounted for at the invoice price only, and certainly in some cases was sold for more, the judge was fairly justified in rejecting these charges.

It is probable that some further items ought to be credited to Beckley, and especially some accounts made by him in disposing of the assets and which remain uncollected; but we do not feel sufficiently convinced of this or of any other supposed errors to be justified in making further changes either way.

The commissioner allowed Beckley $1000 for his services. The circuit judge allowed but $232.58 "for services and expenses." If he acted in good faith and with reasonable diligence in the discharge of his duties, there is no reason why he should not be compensated. Bad faith in some dealings is charged against him, but we do not think it is made out. There is also a charge of concealment and evasion in respect to his accounts, which we also find not established. He is chargeable, however, with some degree of carelessness in his accounts, and in view of this and of the short time he acted as trustee, perhaps $500 would be a fair allowance. For the payment of the balance, $671.41, decree will be entered, and the costs in the circuit court will follow. But as the decree of that court is largely reduced on appeal, Beckley is entitled to the costs of this court, to be set off against the sums awarded against him.

The other Justices concurred.

FREDERICK H. MCCULLOCH ET AL. v. STEPHEN BARNEBEE ET AL.

Chancery Record.

The Court will not disturb a decree dismissing a bill where documents on which the rights of the parties depend are not set out in the record or proofs.

Appeal from St. Joseph. Submitted April 22. Decided April 30.

BILL for accounting. Complainants appeal.

O. J. Fast and *Dallas Boudeman* for complainants.

Germain H. Mason and *John B. Shipman* for defendants.

MARSTON C. J. The record in this case is imperfect in that certain instruments under which the rights and responsibilities of the parties were created do not appear. Apart from this, however, an examination of the evidence returned shows that complainants have no equity in support of their claim against defendant Barnebee. As the record stands it might not be safe, and certainly would not be profitable, to enter upon an extended discussion of the questions of fact presented, and none, therefore, will be attempted.

The decree dismissing the bill must be affirmed with costs.

The other Justices concurred.

ADDISON P. COOK v. IRA D. PERRY.

Practice—Notice of trial—Discontinuance—Election between counts—Defective pleadings—Evidence of repetition of false representations—Interest as damages.

An action based in part on a charge of conspiracy was noticed for trial without bringing in a portion of the defendants. A defendant who had pleaded asked that the case be set down for trial on a day certain, and at the day fixed objected that the others had not been brought in. On motion the plaintiff was allowed to discontinue as to those who had not been brought in. *Held* that the right to object to the irregularity in noticing the case for trial was cut off by consenting to go to trial and by the order of discontinuance, and that it was of no consequence that the discontinuance was not entered on the record, and that there was no formal amendment of the declaration.

The omission to enter an order of discontinuance upon the records of the court is cured by the statute of amendments.

Where there is no misjoinder of counts or of causes of action, the refusal of the court to compel the plaintiff to elect between the counts of the declaration is not reviewable. The union of different statements is allowed by the rules of pleading.

Where defects in a declaration are not substantial and are not demurred to, they cannot be relied on in the appellate court.

In an action for fraud from false representations to the plaintiff, evidence that defendant made the same representations to another person after the cheat had been accomplished, is admissible, not as substantive proof of the statements, but to identify the agency by which the fraud was committed, and to show that plaintiff had not misunderstood the defendant, and because in cases of fraud a wide range of examination is allowed.

Where testimony is competent for one purpose, it is properly admitted in the absence of any request limiting its application.

Where, at the beginning of a trial, the judge informed a party how he should rule as to the measure of damages, and the party made no objection and offered no suggestion in his requests for instructions, he could not properly assign error on a charge embodying the same views.

Interest is allowable as damages for falsely representing the value of land traded to the plaintiff for other lands, where the difference in their value does not adequately redress the fraud.

Error to Ingham. Submitted April 20 and 21. Decided June 11.

43 623
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153 5115

TRESPASS ON THE CASE. Defendant Cook brings error.

R. C. Dart and *G. T. Gridley* for plaintiff in error. A plaintiff cannot notice for trial a case against several defendants only part of whom have appeared, until interlocutory judgment is entered against those who have suffered default, *Cuddeback v. Fanely* 2 Wend. 624; nor can he discontinue as against them and proceed against the rest without amending his declaration, *Ballou v. Hill* 23 Mich. 60; *Mumford v. Fitzhugh* 18 Johns. 457.

M. V. & R. A. Montgomery for defendant in error. Where a case is set down for trial at the request of a party he is estopped from objecting to proceed on the ground that some of the defendants have not been served, 1 Burr. Prac. 69-71; Hilliard on Remedies for Torts 197 § 15.

GRAVES, J. This is a writ of error brought by Cook to reverse a judgment given against him in the circuit court for the county of Ingham. Perry brought a special action on the case against Calvin Faling, Matilda J. Faling and the plaintiff in error, for an alleged cheat by which he was induced to convey valuable premises in Ingham county to Mrs. Faling, in exchange for lands in Jackson county nearly or quite worthless.

The declaration contained two counts, and averred that the defendants conspired together and were confederates in the perpetration of the fraud. Faling and wife were not served and did not appear; but the plaintiff in error pleaded the general issue. The case being noticed for trial at the May term in 1879, the counsel for Cook on the first day requested the court to set the trial down for a day certain, and the court complied and designated the 20th day of the month. At that time it was called up, and the counsel for plaintiff in error then objected that it was not in readiness because the defendants Faling were in the record and had not been brought in. Whereupon the opposing counsel asked

leave to discontinue as to those defendants, and to be permitted to prosecute against Cook alone; and the court gave leave and the cause was discontinued as to said two defendants.

Whether it was or was not strictly regular to notice the cause for trial in the condition of the proceedings is a matter of no importance. The trial was appointed by consent, and the other defendants were dropped. All ground of objection was cut off. *Berresford v. Geddes* L. R. 2 C. P. 285. The failure to have the discontinuance entered in the record is of no consequence. The omission is rendered harmless by the statute (Comp. L., §§ 6049, 6052, 6051, subds. 12 and 13). *Berresford v. Geddes* supra; *Com. v. Taylor* 113 Mass. 1. The neglect of a formal amendment of the declaration is equally unimportant. *Emery v. Whitwell* 6 Mich. 474; Tidd's Prac. 955.

The court was asked to confine the defendant in error to one of the two counts, and to compel him to elect the one on which he would proceed. This was refused, the court stating at the same time, however, that he should restrict the jury on the subject of damages to the value of the property Perry parted with, and would not permit the value of the property he understood he was bargaining for to be made a criterion of damage.

It was not matter of right to have the plaintiff compelled to elect between the counts of the declaration. The union of different statements is allowed by the rules of pleading, and there was no misjoinder of counts or of causes of action. The action of the court is not reviewable.

The objections brought against the declaration for want of certainty and other faults of the like nature are entirely ineffectual.

There is no defect of substance, and whatever inaccuracies may be suggested, they should have been met by demurrer. They are to be considered now as waived or cured by the statute. Comp. L., ch. 190; Tidd's

Prac., 459, 460, 954 et seq.; *Hatheway v. Sackett* 32 Mich. 97; *Van Middlesworth v. Van Middlesworth* id. 183; *Reynolds v. Lounsbury* 6 Hill 534; *Huntress v. Burbank* 111 Mass. 213; *Upham v. Damon* 12 Allen 98; *State Ins. Co. v. Todd* 83 Penn. St. 272; *Nichols v. Poulson* 6 Ohio 305; *Campbell v. New England, Mut. L. Ins. Co.* 98 Mass. 381, 400.

The defendant in error had sworn to certain statements Cook had made to him relative to the location, character and ownership of the land to be received in exchange for the premises to be transferred to Mrs. Faling, and which the defendant in error claimed he relied on as true, and found to be false. After the exchange was made, but before the fact was known to Cook, and after the cheat had been discovered, a son of defendant in error sought an interview with Cook, in the assumed character of a stranger, to draw from him, as the witness claimed, a repetition of the representations previously made to his father, and he was allowed to give his version to the jury of what then occurred, and except in one or two particulars it ascribed to Cook the same representations in substance as had been sworn to by defendant in error. The exceptions were in favor of the defense. This evidence was allowed against the objection that the "talk took place long after the trade was consummated and deception perpetrated, and that it was incompetent to show what Cook said subsequently."

It was not error to overrule this objection. The ground that the negotiation had taken effect was not a valid reason for a total exclusion of the evidence. It is obvious that it could not be used as substantive proof of the alleged false statements constituting the fraud and causing the injurious result. The mischief had been done, and it could not possibly be charged to subsequent falsehoods. But evidence which is not admissible for one purpose is often lawful for another, and it is not uncommon to make proof of matters occurring after the consummation of the wrong, in order to identify the

agency which produced it, or fortify the antecedent indications. *Respublica v. Hevice* 3 Wheeler Crim. Cases 505, 507, 508; *Reels v. Knight* 8 Mart. (La.) [N. S.] 267; *Jackson ex dem. Hooker v. Mather* 7 Cow. 301. Where the question being tried is whether a fraud has been committed, the law allows a wide range of examination. Wheaton Ev. § 33 and cases cited: *Castle v. Bullard* 23 How. 172; *Lincoln v. Claflin* 7 Wall. 132; *Butler v. Watkins* 13 Wall. 456; *Rea v. Missouri* 17 Wall. 532.

As this testimony, so far as it favored the defendant in error, went to show that Cook gave in substance the same representations to the witness that defendant in error had sworn to, it tended to show that the latter was correct in his account of what Cook said in his interview with him. It conduced to satisfy the jury, if they believed the witness, that defendant in error had not misunderstood the plaintiff in error, or misreported his representations. And in this view, at all events, it was competent. And being competent for one object its allowance was proper. No request was made for confining its application, and hence no point arises on that subject. We are to presume it was correctly applied.

The objections to the declaration, with reference to which the fourteenth and fifteenth requests to charge were preferred, have been disposed of, and it follows that the allegations of error based on the refusal of those requests must abide the fate of the objections and that no special comment is necessary.

Complaint is made of the instructions in regard to damages. It was shown that four of the lots Perry conveyed to Mrs. Faling were under a mortgage for $275, accompanied by the note of Perry & Son, and that these lots were by the arrangement transferred subject to the mortgage; but that Perry & Son had been since compelled to pay and satisfy the note. The judge told the jury that if Perry was entitled to recover, the proper measure of damages would be the actual value of the lands transferred by him, with interest, and without ref-

erence to the mortgage. The record discloses that when at the opening of the trial, and in passing on an objection that the declaration claimed the value of the property bargained for as well as the value of the property parted with, the judge informed the plaintiff in error that he should rule that the value of the lands Perry transferred, and not the value of the others must be the guide in getting at the damages, the plaintiff made no objection and to all appearances entirely acquiesced; and notwithstanding a great many requests to charge were made at the close, nothing to the contrary was suggested. The judge was hence led to assume by the attitude and silence of the plaintiff in error that the view suggested in respect to the question of damages was accepted. Such being the case the ruling is not a fit ground for alleging error. *Morrish v. Murrey* 13 M. & W. 52; *Martin v. Great Northern Rw. Co.* 30 E. L. & E. 473: 16 C. B. 179; *Boeklen v. Hardenbergh* 60 N. Y. 8; *Lincoln v. Lincoln* 12 Gray 45; *Milk v. Middlesex R. R. Co.* 99 Mass. 167; Broom's Max. 131, 132; Whart. Max. 20.

But there is likewise room for another answer. There is no ground for contending that the recovery is larger than it would have been if the value of the property alleged to have been bargained for by Perry had been taken as a basis, and certainly no objection could have been urged to that course. The mortgage debt had been discharged by Perry and was no longer in the way. The whole property, without any deduction, was gone, and it does not appear from the case that any valuable recourse against any one remained to Perry to effect a distinct recovery of the amount paid on the note. The defendant in error maintained that the deed received by him conveyed no title whatever, and moreover that the land described in it was substantially worthless, and the case shows nothing different. The land claimed to have been bargained for is shown to have been worth at the least nearly if not quite $3000, and with interest added considerably more than the amount of damages given by

the jury; and at the last term we decided in *Snow v. Nowlin*, ante p. 383, that interest in such a case was allowable.

What has been said affords an answer to all the points contended for in argument, and results in showing that no ground for a reversal of the judgment is presented, and it is affirmed with costs.

The other Justices concurred.

THE MUSKEGON BOOMING COMPANY v. ALFRED E. UNDERHILL ET AL.

Delivery of logs—Stoppage in transitu.

A contract for logs provided that the vendor should drive them to the main stream to be taken in charge by a booming company when its drive went down, and if too late should follow and overtake the drive. The vendor engaged another person who was taking a large quantity of other logs to meet the drive to take these logs with them, but he missed the drive, and as he could not separate the logs and had engaged to take the other logs farther, he took these also, the vendor apparently acquiescing. When he reached his destination the main drive had not been overtaken, and as he was going no farther, the purchaser, without objection from the vendor, engaged the booming company to go back and collect the logs and run them to a designated place. *Held* that the course of the parties to the contract of sale amounted to a delivery which cut off any lien the vendor might have had on the logs, and his right to stop them in transit.

Error to Muskegon. Submitted April 23. Decided June 11.

TROVER for the conversion of a quantity of logs by disregarding the vendor's notice to retain them and by delivering them to the purchaser. Defendant brings error.

Smith, Nims, Hoyt & Erwin for plaintiff in error.

Stevenson & McLaughlin for defendant in error.

GRAVES, J. The present defendants in error brought this cause before us at the April term a year ago, and we sent it back for a new trial. 40 Mich. 660. At the trial so ordered they recovered, and the booming company now asks a reversal for alleged errors thereat. It is unnecessary to follow the able and extended range of counsel. The controversy, when examined closely, appears to be subject to decision on comparatively narrow ground. The final result is fairly dependent on the effect of the transaction at Big Rapids. But for the purpose of ascertaining that effect it is essential to keep in mind and apply the antecedent and surrounding circumstances. They were invariably contemplated by the parties, and were regarded as belonging to the arrangements. In all the various proceedings there was a tacit reference, if not an express one, to the surrounding conditions and established methods of lumbering along the Muskegon and its branches, and no one can form an intelligent idea of the transactions by viewing them as abstractions and apart from their practical relations.

The written contract between Eldred & Co. and the Underhills covering the sale of the logs in question is given in the former report of the case and need not be repeated here. In making it the parties had direct reference to the fact that the booming company was engaged in the general business of driving, assorting and delivering logs in the main river, and received from log owners each season a kind of agreement, together with an account of the logs they desired the company to take in charge, and that the company made up what is called a main drive, consisting of the various lots in readiness at the mouths of tributaries or elsewhere in the main stream, and the respective lots agreed for being taken in charge in the progress of the drive down the river.

For the purpose of the view now taken the case is to be considered on the state of facts advanced or admitted on the part of defendants in error. The land belonged to them, and the logs were to be put afloat in

the west branch of the Muskegon, in Missaukee county, some few miles above the mouth, the latter point being from fifty to sixty miles above Big Rapids on the main river. They were all put in about the first of March and marked with the registered mark of Eldred & Co., and in April Eldred & Co., acting as owners, reported to the booming company their ownership and the situation and description of the logs, and agreed with it to take charge at their expense and drive and deliver the logs to such places as they should direct, the drive to be extra from Big Bapids. It is admitted that the booming company had no contract or dealings with defendants in error.

According to the contract between the sellers and buyers, Eldred & Co. and the Underhills, the ownership vested in the buyers as soon at least as the logs were put afloat; but the sellers retained the possession with the obligation to deliver it to the buyers in the main river in time for the main drive by the booming company, subject however to this, that if the passage out to the main river should turn out to be too late for that drive, then the sellers, at their own expense, should go down and make delivery of possession where the main drive should be overtaken. These provisions for delivery of possession in the main river and at the drive were in the exclusive interest of the buyers. They imposed burdens on the sellers, but conferred no advantage, and the buyers were not bound to insist on them. Being for the exclusive benefit of Eldred & Co., it was competent for Eldred & Co. to waive them. The end to be gained was to get the logs into the hands of the booming company for Eldred & Co., to be held and handled as their property and according to their orders.

The presence of the main drive was not adverted to as of any importance in itself in connection with the intended shift of possession. It was thought of in that relation because no other condition suggested itself as likely to favor or accommodate the end. The essence

of the contract for passing the possession was as just stated, and if fully and fairly accomplished the absence of an aid originally supposed to be necessary ought not to have any influence. In the early spring Watson was getting ready to drive for four others down the west branch to the main river, and about the first of April the Underhills contracted with him orally to take the logs in controversy. There were of these a little over 135,000 feet, whilst the other logs composing his drive contained more than 30,000,000. The terms of the contract they made with him were brief. They were simply that he should drive the logs out of the branch for fifty cents a thousand.

A junction with the spring drive of the booming company at the mouth of the branch was contemplated, and that the company would there receive these logs in the interest and on account of Eldred & Co., and proceed with them down the river. It held the before-mentioned contract with Eldred & Co., and the logs bore their consignment mark as made upon them by Underhills. Watson proceeded down the branch and reached the mouth on the second day of August, and then found that the drive of the booming company, which was expected to take his, had passed there about the first of July. The other parties for whom he had been driving were anxious to have their logs go forward that season, and were of opinion that the booming company drive, which had passed down, might be overtaken at Big Rapids, and they desired him to follow on to that place.

The logs in question were mixed up in the drive, and he had received no express directions concerning their disposal. No arrangement had been made for their removal from the drive, and no one was near to take special charge of them, or to give new directions as to what should be done with them. At the same time, as between the buyers and sellers, Eldred & Co. and Underhills, the latter were bound to put the logs into the hands of the booming company as the former's bailee

and custodian. Any necessity for separating this small lot from the great mass of the Watson drive at the mouth of the branch had not been contemplated, and under the circumstances it was fairly impracticable. Being thus encumbered with these logs, and having consented to go as far as Big Rapids, in order, if possible, to get his drive into the hands of the booming company, he kept on with the whole to that place.

The Underhills were informed of this proceeding, and made no objection. They manifestly acquiesced, and in the next year, with full knowledge of all the facts, paid Watson for the service.

On arriving at Big Rapids, which was as far as he would go with the drive, it was ascertained that the drive of the booming company, which he had sought to overtake, was still considerably ahead, and that it was not possible to get the logs in question into the hands of Eldred & Co., or into the hands of the booming company, as their bailee and custodian, by means of a junction with that drive. The accomplishment of the substantial end was found to be impracticable in the precise way which had been originally considered as the only feasible one. The logs in question were still on Watson's hands, as they were at the mouth of West Branch. He had no further advice from Underhills in regard to their disposal. They were in the river, intermingled with the others, and according to all appearance, and so far as anything was known on the subject, were in a condition to be rightly taken possession of by Eldred & Co., through the booming company, without qualification.

Eldred & Co. and the other parties desired to get the logs of the Watson drive down to Muskegon that season, and they finally made an arrangement with the booming company to effect that object. Watson was satisfied with the arrangement, but it seems that he went no further as repects these logs than simply to abandon them to the consignees. The booming company went back and took charge of the drive. Eldred & Co. undertook

to pay the actual expense for these logs, and the booming company assumed possession on behalf and for the benefit of the former, and ran them down and made delivery in accordance with their orders. What is the unequivocal meaning of the facts? Eldred & Co. had contracted for the logs and had paid money upon them. Underhills, the sellers, were bound to pass the possession to the booming company for them and on their account in the main river, and the logs were on their way in the river therefor, and were as completely open to be taken as they would have been in case they had got down the branch in season and been fallen in with by the main drive.

Eldred & Co. were not bound to remain indifferent spectators, and see the logs become derelict and fall a sacrifice to the failure of an incidental and unimportant circumstance; nor were they bound to incur the trouble and expense of weeding them from the common mass in order to exclude them from their hands on taking control of the others. The absence of the drive had no such serious effect. The parties never intended it. There was no mistake of fact. Neither was there any fraud or deception. The Underhills had provided no express and immediate agency for a formal giving of possession, and it was not necessary. Transactions are hourly occurring all over the world where possession passes with no greater attention to details and ceremony. The parties declare themselves through their acts, and the law encounters no difficulty in ascertaining what is meant. At the time in question the logs were accessible, and there was nothing in the situation to oppose their being taken.

When considered in the light of all the circumstances, the conduct of Underhills could admit of but one construction. It amounted to a distinct and positive dedication of the possession of the logs to Eldred & Co., through the booming company, and continued, without any offer or apparent ground of revocation or withdrawal, until some time after it had been accepted and acted upon,

and after the rights and interests of third parties had attached. It is unnecessary to cite authorities. The position rests on elementary principles.

The conclusion is that the Underhills virtually offered possession to Eldred & Co. at Big Rapids, and that they accepted the offer and virtually took possession by having the logs there taken into custody at their expense and on their account as owners, by the booming company, and that all right of lien, if any previously existed, and all power to apply the doctrine of stoppage *in transitu* was cut off. The case was given to the jury on wholly different principles, and the right to question the deviation is saved.

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

The other Justices concurred.

JAMES THOUBBORON v. FRANK S. LEWIS, MITCHELL SYKES ET AL.

Contracts—Discretion as to design.

A contract for a large quantity of fancy signs was made by correspondence, the manufacturer submitting a design which the customer returned after writing thereon the word "Established," and the date "1875." He wrote the word and the date on opposite sides of a shield which was in the middle of the sketch. He afterwards wrote to the manufacturer, referring to the signs of rival dealers, and saying "We want something to beat theirs." The manufacturer placed the word and the date at the head of the signs and the customer refused to take and pay for them. *Held*, a case in which the arrangement of the design had been left to the reasonable discretion of the manufacturer and that he was entitled to recover.

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

ASSUMPSIT. Plaintiff brings error.

James O'Brien and *Atkinson & Atkinson* for plaintiff in error.

Henry A. Harmon and H. A. Chaney for defendants in error. Payment for goods cannot be enforced unless the order therefor was strictly fulfilled, *Clark v. Wright* 5 Phil. 439; *Smith v. Brady* 17 N. Y. 173; *Martus v. Houck* 39 Mich. 431; *Neville v. Frost* 2 E. D. Smith 62; *Gibson v. Cranage* 39 Mich. 49; usage cannot be shown to explain a contract if inconsistent with its terms, *Barnard v. Kellogg* 10 Wal. 383.

GRAVES, J. The defendants, who are bakers in Detroit, refused to accept and pay for a quantity of fancy signs made for them by the plaintiff, an ornamental sign painter in New York. The negotiation between the parties was carried on by correspondence. The defendants, under date of April 12, 1879, wrote for samples of show cards about the size and style of Hathaway & Son's "Gloss Polish" card, with black ground and red letters, leaving out the picture and putting in "plain, bold letters." The plaintiff replied under date of the 14th, and enclosed a sample of signs just made for a coffee house, and observed that he could design for defendants' trade, and finish up in the style of the coffee-house sign, at certain rates specified.

The defendants, under date of the 17th, sent a rough plan, which they desired the plaintiff to *sketch* for them and return as soon as possible, when, as was added, "we will send you order for same," and the plaintiff thereupon drew a pencil sketch and sent it on the 21st. On receipt of this the defendants wrote on the 28th, "Enclosed we return you sketch for label with the words 'Established 1875' added," and on inspecting the sketch the word "established" appeared in written characters on one side of the shield and the figures "1875" on the other. The communication proceeded as follows: "We

would like to have our name and crackers a little more prominent; that is, have the letters shaded so they will stand out bold and distinct, viz." [giving a pen and ink illustration of the style of letter meant], "or something of that style. Please advise us when we can expect them. Give us a clean, neat label."

The plaintiff replied May 1st that he would make the alteration required and get the signs out without delay, and suggested that it would take about two weeks. A week later the defendants wrote that they have been told that some show signs faded soon, and they desired him to use a color which would not fade by exposure to the sun; and nearly a week thereafter they wrote again that a person whom they named was then at work on a show card for certain establishments who were competitors of defendants, and they observed: "We want something that will beat theirs." "C [the person getting up the other card] said yours would all fade out in a short time."

The plaintiff five days later forwarded from New York to defendants one thousand and thirteen of the signs, and on their arrival at Detroit the defendants refused to accept them, and among the grounds of their refusal the most material was that the word "Established" and the figures "1875" were placed at the top instead of being put in the positions where they were noted on the sketch by defendants. The plaintiff then brought this action for the price, and the jury, under a charge which in substance required them to find for defendants, unless, in their judgment, the defendants left the placing of the new matter before mentioned to the plaintiff's discretion, returned their verdict in the defendants' favor.

The essential question is whether the learned judge, in leaving this point to the jury, and they in deciding it as they did, committed an error, and, on full consideration, we think they did. That the place assigned to the added word and figures by the plaintiff was in better

taste than the original, and that the card so shaped stood a better chance than it would have done otherwise to "beat" the signs preparing for the other bakers, has not been disputed. The word "established" containing eleven letters, and the date of the year only four figures, the appearance of the long word on one side of the shield, and the short date on the other, would involve irregularity and breach of harmony, and would cause more or less offense to the eye.

But defendants contend, as they did below, that the agreement was fixed and absolute in requiring the added matter to be set down exactly where they had noted it on the sketch, and that artistic ideas were not admissible to overrule the stipulation; that they were entitled to have their own way, and to stand on strict compliance with the bargain, whether the production would be more or less pleasing to artists and amateurs.

The right of the defendants to insist upon substantial observance of the contract in every particular is, of course, not disputed. But the question is, by whom and how shall the contract be interpreted? As it depended on written and not oral materials, and they called for no expository aid beyond a consideration of the interior and surrounding circumstances, it was for the court, and not for the jury, to decide whether the plaintiff was authorized to fix the position of the word and figures in question.

And it only remains to speak of the interpretation called for. The negotiations being by letter and between business men, and not being conducted in the phraseology of lawyers, or with the care about expression generally observed in formal documents, it is not safe and would not be fair to test it by any technical rules. It is a case for equitable interpretation, and the proper course is to look at all the circumstances, and then read the arrangement as the defendants were bound to consider it as understood by the plaintiff. *Mizner v. Kussell* 29 Mich. 229-231; *Potter v. Ontario & Livingston*

Mutual Ins. Co. 5 Hill 147; *Barlow v. Scott* 24 N. Y. 40; *Hoffman v. Ætna Ins. Co.* 32 N. Y. 405–413; *Gunnison v. Bancroft* 11 Vt. 493; 2 Kent's Com. 557; *White v. Hoyt* 73 N. Y. 505.

He was a skilled designer and printer of fancy signs, and the defendants sought his service because he was so, and because they were not artists in that line. They believed he had special qualifications, not only for executing, but also for designing, and they felt that to attain their object it would be expedient to confide much to his taste and judgment. Whilst they might indicate the ends they sought, it would be requisite to leave to his decision in a considerable degree the final choice of the proper means. They wanted something superior to their neighbors, and it was expected of him to draw upon his ability to satisfy them. In referring to the lettering they explained that they desired to have the letters shaded so they would stand out bold and distinct; but instead of confining him to any precise method they told him they wished "something" of the style of the pen and ink illustration, and concluded by saying, "give us a clean, neat label."

By this they required his judgment of what would be "clean and neat," and impliedly excluded his employment of anything or any arrangement which in *his* view would be unseemly and out of proportion. Again, they requested that he would use durable colors, and so inferentially referred the selection in that regard to his judgment. And finally, they desired that he would provide a card that would "*beat*" the signs their neighbors were getting up.

Now these various observations and directions, when viewed, as it was natural they should be, in the light of all the facts, were obviously and directly calculated to impress him with the notion that he was allowed discretion wherever he was not positively instructed, and that he was not expected to display the added matter in any predetermined position, or in any way which according

to his judgment would mar the effect and constitute a blemish. The whole grouping had been left substantially to await his suggestions, and the interference of the defendants had been confined to ideas of style.

When they received the sketch they were careful to point out certain changes in the letters to be employed, and to specify certain effects they desired to have produced, but were silent as to the position the new matter should occupy. The only thing which might have indicated that they preferred any special position for it was the fact of its being noted on the sketch as before mentioned. But the other circumstances were too expressive of the purpose that the plaintiff should use his own judgment, to leave any room to claim that he understood or was bound to understand from the fact referred to that the new matter was required to be printed where it was noted.

Considering the situations of the parties relative to each other, and what they were negotiating about, and in what manner, the conclusion is just that it was incumbent on the defendants to make known distinctly to the plaintiff that the word and figures in question must be inserted where they were noted, if it was meant to hold him to a literal adherence in that respect to the sketch. They did not do so, but gave their correspondence such shape as to authorize him to infer that he was to make a change, if neatness, in his judgment, required it.

On the whole, the jury ought to have been instructed that the placing of the word "established" and the accompanying figures "1875," was left to the reasonable discretion of the plaintiff.

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

The other Justices concurred.

LETTER FROM THE JUDGES TO THE GOVERNOR.

In the Matter of Head Notes to the Opinions of the Supreme Court.

The Constitution of Michigan empowers the Supreme Court to appoint a Reporter. The Legislature of 1881 enacted that the Judges should file head notes with their opinions. *Held* that as the duties of Reporter were well known when the Constitution was adopted, they were inseparable from the office, and as his principal duty was to prepare head notes to the decisions of the court, the act deprived the office of one of its essential duties, and was unconstitutional.

The Constitution of Michigan leaves the opinions of the Supreme Court free for publication by any person. By Act 168 of 1879 the publication of the Supreme Court Reports was let by contract, and the act provided that the Secretary of State should hold the copyright. The Legislature of 1881 enacted that the Judges should file head notes with the opinions. *Held* that as the opinions are excluded from copyright, and the head notes would be the only remaining feature of the reports worth copyrighting, the act would impair the obligations of the contract with the publishers and is therefore unconstitutional and void.

SUPREME COURT ROOM,
Lansing, April 12, 1881.

Hon. David H. Jerome, *Governor of the State of Michigan:*

Dear Sir:—At the present session of the Legislature an act was passed entitled "An act to require the Judges of the Supreme Court to prepare and file a syllabus to each and every opinion by them delivered," approved March 31, 1881.

The undersigned Justices of said Court, fully appreciating the importance of a speedy publication of the opinions filed or a synopsis thereof, would be glad indeed to comply with the requirements of the act referred to if there were not insuperable objections in the way.

That a compliance with the provisions thereof would

be adding to our duties we consider no objection, but whatever our personal wishes may be, it is our duty to be guided and governed by the fundamental law of the State, and while we would prefer to comply with the requirements of the act, yet we cannot establish a precedent which in time, owing in part to an increase of business in the Court, might prove exceedingly burthensome to those who will succeed us, more especially as third parties have acquired vested rights under existing laws, which, in our opinion, compliance with this act would violate. Courts and judges, in the performance of their official duties, cannot consider their personal preferences and comply with a request made, however high the source from whence it comes, or universal the demand may be, if not in accordance with the law; it is their duty, though none object, to observe and respect the Constitution and rights of third parties acquired thereunder. Our great respect for the opinions of two co-ordinate departments of the government concurring in the constitutionality of this act, in its passage and approval, has caused us to act with deliberation and examine the matter with care, and to decline complying therewith only because of the clear and unquestionable provisions of a higher law. We respectfully submit that the act in question is unconstitutional for the following reasons:

Article vi., sec. 10 of the Constitution gives the Supreme Court power to appoint a Reporter of its decisions. At the time the Constitution was framed, and adopted by the people, the duties of Reporter of the decisions of a court were, and from time immemorial had been, well known. In providing in the Constitution for such an officer, the usual and customary duties were contemplated as belonging to the office and inseparably connected therewith: so well was this understood that they were neither pointed out in that instrument, nor were they, as in many other cases, left to be prescribed by the Legislature. That the duties pertaining to that office may be defined, enlarged or diminished by the legislative

department, in many respects, we do not question, but the essential duties cannot be taken away, as this in effect would result in the abolishment of the office, a power not within the province of the Legislature. At present and for some time, it has been customary for the Judges in preparing their opinions, to incorporate therein a statement of the facts. Should the Legislature at some future time require the Judges to prepare such statement, which clearly might be done if the present act is valid, there would then be nothing of importance remaining of an intellectual character for a Reporter to perform, beyond the capacity of an ordinary proof-reader. The office could thus in separate acts be deprived of its dignity and importance, and its abolishment might then follow as a matter of course.

The objection to the validity of this act does not end here.

The Constitution also provides that the opinions of the Supreme Court shall be filed in the office of the clerk of the court, and another provision declares that all laws and judicial decisions shall be free for publication by any person. The act in question provides that the syllabus prepared shall be "filed with the papers of the cause"—"filed with the opinion." A syllabus when prepared by the Judges and so filed becomes at once a part of the record and in the language of the Constitution becomes "free for publication by any person." The declaration in the act in question making the syllabus so prepared and filed "accessible to the public and all newspapers in the State desiring to publish the same," would give no new right and adds nothing to this constitutional provision. The policy of the legislation in this State of late years has been to prevent individuals from acquiring by copyright an exclusive interest or right in the published reports, and to secure the same to the State. Of course no copyright could secure to the State or individuals any exclusive right in what the Constitution has declared shall be free for publication by any person. At present the opinions are not protected by

the copyright to the State, but only such matter included in the reports as does not constitute any part of the public record. Under this legislation a contract has been entered into by the State with a firm for the publication of the reports for a series of years. And the act under which such contract is made expressly prohibits any copyright being taken out, except to the Secretary of State for the use and disposal of the State. This copyright to the State is the only protection which the contractor has against publications by private parties. It would follow therefore that under the act in question any person could, without permission from the State, publish the official opinions and syllabi on file, and thus effectually destroy the rights of the State and publishers under present existing contracts. The opinions and syllabi being made free by this act, everything of real value in the present reports would be taken from under the protection of the copyright to the State. It is apparent that the effect would be to very materially impair the obligation of existing contracts entered into with the State, which we must assume was not intended by the passage of this act.

We have deemed it proper, as a matter of courtesy and respect, to submit these our reasons to you and through you to the Legislature, so that our non-compliance with the requirements of the act referred to may be understood. We would be pleased to assist publishers and others in gaining access to the public records and files of the court in so far as the same can consistently be done, but the act in question is in the direction of establishing a new system quite different from that contemplated by the Constitution and by other existing legislation; and it seems obvious to our minds that the Legislature has not contemplated the radical change which we think would result from it, since all the previous legislation respecting the Reporter, his duties and compensation, has been left in force.

All of which is respectfully submitted.

ISAAC MARSTON,
JAMES V. CAMPBELL,
B. F. GRAVES,
T. M. COOLEY.

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2. The proper course on accounting is for parties to appear before a commissioner, with charge and discharge accounts, and after full hearing before and report by him, to file exceptions to his report, and bring the case to a hearing upon them. *Barnebee v. Beckley*, 613.
3. The circuit judge has a right to hear a case of accounting without a reference to a commissioner, but when he does so, he should proceed as a commissioner would, and the parties should make their complaints of his action in such form that, if the case is appealed to the Supreme Court, the precise matters in controversy will be indicated by the record. *Id.*

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2. An invalid writ of attachment will not justify the officer who executes it in seizing property in the possession of mortgagees. *Id.*
3. Proceedings by attachment are statutory and must conform strictly to the requirements of the statute. *Id.*
4. The right of a defendant in attachment to the possession of the attached property is not determined by the levy of subsequent attachments, so as to preclude him from moving to dissolve the earlier levy. It cannot be assumed that he had lost his right to a return. *Sheldon v. Stewart*, 574.
5. A debtor's right to the dissolution of an attachment on his property is not affected by the fact that later attachments have also been levied, as he is not dispossessed by the levy and no question arises as to the restoration of the property. *Schall v. Bly*, 401.
6. A circuit court commissioner has jurisdiction of proceedings to dissolve an attachment. *Id.*
7. A circuit court commissioner's rulings as to the admission of evidence in proceedings to dissolve an attachment, are not reviewed in the circuit court on writ of certiorari. *Id.*
8. The special findings of fact made by a circuit court commissioner in a proceeding to dissolve an attachment are conclusive if there was any evidence to support them. *Sheldon v. Stewart* 574.
9. The circuit court, like the Supreme Court, cannot on certiorari review upon the facts the proceedings before a circuit court commissioner for the dissolution of an attachment. *Schall v. Bly*, 401.
10. The same attorney can act in proceedings to levy and to dissolve attachments in distinct suits by different creditors against the same debtor. *Id.*

ATTORNEY AND CLIENT.
1. Disbarred attorneys can no longer appear as attorneys in any court of record in this State, nor represent any person in court as attorney, agent, or otherwise. *Cobb v. Judge of Superior Court*, 289.
2. A party cannot appear in a court of record by an agent who is not an attorney duly licensed to practice. *Id.*
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BAIL.
1. The certificate of the county clerk to the acknowledgment of a recognizance of bail is not a record made in open court and

may be impeached by testimony in denial of the execution of the bond; and it is error to charge as matter of law that the certificate is entitled to more weight than the unsupported oath of the defendant in an action against the bail. *Spencer v. Fish*, 226.

2. In an action on a recognizance of bail the jury must determine whether to believe the certificate of acknowledgment thereto, or the testimony of the defendant denying the execution of the bond. *Id.*
3. The special bail for defendant in a suit by *capias* are not bound to indemnify against charges in the declaration that are materially different from those in the affidavit on which the writ issued. *Fish v. Barbour*, 19.
4. Special bail to a *capias* are not held to a case not made by the affidavit for the writ, unless, perhaps, where the record shows that the recovery was limited to the matters in the affidavit. *Id.*
5. The renewal of jurisdiction by waiving the right to a discontinuance given by plaintiffs' neglect to follow the statutory procedure in suits by *capias*, cannot at common law bind the sureties on the defendants' recognizance of special bail. *Id.*
6. Sureties on a bail bond are presumed, for their own benefit, to have the custody of their principal; and they may surrender him to exonerate themselves. *Koch v. Coots*, 30.
7. In an action by special bail against the sheriff for having falsely returned to an execution that the defendant could not be found in his county, it cannot be said as matter of law that the sheriff's neglect to inquire of the plaintiff in the execution as to the defendant's whereabouts, tended to show negligence. *Id.*

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1. The willful destruction of an ice-field by running a vessel so near it as to break it up gives a cause of action for damages within the Boat and Vessel Law. Comp. L., ch. 210. *People's Ice Co. v. Steamer Excelsior*, 336.
2. On an appeal under the Boat and Vessel Law, the case must be certified by the trial judge, and the Supreme Court cannot act on a mere transcript of the stenographer's notes of the testimony taken on the trial below. *Id.*
3. The Supreme Court can modify a decree on proceedings under the Boat and Vessel Law by including the parties to the bonds. *Id.*
4. Proceedings under the Boat and Vessel Law are special, and differ from proceedings in either law or equity. Such causes are tried like cases at common law, but on appeal are to be tried over again, and the appellate court is not confined to the evidence taken below. *Id.*
5. Appeals under the Boat and Vessel Law resemble those from probate and justices' courts rather than in equity, and complete provision for obtaining testimony is made to enable the appellate court to determine the rights of the case, and not simply to find whether the judge below had come to a correct conclusion on the facts before him. *Id.*
6. Upon appeals under the Boat and Vessel Law the hearing shall be *de novo*, not upon oral testimony but on a transcript of the pleadings and decree below and on any original depositions and testimony taken by either party within sixty days after the appeal unless the time is extended, such testimony being taken by deposition before a judge or circuit court commissioner if the witness is within the State, and by commission if not. *Id.*
7. Where an appeal from a decree under the Boat and Vessel Law, was brought to the Supreme Court under a misapprehension as to the requirements regarding the taking of testimony, the court gave them additional time within which it could be taken. *Id.*

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2. When unexpected difficulties occur in the transportation of property by a carrier, and the consignor agrees, in view of them, to pay a sum for the carriage, in addition to what had been previously fixed upon, and pays the same, he cannot recover it back as paid without consideration. *Id.*
3. A railroad company receiving and receipting goods for transportation to a point beyond the terminus of its road, is not to be understood as undertaking to carry the goods beyond such terminus, unless there is an express promise to that effect. But if the company receipts the goods to be transported to a point beyond its line for a definite sum named, and the consignor is charged a larger sum therefor, the receipting company is responsible to the consignor for the excess. In an action to recover such excess, a variance in describing the defendant's undertaking as one for the carriage of the goods for the whole distance, is immaterial. *Id.*

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COMMON COUNTS,
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COMPARISON
of handwriting: EVIDENCE, 11.
COMPENSATION
for wife's services: HUSBAND AND WIFE, 3.
to accountant: ACCOUNTING, 1.
of constables serving criminal process in DETROIT CITY, 3.
to partners for services: PARTNERSHIP, 9, 10.
COMPLAINT.
of circuit judge's action on ACCOUNTING, 3.
for disorderly conduct: CRIMINAL LAW, 22.
COMPROMISE.
1. In an action on a promissory note the plaintiff had to show, in explaining certain memoranda on the note, that a compromise had been made, but he claimed that as it had been only partly fulfilled, he was entitled to recover in full. *Held* that as he did not show what the terms of the compromise were, or in what the default lay, he was only entitled to recover the amount remaining unpaid on the compromise sworn to. *Browning v. Crouse*, 489.
COMPTROLLER
cannot modify city CONTRACTS, 34.
CONSENT.
partition may be made by: PARTNERSHIP, 12.
CONSIDERATION:
for married woman's note: HUSBAND AND WIFE, 4, 5.
statement of, in administrator's deed: ESTATES OF DECEDENTS, 16.
sufficiency of, when not inquired into: CONTRACTS, 8.
presumption as to retention of: TAXATION, 7.
payment without: CARRIERS OF GOODS, 2.
for mutual subscriptions: CORPORATIONS, 7.
presumption from payment of: PARTNERSHIP, 3.
money paid agent without: ACTION, 1.
CONSIGNOR. See CARRIERS OF GOODS, 2.
1. Constables have always been peace officers in the arrest of criminals and the prosecution of crimes and disturbances, and have always been chosen by popular vote for the preservation of peace in the territory of their constituents. *Allor v. Wayne County Auditors*, 76.
2. Constables in Michigan are local peace-officers, ministerial officers of justices of the peace, and bailiffs of courts of record of criminal jurisdiction in the county. Their power to serve process in civil cases was conferred merely because civil powers were conferred on justices. *Id.*
powers and compensation in DETROIT CITY, 3.
CONSTITUTION
change in does not validate ordinance: MUNICIPAL CORPORATIONS, 10.
CONSTITUTIONAL LAW:
validity not passed on till necessary: STATUTES, 2.
CONSTRUCTION:
of agreement to pay royalty: CONTRACTS, 20.
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CONTRACTS: *Contract relations*, 1; *implied*, 2, 3; *with incompetents*, 4; *acceptance*, 5–7; *consideration*, 8; *Sunday contracts*, 9–14; *construction*, 15–22; *proof to vary*, 23–27; *right to terminate*, 28; *actus Dei*, 29, 30; *failure to perform*, 29–31; *abandonment*, 32; *impairing obligation of*, 33; *municipal contracts*, 27, 34.

1. Where a man and his wife live with the man's father, on the father's farm, it is presumed that they are not living together under any contract relation, but as a family, and that there can be no claim for services, or for supplying the ordinary conveniences of life. *Mason v. Dunbar*, 407.
2. An agreement to compensate cannot be implied from the mere fact that services were rendered. *Godfrey v. White*, 171.
3. A merchant who for his own purposes sends his customers to another dealer does not thereby acquire any claim on him. *Id.*
4. Bargains cannot be made with a person who is imbecile, but where a man is merely weak and helpless, and in the exclusive care of his children, there is no legal impediment to their dealing with him if he retains legal capacity, though their bargains should be closely scrutinized. *Mason v. Dunbar*, 407.
5. An offer to employ another does not bind the person making it unless he is given to understand that it is accepted; and the right to compensation arises from the parties having placed themselves in the relative positions of employer and employed, and assumed respectively their obligations and duties. *McDonald v. Bœing*, 394.
6. A contract of employment must always be a voluntary act on the part of the employer and employed, coinciding in a common understanding. *Id.*
7. B declined to give M the refusal of certain lands for which he had asked him a stated price, but wrote him promising to pay the usual commissions if he sold it to good parties. M did not reply, but caused a purchaser to negotiate with B, and the result was that B sold the land personally, though at a lower price. *Held* that the written offer was not general, but was to be construed in connection with the previous statement of price, and as M had not notified B that he accepted it, he was not entitled to claim any commissions under it. *Id.*
8. The sufficiency of the consideration for an honest bargain cannot be inquired into if there was any consideration of value which was not separable at the time into specific values. *Kennedy v. Shaw*, 359.
9. The support of public worship is a work of charity that may properly be done on Sunday, and subscriptions taken for that purpose from a congregation assembled for religious exercises on the Sabbath may be sustained. *Allen v. Duffie*, 1.
10. Raising subscriptions from a congregation on Sunday to pay off a church debt, or purchase a house of worship is a work of charity within the exception to Comp. L., § 1984, which prohibits Sunday business. *Id.*
11. Mere convenience of time and opportunity cannot be the test as to whether work done on Sunday is work of necessity. *Id.*
12. All the necessary and usual work connected with religious worship is work of charity. Religious societies are formed to do good to mankind, and charity is active goodness. *Id.*
13. Whether work done on Sunday is within the exception to the Sunday law as a work of necessity or charity is purely a question of law and statutory construction, and depends in all cases upon the intent of the statute. *Id.*
14. A note made on Sunday is not void at common law, and in a

suit on a foreign note any foreign statute invalidating it must be proved. *O'Rourke v. O'Rourke*, 58.

15. The manifest meaning of a contract must govern until it is shown to be impracticable. *Gillett v. Bowman*, 477.
16. A contract for the shipment of timber in providing that it should be paid for "on the returns of each load shipped" contemplates its measurement at the port of destination. *Id.*
17. A written assurance that "we here agree to pay every man you have in your employ * * * that stays by you until you put in your logs" does not cover persons not employed till after it was received. *McDonald v. Bewick*, 438.
18. The construction of written instruments is for the court to determine, but the identity of words is for the jury who may be aided by parol evidence of facts connected with the giving of the paper. So *held* where a note which purported in the margin to be for $50 was so written in the body that it was uncertain whether it was for fifty or sixty dollars. *Paine v. Ringold*, 341.
19. An agreement to pay a servant what the employer thinks he is worth, binds the latter to pay what the services are reasonably worth, and does not leave him to fix his wages at such sum as he sees fit after the services are performed, although such an agreement will be valid if understood. *Millar v. Cuddy*, 273.
20. The assignee of a patent right agreed to pay the patentee a certain sum "for each and every one of said machines sold or caused to be sold by him." *Held* that this covered any transfer by him of the mere right to use the machine, and any "settlements" made with persons who were using machines of the kind. *Rogers v. Torrant*, 113.
21. In an action based on a shortage of logs sold, it was shown that the measurement was to have been by the scale of a certain company in whose boom the logs were lying. *Held* proper to instruct the jury that the parties must be deemed to have contracted with reference to the scale by which the boom company's business was ordinarily conducted, which was sufficiently proved by the measurement which they had entered on their books and acted on, and the original tally need not be produced. *Smith v. Kelly*, 390.
22. A contract for a large quantity of fancy signs was made by correspondence, the manufacturer submitting a design which the customer returned after writing thereon the word "Established," and the date "1875." He wrote the word and the date on opposite sides of a shield which was in the middle of the sketch. He afterwards wrote to the manufacturer, referring to the signs of rival dealers, and saying "We want something to beat theirs." The manufacturer placed the word and the date at the head of the signs and the customer refused to take and pay for them. *Held* a case in which the arrangement of the design had been left to the reasonable discretion of the manufacturer, and that he was entitled to recover. *Thoubboron v. Lewis*, 635.
23. A written contract to deliver timber at certain rates is not varied by parol testimony of an understanding between the parties that it was to be measured at the ports of destination. *Gillett v. Bowman*, 477.
24. Parties to contracts may come to an independent agreement upon details as to the execution thereof at the time of contracting as well as afterwards. *Id.*
25. Where a contract is express no provision can be implied. *Keystone Lumber & Salt Mfg. Co. v. Dole*, 370.

26. The actual value of services may be shown in an action on a contract of employment where there is a direct conflict of evidence as to the agreed rate of payment. *Richardson v. McGoldrick*, 476.
27. In an action involving a contract with a municipal corporation to do its printing at a certain per cent below the statutory rates for legal notices, it being farther provided that no constructive charges should be allowed, evidence of a printer's usage allowing double measure in paying for "figure work," such as advertisements of tax sales, was *held* to be inadmissible. *Advertiser & Tribune Co. v. Detroit*, 116.
28. A right to terminate a contract subject to a liability for damages does not entitle one party to alter its terms on giving notice to the other. *Gillett v. Bowman*, 477.
29. Small pox is not *actus Dei* in such a sense as to excuse a school district from liability on a contract with a teacher the performance of which the district has prevented by closing the school. *Dewey v. School District*, 480.
30. The act of God which will release one from the obligation of a contract is one which renders its performance impossible. *Id.*
31. Failure to perform a contract to furnish water for floating logs is not excused by an accident whereby the dam was broken, if the contract does not provide for accidents, nor if it is a continuing contract and the dam can be repaired in time for substantial compliance. *Keystone Lumber & Salt Mfg. Co. v. Dole*, 370.
32. A man made an agreement with his son-in-law whereby the latter was to take care of him if he would pay over all the wages he earned. He afterwards abandoned his son-in-law's house on account of personal violence, and sued him for breach of the agreement, claiming repayment of the money he had already paid him, except a sum which he credited for his board. *Held* that the case should have gone to the jury on the extent of the provocation for abandoning the arrangement; or, if there was no contract, on the amount of counter-claim to which defendant would be entitled for plaintiff's board. *Ehlert v. Klenger*, 61.
33. The Constitution of Michigan leaves the opinions of the Supreme Court free for publication by any person: By Act 168 of 1879 the publication of the Supreme Court Reports was let by contract, and the act provided that the Secretary of State should hold the copyright. The Legislature of 1881 enacted that the Judges should file head notes with the opinions. *Held* that as the opinions are excluded from copyright, and the head notes would be the only remaining feature of the reports worth copyrighting, the act would impair the obligations of the contract with the publishers and is therefore unconstitutional and void. *Matter of Head notes*, 641.
34. Where a city charter gives the common council the power to audit and allow accounts, and only permits the comptroller to receive, examine and report upon them, the latter cannot modify a contract on the part of the city, and the city is not bound by notice to him that has not been communicated to the council. *Advertiser & Tribune Co. v. Detroit*, 116.

given in escrow, action enjoined: INJUNCTION, 1.
changing by parol: INSURANCE, 1.
not apportionable: DAMAGES, 2.
for paving under charter of DETROIT CITY, 6, 7.
damages for non-performance: DAMAGES, 2.
obligations of, in charter: CORPORATIONS, 2.

proof of, by subscribing witness: REPLEVIN, 5.
promise to pay: MORTGAGE OF LANDS, 8, 9.
CONVERSION:
property annexed to land: TROVER, 4.
suit against surviving partner: PARTNERSHIP, 14, 15.
COPY
of PUBLIC RECORDS, 1.
CORPORATIONS. *Incorporation*, 1; *inviolability of charter*, 2–6; *powers of trustees*, 7; *sale by trustees to themselves*, 8; *suit by trustees*, 9; *mortgage of franchises*, 10–13; *action by stockholders*, 14–16; *powers of committee*, 17; *labor debts*, 18–25.

1. The choice of trustees to hold property, at a meeting of the members of a religious society, is not enough to effect a statutory incorporation in Michigan. *Allen v. Duffie*, 1.
2. Where the essential elements of a contract do not appear in a statute granting a franchise, the courts will not be astute in discovering contract obligations therein for the purpose of defeating later statutes on the same subject, but will solve all doubts in favor of the State. *Detroit v. Detroit & Howell P. R. Co.*, 140.
3. A charter forbidding a turnpike corporation to erect toll-gates within city limits does not oblige them to remove gates brought within the limits by their subsequent extension. *Id.*
4. The rights of a private corporation under its charter cannot be taken away as forfeited until there is a judicial finding of the forfeiture. *Id.*
5. Act 219 of 1879 requiring any plank road company to remove its toll-gate beyond municipal limits is invalid as taking property without due process of law. *Id.*
6. The reserved right to amend the charter of a corporation will not authorize the Legislature to add requirements that would be inconsistent with constitutional principles, as by depriving it of its property without due process of law. *Id.*
7. The trustees of any incorporated society, for a lawful purpose, may receive gifts and promises on its behalf; and a mutual subscription for its benefit may be supported even though no payee is named, if the object is made definite and certain. The mutual promise of the subscribers is a sufficient consideration. *Allen v. Duffie*, 1.
8. Whether a trustee's sale of corporate property to trustees and members of the corporation can be sustained if seasonable objection is raised—*Q. German Am. Seminary v. Kiefer*, 105.
9. Where suit is brought in the name of certain persons as trustees of a certain religious society, and there is no averment or recital of incorporation, it must be assumed that none exists or is relied on. *Allen v. Duffie*, 1.
10. A corporation regularly organized under the laws of Michigan can mortgage or convey its rights, property and franchises acquired thereunder as though it were a private individual, subject only to the restrictions which the Legislature may have imposed; and it may do so whether the rights were conferred on the original incorporators, or on subsequent stockholders. *Detroit v. Mutual Gas Co.*, 594.
11. Corporate rights are granted to the corporation and not to the individuals interested therein; the stockholders may separately assign and transfer their stock, and apart from their rights the corporation can mortgage its property, rights and franchises. *Id.*
12. On foreclosure sale of a mortgage of the property, rights and franchises of a corporation, the purchaser acquires the same

rights and privileges as were held by the corporation and subject to the same terms and conditions, and he may transfer them to any other corporation capable of taking and exercising such franchises. *Id.*

13. An ordinance authorizing a gas company to supply the city, declared that if it should enter into any combination with any company concerning rates, the ordinance should be void, and if it sold its property, franchises or privileges to any other gas company, it should forfeit its property. The company mortgaged its property and afterwards made an arrangement with another company to divide the city between them. On foreclosure of the mortgage the company's property, rights and franchises were bought in by an individual who transferred it to a new corporation. On a bill to enjoin both companies from supplying the city, it was *held* that they could not be subjected to the forfeiture of the city's consent to supply gas, or of their property, as such a measure of damages was not recognized either at law or in equity, and the bill was accordingly dismissed. *Id.*
14. A resolution appointing a committee to investigate the affairs of the corporation, if adopted by the holders of a majority of stock at a regular meeting, is a valid act of a corporation organized under Comp. L., ch. 83, to engage in commerce and navigation. *Star Line v. Van Vliet*, 364.
15. The management of a corporation belongs generally to the directors, but the holders of a majority of stock can act where it is necessary to investigate the management. *Id.*
16. Where the records of a corporation show that a resolution was adopted by the stockholders, it may be presumed, unless the contrary is shown, that it was adopted by the holders of a majority of stock. *Id.*
17. Power conferred upon a committee to investigate the affairs and accounts of a corporation, implies everything necessary to execute it, such as employing an accountant and obtaining clerical assistance for him. *Id.*
18. A Michigan court may well take judicial notice that stockholders in the mining corporations of the State are largely non-residents and beyond its jurisdiction for rendering personal judgments. *Milroy v. Spurr Mt. Iron Mining Co.*, 231.
19. The individual liability for labor debts imposed on stockholders by the Constitution means a liability beyond that of members of the corporation and does not refer to their several liabilities. *Id.*
20. The Legislature may prescribe the means of enforcing the Constitutional liability of stockholders for labor debts. *Id.*
21. An action for labor debts brought under act 113 of 1877 cannot be maintained against stockholders unless joined with the corporation as defendants. *Thompson v. Jewell*, 240.
22. Under Act 113 of 1877 the property of a corporation is made primarily liable for labor debts, and the individual property of stockholders secondarily liable, and the stockholder's property cannot be taken until the corporate property is exhausted. *Milroy v. Spurr Mt. Iron Mining Co.*, 231.
23. Act 113 of 1877 authorizes suits for labor debts to be brought against a corporation alone or jointly with one or more of the stockholders. *Held* that where a claimant has elected to sue the corporation alone and has recovered judgment, he cannot afterwards bring his action on the same debt or upon a claim including it against the corporation and stockholders jointly, or conversely. *Id.*

24. A perfected claim for labor will not support separate actions for the different amounts into which it may be divided, even though portions of it have been assigned and the division of the claim corresponds to the periods for which the laborer was hired. *Id.*
25. An action on a labor debt may be brought in a justice's court against a corporation and stockholders jointly under Act 113 of 1877, § 35. *Id.*

de facto, suit by: RAILROAD COMPANIES, 4.
reorganization after foreclosure: RAILROAD COMPANIES, 1, 2.

COSTS.
1. Costs may be denied where a question of practice is involved that is fairly open to question. *Culver v. McKeown*, 322.
2. Costs cannot be awarded to parties who have not appealed, even though the decree is modified as to them. *Powers v. Golden Lumber Co.*, 468.

denied on reversal of order allowing execution for alimony: HUSBAND AND WIFE, 12.
on dismissal of *certiorari*: HIGHWAYS, 2.
taxability, excluded from bill of exceptions: PRACTICE, 10.
credited to assignee: DEBTOR AND CREDITOR, 11.
on appeal in accounting: PARTNERSHIP, 13.

COUNTIES: *Claims against*, 1, 2; *county seat*, 3–6.
1. The original jurisdiction over claims against counties which belonged to the courts at common law before the adoption of the Constitution was not taken away by the constitutional provision that the board of supervisors should have exclusive power to adjust all claims against their respective counties, and the sums so fixed should be subject to no appeal, The purpose of the provision was to take away the right of appeal. *Endriss v. Chippewa County*, 317.
2. A claim against a county for moneys illegally collected by its officers will sustain an action at common law against the county, and such an action is not prohibited by the clause in the Constitution giving the board of supervisors "exclusive power to adjust all claims against their respective counties." Art x. § 10. *Id.*
3. The legislature in organizing a county may provide for the original location of the county seat by commissioners named in the act. *Rice v. Shay*, 380.
4. Where a county seat has been located according to law, it remains where it was established until lawfully removed. *Id.*
5. Mandamus lies to compel the county treasurer to keep his office at the county seat. *Id.*
6. Under the Constitution and laws of Michigan, the proposition for the removal of a county seat may originate with the board of supervisors. No previous action of the legislature is necessary to give the board authority to act. It is immaterial that in the particular case the county seat was permanently located by the legislature when the county was organized. The permanent location is only until a removal takes place in accordance with law. *Bagot v. Antrim Supervisors*, 577.

not charged with fees for services under FRAUDULENT DEBTORS' ACT, 2.

COUNTY SEAT. See COUNTIES, 3–6.

COURTS.
1. Courts cannot lawfully be subjected to executive or ministerial interference in the exercise of their functions, and should not submit to it or receive directions for any purpose except

from such other courts as by the Constitution have superintending control over inferior courts. *Allor v. Wayne County Auditors*, 76.

2. Judicial power in Michigan can be vested only in courts and judicial officers, and all the judges and judicial officers must be elected directly by the people of the State or of the local districts. *Id.*
3. Courts must look beyond the particular case to the governing principle and be governed thereby regardless of special and temporary inconvenience. *Detroit v. Detroit & Howell Plank Road Co.*, 140.
4. Proceedings in another court, when introduced collaterally, cannot be questioned for error or irregularities where no jurisdictional defect is alleged against them. *Mitchell v. Chambers*, 150.
5. A decision by a majority of a court is conclusive, and a change in the composition of the court will not warrant a re-opening of the controversy unless the court itself orders a re-argument. *McCutcheon v. Homer*, 483.
6. The Legislature is not forbidden by the Constitution to give jurisdiction to the circuit courts in cases where the amount claimed is less than $100. *Milroy v. Spurr Mountain Iron Mining Co.*, 231.
7. Act 113 of 1877, § 35, provides that in actions on labor debts the clerk of the court shall indorse directions on the execution. *Held* to refer to the officer issuing the execution and not to exclude the justices' courts, in which the justice is his own clerk, from jurisdiction of such actions. *Id.*
8. The Constitution of Michigan empowers the Supreme Court to appoint a Reporter. The Legislature of 1881 enacted that the Judges should file head notes with their opinions. *Held* that as the duties of Reporter were well known when the Constitution was adopted, they were inseparable from the office, and as his principal duty was to prepare head notes to the decisions of the court, the act deprived the office of one of its essential duties, and was unconstitutional. *Matter of Head Notes*, 641.

what court can enforce partition: EQUITY, 40.

COVERTURE. See HUSBAND AND WIFE.

CREDIBILITY
of witness, EVIDENCE, 1.

CRIMINAL LAW: *Necessity of warrant*, 1; *power to examine and commit*, 2; *separate offenses*, 3; *informations*, 3–5; *withdrawal of count*, 6; *assaults*, 10–15; *intent*, 11–17; *manslaughter*, 17; *murder*, 18; *bigamy*, 19–21; *disorderly conduct*, 22, 23; *horse stealing*, 24, 25; *larceny*, 24–26; *robbery*, 27, 28; *prisoner's statement*, 29, 30; *sentence*, 31, 32.

1. Due process of law for the restraint of personal liberty requires a warrant issued by a court or magistrate upon a proper showing or finding, except in cases of reasonable belief of treason or felony, or breach of the peace committed in the presence of the officer. *Allor v. Wayne County Auditors*, 76.
2. The power to examine and commit persons charged with crime is not judicial, but is one of the duties of conservators of the peace, and it may be vested in other persons than courts; and those in whom it is vested by the Constitution cannot be deprived of it by legislation. *Id.*
3. Separate and distinct offenses, committed on different days, cannot be alleged in the same complaint and warrant. They

may be charged in different counts of an information, but the prosecutor must elect on which count he will proceed. *Tiedke v. Saginaw*, 64.

4. An affidavit attached to an information and stating that affiant has good reasons to believe and does believe the contents of the information to be true, is not such verification as will warrant an arrest, especially where there has been no preliminary examination and a *prima facie* case made out. *Swart v. Kimball*, 443.
5. An information for a statutory offense must identify and distinguish it from every other, and set forth specifically its statutory components. *Hall v. People*, 417.
6. A prisoner having been once in jeopardy upon a count which has been withdrawn by the judge at the trial, cannot afterward be held upon it. *Id.*
7. An information alleging a breaking and entry of a store not occupied with a dwelling, but not stating whether it was done either in the night time or in the day time, does not allege any offense under Michigan laws. *Id.*
8. An information for feloniously breaking and entering a store not adjoining a dwelling house, with intent to steal the chattels therein found, does not charge any offense known to the law. *Id.*
9. It would be burglary to break into, and arson to burn a house, during the temporary absence of the occupants. *Stupetski v. Transatlantic F. Ins. Co.*, 373.
10. In a prosecution for an assault with intent to commit rape, a charge in which the judge explains the crime and that of rape, and directs a verdict of guilty if the jury find beyond a reasonable doubt that the respondent on the occasion in question took hold of the complainant and used force to overcome her, —that she resisted, and that his intent was to overcome her resistance and gratify his passions notwithstanding, and that it was against her will, is *held* proper. *Mahoney v. People*, 39.
11. A mere intent to commit violence, accompanied by acts preparatory thereto, will not sustain conviction for an assault if it goes no farther. There must be present ability to carry out the intent, and the act done must be criminal and sufficiently proximate to the deed intended; and it is for the jury, under proper instructions, to determine whether it has proceeded far enough. *People v. Lilley*, 521.
12. Where an act is done with intent to commit an assault, but the intent is voluntarily abandoned, or is prevented while the distance between the parties is too great to commit an actual assault, there can be no conviction as for an assault. *Id.*
13. An assault is an inchoate violence to the person of another with the present means of carrying the intent into effect: threats are not enough; there must be violence actually offered, and within such distance that harm may follow it if the assailant is not hindered. *Id.*
14. An assault with intent to commit manslaughter is not an offense known to the law in Michigan. *Id.*
15. There can be no specific intent without deliberation, and as an act done on sudden impulse, like manslaughter, cannot be deliberate, there can be no such offense as an assault with intent to commit manslaughter. *Id.*
16. In a statute treating of offenses committed with a particular intent involving deliberation, *it seems* that general language referring to assaults with intent to commit any other felony must also contemplate deliberate intent. *Id.*

17. Manslaughter is the unlawful killing of another without malice or premeditation, though it often involves a direct intent to kill; where voluntary it arises from the sudden heat of the passions and is the result of temporary excitement wherein the reason is so disturbed or obscured by passion that an ordinary man of fair average disposition is liable to act rashly or without due deliberation or reflection and from passion rather than judgment. *Id.*
18. A homicide is murder and not manslaughter where there is evidence of actual malice or if the provocation to it was resented in a brutal and ferocious manner evincing a malignant disposition, or if before it was committed there was time for the perpetrator's passion to subside and his blood to cool. *Id.*
19. A civil marriage performed under a license irregularly issued, and under such circumstances that all concerned must be presumed to know that it gave no authority, cannot furnish ground for a prosecution for bigamy if not based on the voluntary consent of both parties, or followed by cohabitation or some recognition of a marriage entered into in good faith. *Kopke v. People*, 41.
20. An information for bigamy is not bad for merely omitting to allege the exceptions to the statute and negative their existence, if it avers both marriages and sets forth that the first wife was living when the second marriage took place. *Id.*
21. In an information for bigamy the averment of the first marriage is presumed to intend a lawful marriage, which the prosecution must prove; and the averment that the second marriage was felonious is sufficient without also charging it to have been unlawful. *Id.*
22. A complaint before a justice was held sufficient which alleged under the proper venue that "on the 2d day of February A. D. 1880, and for thirty days next preceding said day, at the city of Ionia, in said county, Lizzie L. Palmer is, and for said thirty days has been, a disorderly person within the meaning of section one of chapter fifty-three of the Compiled Laws of said State, for that she, the said Lizzie L. Palmer, at the city of Ionia aforesaid, is and was for said thirty days the keeper of a bawdy house, contrary to the form of the statute," etc. *Palmer v. People*, 414.
23. A justice is not held to strict rules as to the reception of evidence in proceedings for disorderly conduct, and his rulings will not be reviewed by the Supreme Court on *certiorari* farther than to see that injustice has not been done by them. *Id.*
24. Act 102 of 1877, if valid at all, cannot be made to cover a case of horse-stealing unless by the clearest averments, and will not support as an information for horse-stealing an information that consists of the ordinary charge of larceny and includes other property besides the horse. *Boody v. People*, 34.
25. A sentence as for the crime of horse stealing, to six years' confinement in the State prison, on conviction under an information for "grand larceny" which included other property besides the horse, is not authorized by Michigan statutes. *Id.*
26. Larceny is not classified in Michigan as grand and petty, and as "grand larceny" is not a crime known to Michigan law, and the crime known by that name at the common law might fall within the jurisdiction of a justice of the peace, it would be doubtful how far a conviction under that name would sustain a sentence for the higher grade of larceny. *Id.*
27. Where a robbery is committed by several persons acting in concert, it is proper on the separate trial of one of them to

show that the plunder was found with one of the others, or in the cell where he had been locked up. *People v. Whitson*, 419.

28. In a prosecution for robbery it was shown that after the robbery the complaining party went into a house in the door of which a woman was standing. *Held* that the witness could not be cross-examined as to the reputation of this woman as a prostitute, thief and brothel keeper. *Id.*
29. A person on trial before a justice should make his statement to the jury at the proper time, before the prosecutor has summed up, and if he does not do so, he cannot complain of the justice's refusal to allow him to do so afterward. *Palmer v. People*, 414.
30. The prisoner's statement in his own defense on a former trial of the same case may be introduced by the prosecution and shown to be false. *People v. Arnold*, 303.
31. A sentence pronounced under an apparently erroneous view, cannot be maintained by the Supreme Court on a different theory, as it would then become an original sentence by the appellate tribunal. *Boody v. People*, 34.
32. Comp. L., § 7998, authorizing an excessive sentence to be affirmed so far as lawful, does not apply where there is any other reason for reversing it. *Id.*

no waiver of right of trial by JURY, 2.
constables as peace officers: CONSTABLES, 1, 2.
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CROPS:
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CROSS-BILL:
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as to remarks of drawee: NEGOTIABLE INSTRUMENTS, 4.
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as to contribution to expenses of suit: TRIAL, 8.
of complaining party: CRIMINAL LAW, 28.
as to character of parties: TRIAL, 9.
as to criminal character: TRIAL, 12.

DAMAGES.

1. One who is defrauded into lending money on inadequate security is damnified as soon as the loan is made, and in an action for the fraud is entitled to recover the difference between the sum lent and the value of the securities at the date of the loan, and interest thereon from that date. *Briggs v. Brushaber*, 330.
2. An express contract to pay a certain sum per thousand for running certain logs, and for floating a part of them into the main stream, is not divisible and cannot be apportioned, part to running the logs and part to supplying the water; and in an action on the contract the measure of recovery would be the full contract price as agreed less any damages from breach of any part of the contract. *Keystone Lumber and Salt Manufacturing Co. v. Dole*, 370.
3. Interest is allowable in Michigan as damages for fraudulently representing the value of land sold or traded to the plaintiff where the mere difference in the values of the property traded will not make good his damages. *Snow v. Nowlin*, 383.

4. Interest is allowable as damages for falsely representing the value of land traded to the plaintiff for other lands, where the difference in their value does not adequately redress the fraud. *Cook v. Perry*, 623.

allegation of special damages: FALSE IMPRISONMENT, 1.

for injury from false return by tax-collector: TAXATION, 5.

DEBTOR AND CREDITOR.

1. Mere inquiry by a creditor to ascertain whether it would be more for his advantage to approve or contest an assignment made by the debtor, is not dishonest or unreasonable, and is not in itself equivalent to an inducement to others to act upon it. *Hubbard v. McNaughton*, 220.
2. Where a bill is filed in aid of execution and the question at issue is the good faith of a transfer of the land, and the purchaser is made a party defendant, and evidence is given tending to show that the sale was made with an evident intent to defraud creditors, his neglect to make an affirmative showing to support the sale, will warrant a court in giving their full force to any legitimate inferences drawn from the evidence given against it. *Id.*
3. The fraudulent character of an assignment does not depend on the assignor's opinion that what he does is not fraud in law. *Id.*
4. An assignment for the benefit of creditors is fraudulent if property is withheld that should be put into it, and if the assignors give away or place excessive liens on property that should not be so disposed of. *Id.*
5. A general assignment is invalidated by a clause purporting to bind the creditors to agree to it and release their claims in full and discharge the assignor from all liabilities as soon as their just proportion of the proceeds is paid to them.—COOLEY, J., dissents. *Id.*
6. An insolvent debtor cannot dictate to his creditors terms that shall make him independent of his legal obligations. *Id.*
7. It is fraud to intentionally withhold from a general assignment property which ought to have been included in it. *Farrington v. Sexton*, 454.
8. A general assignment that is broad enough in its terms to cover any property belonging to the assignor is nevertheless invalid if property is secretly kept back from the assignee and used for private purposes, and no authority is given to the assignee to take measures to set aside fraudulent transfers. *Id.*
9. A general assignee is not a *bona fide* purchaser, and general assignments are not exempted from the consequences of actual fraud that has any tendency to hinder, delay, or defraud creditors. *Id.*
10. Fraud in a general assignment is fairly inferable from the fact that the goods were inventoried at $55,011.68 and were appraised at $27,272.77, while the goods on hand five weeks before inventoried about $95,000; it may also be inferred from a showing that the assets of a certain company belonged to the firm making the assignment, and had been disposed of by collusion. *Id.*
11. Where an assignee for the benefit of creditors filed a bill in good faith to settle a question which related to the disposition of the fund in his hands, and fairly admitted of some doubt, he was allowed in making up his accounts to credit himself with the costs and his necessary expenditure in the suit. *Booth v. Conn. Mut. L. Ins. Co.*, 299.
12. The assignee of a debtor should distribute the fund realized

from the estate without regard to a claim for which his assignor was not personally liable, such as a debt secured by a mortgage on lands which the assignor had purchased subject to the encumbrance. *Id.*

13. Fraud as against creditors in a deed by the debtor is a question of fact, and if not explicitly found cannot be reviewed on error. *Johnson v. Crispell*, 261.

selection of exempt property: EXECUTION, 1–3.
delaying claim against ESTATES OF DECEDENTS, 12.
agreement to take pay from proceeds: PAYMENT, 4, 5.
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See ATTACHMENT; FRAUDULENT DEBTOR'S ACT; MORTGAGE OF CHATTELS.

DECEASED OPPONENT:
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DECLARATION
in EJECTMENT, 3.
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DECREE,
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error in reciting date of: MORTGAGE OF LANDS, 19.
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in foreclosure: MORTGAGE OF LANDS, 15.
modification of: BOAT AND VESSEL LAW, 3.
of probate court on executor's account: ESTATES OF DECEDENTS, 19.
of dismissal, not disturbed: EQUITY, 34.
personal, when not made: EQUITY, 32.
should follow the pleadings: EQUITY, 30.

DEEDS.

1. A voluntary conveyance deliberately made and delivered without mistake or contrivance or any understanding for a reconveyance, and on which the grantor receives the consideration, is binding on him. *Barber v. Milner*, 248.
2. Where a wife signs a deed given as security, only on condition that on payment of the amount secured the grantee shall convey the premises to a third person, the grantee cannot dispose of the property otherwise; and after he has conveyed as agreed, the validity of the trust to him cannot be questioned on the ground that it was not in writing. *Id.*

upon administrator's sale: ESTATES OF DECEDENTS, 16.
record of, as evidence in EJECTMENT, 6.
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to mortgagee on foreclosure: MORTGAGE OF LANDS, 22, 23, 25.
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DEFICIENCY
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DEFINITIONS:
"assault:" CRIMINAL LAW, 13.
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DELAY:
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as cutting off lien on logs: SALE, 1.
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signed without reading, inadmissible in EVIDENCE, 10.

DESCRIPTION
of property, in REPLEVIN, 7.
of land, declared for in EJECTMENT, 3.

DESIGN.
discretion as to: CONTRACTS, 22.

DETROIT.
1. Municipal courts cannot be authorized to try extra-municipal crimes; and justices of the peace in Detroit have power under the general laws of the State to dispose of all criminal business arising in Wayne county outside of the city. *Allor v. Wayne County Auditors*, 76.
2. The Metropolitan Police force of Detroit, so far as lawfully constituted, is merely an additional force of constables and watchmen appointed by the State for certain limited purposes. It cannot supersede the local peace officers for all common law purposes. *Id.*
3. Constables are the only peace officers elected by the corporation of Detroit, and they can act within the city as well as elsewhere in the county in serving the criminal process issued by justices, and are entitled to compensation for such service. Their powers cannot be superseded by the exclusive authority to serve process within the city conferred by the Police Act upon members of the Metropolitan Police. *Id.*
4. The Public Works Act of Detroit requires proposed public improvements to be submitted to the Board of Public Works for estimates and recommendations. *Held* that bids for paving contracts could not properly be invited until such reference and report. *Butler v. Detroit*, 552.
5. The constitutional requirement that the title of an act must express its purpose, is not violated by a provision in an act "to establish a Board of Public Works" whereby proposed public improvements must be referred to such Board before the common council can carry them out; nor does such a provision unduly limit the legislative authority of the council. *Id.*
6. Under the charter of Detroit a paving contract cannot be extended unless work has been actually begun upon it in good faith. *Id.*
7. An injunction against the sale of property on a paving assessment was allowed where the common council advertised for bids before the proposed improvement had been referred, as required by law, to the Board of Public Works, and because the contract had been extended in violation of the charter before any work had been done. *Id.*

DETROIT HOUSE OF CORRECTION.
1. The maintenance of prisoners sentenced by the Recorder of Detroit to the Detroit House of Correction is a proper charge against Wayne county, even though no contract has been made for their support; and the county auditors must audit claims therefor at reasonable rates. *Detroit v. Board of Auditors of Wayne County*, 169.

DISCHARGE
of sureties on official bond: SURETYSHIP, 1.
of sureties on forthcoming bond in REPLEVIN, 11.

DISCLOSURE
of garnishee: GARNISHMENT, 5.
DISCONTINUANCE.
omission to enter order of: PRACTICE, 3, 4.
DISCRETION
as to amendment at final hearing: EQUITY, 22.
to refuse new trial: TRIAL, 40.
of manufacturer as to design: CONTRACTS, 22.
DISMISSAL:
leave to file another bill: TAXATION, 8.
leave to sue again in EQUITY, 31.
of bill, without prejudice: EQUITY, 22.
of bill, not preventing defense at law: TAXATION, 9.
of writ of error for non-joinder: PRACTICE, 5.
of appeal, case not settled: PRACTICE, 9.
of divorce bill, affirmed: EQUITY, 33.
DISSOLUTION
of ATTACHMENT, 5-10.
DISTRIBUTION:
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of proceeds of executor's sale: ESTATES OF DECEDENTS, 20.
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DIVISION FENCE:
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DIVORCE:
for cruelty: HUSBAND AND WIFE, 11.
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DOMESTIC RELATIONS:
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DOWER
does not estop from claiming HOMESTEAD, 1.
DUE PROCESS OF LAW:
requirement of warrant: CRIMINAL LAW, 1.
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of SHERIFF, 1, 2.
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binding sureties on official bond: SURETYSHIP, 2.

EJECTMENT: *Right of action*, 1; *Parties*, 2; *Pleadings*, 3; *Proof* 4-9; *Lien for taxes*, 10.

1. Adjoining owners orally agreed that one of them should keep up a division fence but should keep it entirely within his own bounds. After twenty years the fence was moved to the boundary and ejectment was brought for the strip of land cut off by its removal. *Held* that the action would not lie. As the oral agreement was void and the owner of the strip might have withdrawn from it, the strip was never held adversely to the owner whose title was recognized in the agreement and always afterward. *White v. Hapeman*, 267.
2. When a married man lives upon forty acres of land, and an adjoining strip of land is in dispute between him and a neigh-

bor, the latter, in bringing ejectment for the strip, need not join the defendant's wife in the suit, as presumptively she has no homestead interest in the land in dispute. *Bunce v. Bidwell*, 542.

3. A declaration in ejectment for "a portion of a strip of land ten rods wide off from the west side" of a designated forty-acre lot, is fatally defective because it neither gives the length or width of the strip, nor so identifies it that possession may be given in case of recovery. *White v. Hapeman*, 267.
4. When both plaintiff and defendant in ejectment claim under a particular person, the latter's title is mutually admitted, and plaintiff need not go farther back in the chain of title. *Eames v. McGregor*, 313.
5. Plaintiff in ejectment must inquire of the defendant in possession as to the nature of his claim, and the latter must truthfully explain it, and his statements and explanations are admissions concerning the nature and extent of his right, which plaintiff may put in evidence to show that both claim from the same source, and that plaintiff has paramount title. *Id.*
6. The record of a deed cannot be excluded from evidence in an action of ejectment for the reason that it had not been recorded until after suit was begun. *Id.*
7. Where the parties in ejectment claim under a person of the same name, and there is evidence to support, but none to contradict, the inference of identity, it is reasonable to assume that it was the same individual. *Id.*
8. Plaintiff in ejectment showed title from the grantee of one John McGregor, and also offered evidence that the defendant, James McGregor, was in possession before plaintiff's purchase, and had told the latter's agent that he was on the place by the permission of his brother John, and after saying that if he was paid for his crops he would yield possession at once, refused to do so, though he claimed no title. Defendant offered no evidence. *Held* that the case should have gone to the jury on an instruction that if they believed the undisputed evidence, and found that defendant rested on the title held by John before he conveyed, they should find for plaintiff. *Id.*
9. Judgment for defendant on a finding in ejectment cannot be disturbed unless the facts found would warrant judgment for plaintiff. *Johnson v. Crispell*, 261.
10. A defendant in ejectment on suffering judgment cannot in the same case recover for the amount of taxes paid by him. *Ellsworth v. Freeman*, 488.

bill in aid of: EQUITY, 18, 23.
by heir of mortgager of HOMESTEAD, 7.
cannot be brought by mortgagee: MORTGAGE OF LANDS, 11.
notice in: HOMESTEAD, 8.

ELECTION:
imperfect finding in QUO WARRANTO, 1.
between counts of declaration: PLEADINGS, 4.
judges and judicial officers must be elected: COURTS, 2.

EMPLOYMENT.
offer and contract of: CONTRACTS, 5, 6.

ENFORCEMENT
of taxes: TAXATION, 4.

ENCUMBRANCE
deducted from bid at administrator's sale: ESTATES OF DECEDENTS, 16.

EQUITY: *When will relieve*, 1–10; *appearance to demur*, 12; *final order*, 13, 14; *pleadings*, 15–27; *practice*, 28–35; *receivers*, 36–39; *partition*, 40.

1. Equity will relieve where a party has so enforced his legal rights as to work injustice to another. *Gilbert v. Haire*, 283.
2. Mistakes of law cannot usually be made a ground of equitable relief when standing alone. *Lapp v. Lapp*, 287.
3. Equity gives, in case of fraud, a concurrent remedy to that which may be had at law. *Wyckoff v. Victor Sewing Machine Company*, 309.
4. Where the objection to an equitable remedy is one that must be passed upon at the final hearing, after all the evidence is in, it is not to be favored. *Id.*
5. Equity will not interfere where, with full knowledge of the facts, suit on a merely constructive trust has been delayed until many of the persons concerned in the transaction are dead, and the recollection of the others is such that the court must be in doubt whether the case established by the evidence is not partial and misleading. *German American Seminary v. Kiefer*, 105.
6. An equitable action of assumpsit, if it lies at all, will be outlawed by the same lapse of time as bars an action at law, particularly if it rests on a merely constructive trust and the defendant has always denied the equity and relied on an adverse claim. *Id.*
7. Courts of equity will not encourage the splitting of causes of action and needless litigation. *Id.*
8. *It seems* that bringing suit against only one of several persons to recover an entire sum received by him under a constructive trust, but divided with the others, should preclude separate suits against the rest if the complainant had full knowledge of their interests when he elected to sue a particular defendant. *Id.*
9. A bill to set aside a deed as against a subsequent bond, on the ground that it was made by a person who was insane at the time, and continued so until he died, establishes no equity greater than that of the grantee, and should be dismissed. *Davis Sewing Machine Co. v. Barnard*, 379.
10. Laches alone is not necessarily conclusive against a complainant's equities when he is not of a suspicious nature nor prompt to assert his rights. *Wyckoff v. Victor Sewing Machine Company*, 309.
11. A court of law will not in a collateral case review irregularities in the procedure of a court of equity, if they were not jurisdictional. *Ruggles v. First National Bank of Centerville*, 192.
12. An appearance for the exclusive purpose of demurring to the jurisdiction does not admit it if the substantial matter of the bill is improper for the cognizance of the court. *Woodruff v. Young*, 548.
13. An order refusing to enjoin a replevin suit, is not final and appealable. *Merch. & Manuf'rs' Nat. Bk. of Detroit v. Kent Circuit Judge*, 292.
14. An order enjoining a replevin suit for property to which plaintiff claims title, is in the nature of a final order and is appealable. *Id.*
15. Evidence is not to be set out in a bill. *Hubbard v. McNaughton*, 220.
16. Bills complaining of fraudulent intent can hardly contain very special averments. *Id.*
17. A bill is multifarious that seeks to compel an accounting as to

the management of an estate, and to enforce complainant's right as devisee, and which charges the executrix with fraud in obtaining from complainant a deed of property, and a co-defendant with individual frauds. It is also demurrable for the misjoinder of defendants, as separate individual frauds cannot sustain a joint litigation, since neither is answerable for the frauds of the other. *Woodruff v. Young*, 548.

18. A prayer for foreclosure and sale as an independent remedy is inconsistent with a bill framed to aid proceedings in ejectment, and makes the bill multifarious and demurrable; and if it contains no other requisites of a foreclosure bill it will not support a foreclosure decree. *Livingston v. Hayes*, 129.
19. A bill filed and resisted as merely auxiliary to an action at law cannot be converted by amendment on final hearing, into a bill for complete and independent relief under another branch of equity. *Id.*
20. Where the prayer of an auxiliary bill is inconsistent in some respect with a merely auxiliary proceeding, the limited jurisdiction is not enlarged in consequence. *Id.*
21. An amendment to a bill in equity proposed on the final hearing with the design of introducing or substituting a new controversy in principle, will generally be refused. Bills of discovery have in some cases been made bills for relief at an earlier stage of the suit. *Id.*
22. It is very much within the discretion of a trial court to allow a bill to be amended at the final hearing on the pleadings and evidence; and where the amendment would transfer the case to a different head of equity jurisdiction, a dismissal of the bill without prejudice will not be reviewed unless the refusal to allow the amendment was clearly error. *Id.*
23. A bill in aid of ejectment proceedings cannot be converted into a foreclosure bill by merely substituting the ordinary prayer for foreclosure in place of the prayer originally made. *Id.*
24. Whether an answer can be used in place of a special demurrer for the lack of specific averments of facts that have been broadly enough averred—*Q.* *Hubbard v. McNaughton*, 220.
25. Where a bill in aid of execution alleges fraud, and has been answered, and the parties have been sworn, the objection that the allegations of fraud are too general cannot be raised. *Id.*
26. Bills of discovery may lie to draw out matters that must necessarily be confined to the knowledge of defendants. *Id.*
27. A judgment creditor's bill averred that execution had been returned unsatisfied on a specified day. It was demurred to on the ground that it failed to show that the execution was returned as required by law to entitle complainants to maintain the bill. *Held* that the demurrer did not sufficiently present the objection that the date of the return was Sunday. *Kellogg v. Hamilton*, 269.
28. An order *pro confesso* is practically waived in so far as it might estop the defendant from maintaining a cross-bill, if the cross-bill is really filed and both cases are argued together and treated as a single litigation. *Johnson v. Van Velsor*, 208.
29. Objections to evidence taken by a commissioner are reserved until final hearing, and the evidence is all received; and where a verdict has been influenced by improper evidence, which has thus been admitted, a decree based thereon may be properly reversed. *Collins v. Jackson*, 558.
30. A decree should follow the case pleaded and the allegations of the bill. *Livingston v. Hayes*, 129.
31. Leave, on dismissing a bill, to sue again in equity should no

be granted without some equitable reason, and is properly denied where the amount involved is trifling and there is a legal remedy. *Gamble v. East Saginaw*, 367.

32. A personal decree cannot be made in one jurisdiction against parties living in another and not personally served or not voluntarily appearing. *Booth v. Conn. Mut. Life Ins. Co.*, 299.
33. A decree dismissing a bill praying for divorce on the ground of extreme cruelty in the use of abusive language, was properly affirmed where the proofs, which were taken in open court, failed to make out a case. *Lockwood v. Lockwood*, 230.
34. The Court will not disturb a decree dismissing a bill where documents on which the rights of the parties depend are not set out in the record or proofs. *McCulloch v. Barnebee*, 622.
35. Proceedings subsequent to the decree appealed from are not reviewable. *Kellogg v. Hamilton*, 269.
36. The power of a court of equity by appointing a receiver to draw to itself the jurisdiction to try disputed titles, is exceptional, and must rest on facts that render common law remedies inadequate or improper in the particular instance. *Merch. & Manuf'rs'. Nat. Bk. of Detroit v. Kent Circ. Judge*, 292.
37. An order appointing a receiver when no suit is pending concerning the property of which he is put in charge, is void. *Id.*
38. A receiver cannot employ a solicitor as his own counsel, unless with the consent of all parties concerned in the results of the receivership, which may include persons not parties to the suit. *Id.*
39. The law-partner of the solicitor for a complainant in foreclosure, cannot, even by consent, be made receiver in the suit. *Id.*
40. Partition is a local proceeding, and can only be enforced in a court which has jurisdiction of the territory where the land is. *Godfrey v. White*, 171.

no costs to non-appellants: COSTS, 2.
relief from unfair foreclosure sale: MORTGAGE OF LANDS, 24.
to file new bill after dismissal: TAXATION, 4.
enforcing rights under policy of INSURANCE, 5.
from purchase by constructive partner: PARTNERSHIP, 1.

ERROR.

1. Where the record does not show what answer a witness gave to a question that might have been proper, the appellate court cannot know that there was any injury in admitting it. There is no presumption of error. *Howard v. Patrick*, 121.
2. Judgment will not be reversed for error that does not prejudice. *Swart v. Kimball*, 443.

no presumption to sustain: TRIAL, 31.
non-joinder of plaintiffs in: PRACTICE, 5.
rulings on immaterial point: TRIAL, 27.
rejection of depositions: TRIAL, 16.
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ESCROW,
contract given in, action enjoined: INJUNCTION, 1.

ESTATES OF DECEDENTS: *Jurisdiction*, 1; *widow's interest*, 2; *purchase of heir's interest*, 3; *distribution*, 4, 10, 11; *conversion*, 5–8; *claims*, 9–12; *voluntary settlement*, 13; *liability of administrator*, 11–14; *administrator's sale*, 15–18; *liability on executor's bond*, 19–22.

1. Where certain tribunals have acquired jurisdiction over an estate and its representative within their territory, the representative is bound to account to them only for all assets, and

the courts of other States cannot interfere. Otherwise, intervening claimants within different foreign jurisdictions may claim through different courts the right of controlling the management of the estate. *Woodruff v. Young*, 548.

2. A widow's interest in her husband's estate is a valuable proprietary interest, practically absolute, and subject only to the contingency of debts of the estate, and she can sell it whether administered or not. *Kennedy v. Shaw*, 359.
3. Where one who bargains for the interest of an heir agrees also to pay the debts of the estate, he gets the full benefit of the transfer of the interest. *Id.*
4. An administrator cannot reclaim property taken by distributees of the estate unless it is needed for debts. *Id.*
5. P's administratrix, who was his daughter, brought suit for the estate against the estate of P's son as for property converted by the latter. The administratrix testified that she and her sisters were to have had a certain amount from their father's estate, and that settlements had been made accordingly. Evidence that before she was administratrix she had said she had no claim against the defendant estate was offered by way of impeachment. *Held* that it was foreign to the issue, which was the son's liability, and the fact whether or not the administratrix had any private interest left in her father's estate had no bearing on the question whether the father or son owned the property in dispute. But questions relating directly to the father's disposal of his property to his sons during his lifetime, bore on the issue and were proper for impeachment. *Howard v. Patrick*, 121.
6. In a litigation between two estates as to the right to property which defendant's intestate claimed as surviving partner, a question at issue was the amount of live stock kept by the decedents at a certain time. *Held* that evidence as to how many cattle there were before the building of a certain shed that had been put up in the life-time of plaintiff's intestate, and as to how they had been cared for the winters before and after his death, was not material. *Id.*
7. In an action by one estate against another, the fact that the administrator of the latter had presented a claim against the former can have no bearing on the relations of the two intestates, though if his decedent had lived and presented the claim, it might possibly have shown inconsistency in his position. *Id.*
8. Testimony that the widow of an intestate continued in possession of the property at the homestead bears on the claim that the son had converted it. *Id.*
9. When a creditor of an estate proceeds in the probate court to compel the administrator to pay his claim, and the case is appealed to the circuit court, where the case involves substantially the issue *plene administravit*, the judgment of the circuit court thereon may be removed to the Supreme Court by writ of error. *Brown v. Forsche*, 492.
10. When commissioners have made their report upon claims against an estate, and the administrator has paid all that was allowed, and the time has expired for presenting more, except upon special application to the probate court on cause shown, it is the duty of the administrator to turn over the property to the heirs and distributees, and he may do so without waiting for an order of the probate court requiring him to do so. *Id.*
11. Where an administrator had turned over property to the dis-

tributees under such circumstances, but neglected to file his final account, and sometime afterwards another claim was presented and allowed by the probate judge, at which time the property had been used up by the distributees, *held* that notwithstanding his final account was not settled, the administrator was not responsible for the claim, or for the use made by the distributees of the property. *Id.*

12. A creditor who thus delays the presentation of his demand until he can bring it in as matter of favor only, must take all risks of being able to collect it in the condition in which he finds the estate. He cannot hold the administrator responsible except upon the ground of some personal wrong or default. *Id.*
13. It is the right of all parties interested in an estate to settle it up by voluntary proceedings if they agree to do so; and they may do this after an administrator is appointed as well as before. *Id.*
14. The liability of an administrator to the estate or to creditors is to be tested by equitable rules, regardless of mere technicalities; and this on appeal as well as in the probate court. *Id.*
15. In an action for the price of lands sold at an administrator's sale, the probate proceedings and arrangements preliminary to the sale were pertinent in explaining the true state of facts and were admissible in evidence therefor. *Stebbins v. Field*, 333.
16. The purchaser at an administrator's sale agreed with the administrator that the amount of any encumbrance against the parcels should be deducted from the face of any nominal bid therefor. *Held* that this was in accordance with the statute which requires a purchaser to take the title as it stands, and that a deed stating the consideration to be the unencumbered value having been corrected according to this understanding at the instance of the purchaser's counsel, the purchaser could not object to the deed on the ground that it stated a smaller consideration than the nominal bid. *Id.*
17. The claim of a widow to a homestead right, in behalf of herself and her children, does not bring in question the validity of an administrator's sale of the same land to pay debts of the intestate, since the sale must be deemed made subject to the homestead right. *Showers v. Robinson*, 502.
18. Whether lands can rightfully be sold to pay debts of a decedent, subject to a homestead right, *quære*. If such sale is ordered and made, however, it is not absolutely void, and cannot be attacked collaterally, but is only voidable on appeal. *Id.*
19. A probate court in passing upon an executor's account can decree that all debts and claims and administration charges on the estate have been satisfied, and determine the executor's liability to the estate and the amount left to a specified devisee. Such a decree, if no appeal is taken, is binding upon the executor, the devisee and all parties in interest, and cannot be attacked collaterally; and under it the executor must pay over to the devisee the legacy with accumulated interest, and if he does not, the sureties become liable on the executor's bond. *Clark v. Fredenburg*, 263.
20. After an executor's sale of realty, made by order of the probate court, has been confirmed without opposition, the executor cannot refuse to obey its order to distribute the proceeds to the devisees, on the ground that the sale was irregular; and in an action on his bond for such refusal this defense is not open to the executor or to his sureties. *Id.*
21. An executor's bond covers all moneys received by him under color of his official authority. *Id.*

22. Where the sureties on an executor's bond have been cited to appear and show cause why suit should not be brought upon the bond, and have acquiesced in the decision on the hearing, they are bound by it. *Id.*
claim on insane person's BOND, 1.
evidence of GIFT, 1.
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EVIDENCE: *Credibility*, 1; *competency*, 2, 3; *by surviving party*, 4, 5; *declarations*, 6; *conversations*, 7; *minutes on former trial*, 8; *writings*, 9; *depositions*, 10; *handwriting*, 11; *foreign statutes*, 12; *certificates*, 13.

1. An instruction that if the jury find that a party has willfully sworn falsely as to a material fact, and they should be of opinion that such willful false swearing rendered him incredible in the whole, they would have a right to disregard his entire testimony, is not erroneous. *O'Rourke v. O'Rourke*, 58.
2. A party to an action on a contract of employment is as competent as any other witness, if he knows the facts, to swear to the agreed rate of payment, or to the value of services. *Richardson v. McGoldrick*, 476.
3. An exception to the general rule of the competency of testimony must come fairly within the statute excluding it. *Howard v. Patrick*, 121.
4. The rule that a surviving party may not testify to facts known only to himself and the decedent applies to a case where it is sought to introduce such testimony to supplement that of other persons insufficient in itself to establish a case. *Downey v. Andrus*, 65.
5. Testimony cannot be excluded as equally within the knowledge of a deceased opponent unless it comes fairly within Comp. L., § 5968; and where enough does not appear to indicate that the witness' knowledge was necessarily so obtained as to exclude it, the proper ruling would be to restrict the examination to such matters as were not within the excluding rule. *Howard v. Patrick*, 121.
6. The statements of a decedent as to what he had already done with his business are admissible in a suit concerning the right of another to carry it on as partner, but not as evidence of an intention to transfer it as by a verbal will. *Id.*
7. In a suit for wages a conversation between one of the defendants and a third party is admissible if it belongs to the negotiation which led to hiring the defendant, and tended to show that a fixed amount was to be paid him. *Millar v. Cuddy*, 273.
8. Stenographer's minutes of the testimony given upon a former trial by a party who has since left the jurisdiction, are admissible; and if the effect of such evidence is so confined as to affect only the liability of the party who gave it, a joint party cannot complain of its admission. *Stewart v. First National Bank of Port Huron*, 257.

9. Any written agreement that constitutes part of the bargain by which title has been acquired may properly be put in evidence where the purchase is to be shown. *Mitchell v. Chambers*, 150.
10. Deponents cannot waive the reading of their depositions before signing them; depositions so signed are inadmissible in evidence. *Godfrey v. White*, 171.
11. A witness' knowledge of handwriting cannot be tested by comparing papers in the case with others not in it, as *e. g.* fictitious specimens. *Howard v. Patrick*, 121.
11. Foreign statutes should, when possible, be proved as provided for in the State laws and the acts of Congress rather than by the testimony of a lawyer who has practiced within the jurisdiction where they are in force. *Kopke v. People*, 41.
13. Certificates of acknowledgment may be impugned by proof of fraud or duress, but not by a mere denial of the facts certified, made on oath by the party purporting to make the acknowledgment and opposed by equally strong evidence in support of such certificate. *Johnson v. Van Velsor*, 208.

against accomplices: CRIMINAL LAW, 27.
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in proceedings for disorderly conduct: CRIMINAL LAW, 23.
of bad faith of transferee of goods of PARTNERSHIP, 5.
of original transfer, when irrelevant: FRAUD, 1.
of repetition of false representations: FRAUD, 2.
of character of parties: TRIAL, 9.
of value of lands traded: FRAUD, 3.
in suit for converted property: PARTNERSHIP, 14, 15.

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EXECUTION.

1. An execution debtor's right to make his own selection of property exempt from execution, is not affected by his having given a fraudulent mortgage on other property; he is entitled to the exemption of property of the full statutory value, and cannot be compelled to select mortgaged property. If the levy is insufficient, the creditor can levy an *alias* execution on other property not encumbered or covered by a mortgage supposed to be fraudulent, or not mortgaged. *Baldwin v. Talbot*, 11.
2. An execution debtor is not precluded from claiming property as exempt from levy, by the fact that he has property in another county that is not levied on, unless, perhaps, he should claim an exemption on a second levy that would be excessive when taken with his first claim. *Id.*
3. An execution creditor is not concerned in the fact that the debtor does not select mortgaged property as exempt from execution, or does not claim all he has a right to. *Id.*

averment of return of: EQUITY, 27.
in actions on labor debts, indorsement: COURTS, 7.
of LEASE, 1.
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EXECUTOR'S BOND:

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sureties' liability: ESTATES OF DECEDENTS: 19, 20, 22.

EXECUTOR'S SALE:

liability for proceeds: ESTATES OF DECEDENTS, 20.

EXEMPTIONS:

selection of exempt property: EXECUTION, 1-3.

EXPENSES

of church, Sunday subscriptions for: CONTRACTS, 9, 10.

EXTENSION

of municipal contracts: DETROIT, 6, 7.

FALSE IMPRISONMENT.

1. In an action for false imprisonment, an averment that plaintiff incurred large expense in obtaining his liberation from imprisonment, is a sufficient allegation of special damages to sustain proof of the amount of the attorney fee. *Swart v. Kimball*, 443.
2. In an action for false imprisonment it was shown that defendant had sought to obtain the re-arrest of the plaintiff. *Held* that the evidence was admissible, and as likely to aid the defendant as to injure him, if it was uncertain whether it was done in malice or in an honest belief of plaintiff's guilt. *Id.*

FALSE PRETENSES:

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FALSE REPRESENTATIONS:

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of value of lands sold or traded: DAMAGES, 3, 4.

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FENCE,
oral agreement to keep up: EJECTMENT, 1.
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administrator's neglect to file: ESTATES OF DECEDENTS, 11.
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See TRIAL, 17-24.
FORECLOSURE:
requisites of bill for: EQUITY, 18.
of MORTGAGE OF LANDS, 11-37.
creation of trust by: MORTGAGE OF CHATTELS, 1.
FOREIGN STATUTES:
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invalidating Sunday note must be proved: CONTRACTS, 14.
FORFEITURE:
of policy of INSURANCE, 3.
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FORMER TRIAL:
stenographer's minutes in EVIDENCE, 8.
prisoner's statement on: CRIMINAL LAW, 30.
FORTHCOMING BOND
in REPLEVIN, 8, 10, 11.
FRAUD.
1. The purchaser of goods being dissatisfied negotiated for a resale to the vendor, but notes which he had given fell due and he became embarrassed and made an assignment. In the course of the settlement of his affairs the vendor took back the goods and received a deed of them and gave a mortgage on them to a stranger. In later proceedings to set these aside as having been obtained by fraud, testimony to the original transfer was irrelevant except for the purpose of showing how complainant became indebted and how defendant became interested in the settlement of his debts. *Collins v. Jackson*, 559.
2. In an action for fraud from false representations to the plaintiff, evidence that defendant made the same representations to another person after the cheat had been accomplished, is admissible, not as substantial proof of the statements, but to identify the agency by which the fraud was committed, and to show that plaintiff had not misunderstood the defendant, and because in cases of fraud a wide range of examination is allowed. *Cook v. Perry*, 623.
3. In an action for fraudulent representation of the value of lands traded for lands belonging to the plaintiff, the value of the latter is immaterial. *Snow v. Nowlin*, 383.

a question of fact: DEBTOR AND CREDITOR, 13.
averments in bill: EQUITY, 16, 25.
concurrent remedy in EQUITY, 3.
cross-examination of plaintiff: TRIAL, 6.

falsely representing value of land: DAMAGES, 3, 4.
in assignment for creditors: DEBTOR AND CREDITOR, 3-10.
in procuring insurance, notice: INSURANCE, 6.
in procuring loan on inadequate security: DAMAGES, 1.

FRAUDS:
misjoinder of defendants: EQUITY, 17.

FRAUDULENT DEBTORS' ACT.
1. Proceedings under the Fraudulent Debtors' Act are not of a criminal nature. *Wayne County v. Randall*, 137.
2. Fees for services performed under the Fraudulent Debtors' Act are not a charge upon the county. *Id.*
3. Fees of a circuit court commissioner under the Fraudulent Debtors' Act are chargeable on the defendant if the proceedings are sustained; and if they cannot be collected from him the magistrate may look to the plaintiff, from whom he may require security for them, and who, if he prevails, may recover them from the defendant. *Id.*

GARNISHMENT.
1. Garnishment proceedings are purely statutory and cannot be extended to cases not provided for by law. *Stevens v. Woodburn Sarven Wheel Co.*, 275.
2. Funds under the official control of receivers and registers in chancery cannot be reached by garnishment process. *Id.*
3. A judgment recovered in justice's court is not, under Michigan statutes, subject to garnishment proceedings before another justice. *Id.*
4. Where the right to proceed to the trial of an issue against a garnishee depends on the state of the principal case, the court is at liberty to consider the record in that case without separate proof. *Farrington v. Sexton*, 454.
5. A garnishee's disclosure will not sustain judgment in a justice's court if it is too ambiguous to show whether any indebtedness exists, or if so, to whom. The garnishee is a witness for the plaintiff, who has the burden of making out by him a *prima facie* case. *Spears v. Chapman*, 541.

payment of the judgment; JUSTICES OF THE PEACE, 2.

GENERAL VERDICT:
when indeterminate as to separate question: TRIAL, 39.

GIFT.
1. Evidence that a decedent had stated positively that she had given certain specified property to her sons and had previously declared an intent to give it, and that one of the sons remained at her house until her death, warrants a finding of a complete gift *in præsenti*, and at all events a finding that all parties understood that there was a complete gift with no intention of revocation and such possession as was possible. *Harris v. Hopkins*, 272.

power of trustees to receive for CORPORATIONS, 7.

GOOD FAITH
in purchase of assets of PARTNERSHIP, 3, 5.
of offer to pay money: PAYMENT, 2.

GROWING CROPS:
pass under foreclosure deed: MORTGAGE OF LANDS, 23.
removal after foreclosure: MORTGAGE OF LANDS, 20, 23.

HANDWRITING:
knowledge of, how tested: EVIDENCE, 11.

HEAD NOTES
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upon appeals under BOAT AND VESSEL LAW, 6.

HEIR:
of mortgager, ejectment for HOMESTEAD, 7.
purchase of interest of: ESTATES OF DECEDENTS, 3.

HIGHWAYS.
1. Proceedings to lay out a highway are void if there is no proof of service of the notice of the meeting to determine its necessity and appraise the damages. *Nielson v. Wakefield*, 434.
2. A writ of *certiorari* to review proceedings to lay out a highway will be dismissed with costs if notice of the intention to appeal was not promptly given after the complaining party became aware of the action taken. *Wilder v. Hubbell*, 487.

alleys are not public highways: ALLEYS, 1.

HOMESTEAD: *Right to claim*, 1-3; *parties to suit for*, 3, 4; *in lands owned in common*, 5; *mortgage of*, 6, 8.
1. A widow may have dower set off in lands which are subject to a homestead right, and this will not estop her from claiming the homestead afterwards. *Showers v. Robinson*, 502.
2. A widow is not estopped from claiming a homestead in lands by the fact that she desired its sale for the payment of debts, and requested a party to buy the land, and received from the proceeds the amount of a claim allowed in her favor. Estoppel *in pais* has no application to interests in lands. Moreover, it must be presumed that the sale the widow desired was a sale subject to the homestead. *Id.*
3. The acts of the widow in moving away from the homestead for a time, or in neglecting to claim it, cannot deprive the minor children of the right to claim it. If she neglects or refuses to assert their claim, it may be done by some other proper representative. *Id.*
4. Minor children are not necessary parties to a suit brought by the widow, their mother, to recover the homestead, though it is proper to join them. *Id.*
5. A homestead may be claimed in lands of a decedent which he owned in common with another. Lozo v. Sutherland, 38 Mich., 168. *Sherrid v. Southwick*, 515.
6. A mortgage given by a married man of his homestead requires to its validity the signature of his wife, even though at the time she is not living with him. The signature of a woman, then passing as his wife, when she is not, is merely void. *Id.*
7. The mortgage of a homestead given by a married man without his wife's signature is void absolutely, and not merely as to the homestead interest. An heir at law of the mortgager, after his death, may maintain ejectment against one holding under a foreclosure of it, and this, whether the heir is or is not a minor. *Id.*
8. One who gets possession of a homestead under proceedings in foreclosure of a void mortgage, is not entitled to notice as tenant at will, before being sued in ejectment. *Id.*

and dower, barred: MORTGAGE OF LANDS, 4.
wife's right to preclude conveyance: HUSBAND AND WIFE, 2.

HOMICIDE: See CRIMINAL LAW, 18.

HORSE STEALING: See CRIMINAL LAW, 24, 25.

HUSBAND AND WIFE: *Marriage*, 1; *marital rights*, 2; *wife's services*, 3; *liability of married women*, 4-9; *divorce*, 10-13.

1. Positive evidence of non-assent to a marriage ceremony that had been irregularly performed weighs against the presumption of its validity. *Kopke v. People*, 41.
2. A wife driven from her home by the misconduct of her husband carries with her all her marital rights, including the right to preclude the conveyance or mortgaging of the homestead without her consent. *Sherrid v. Southwick*, 515.
3. A wife can recover compensation for services in taking care of her father-in-law, living in the family, if he understands and assents to the arrangement, and if her husband gives up to her his own right to her time and services. *Mason v. Dunbar*, 407.
4. In Michigan a married woman cannot be personally liable on an existing promise unless it concerns her separate estate; and her note given for any other consideration is void. *Kenton Ins. Co. v. McClellan*, 564.
5. A married woman's promissory note cannot be presumed valid, and a binding consideration must always be proved whether the note is negotiable or not, and probably so even if value is expressed. *Id.*
6. A married woman's power to contract is only statutory and cannot be extended beyond the constitutional and statutory limits. *Id.*
7. The disabilities of coverture prevail against a *bona fide* holder as well as against others. *Id.*
8. A married woman cannot give her agent any powers which she does not possess herself, and her agent cannot bind her except as to her separate property. Persons dealing with such agents must inquire into their powers. *Id.*
9. A married woman is not liable for the cost of improvements put into her own house, where the work is done in reliance on the responsibility of her husband and by his directions. *Holmes v. Bronson*, 562.
10. It is not presumable that any person of ordinary intelligence supposes that a marriage can be dissolved by mere consent of parties. *Lapp v. Lapp*, 287.
11. A bill for divorce for cruelty cannot be maintained, where it shows that the complainant had known defendant had a former wife who was living apart from him under an agreement of separation, and does not show that complainant was led to believe there had been any thing equivalent to a divorce, or aver that she believed her own marriage valid. *Id.*
12. Costs were denied on reversing an order allowing an execution for alimony, where there was no valid marriage, and both parties had reason to know it. *Id.*
13. Alimony is not allowed on a bill for divorce that does not bring the complainant within any recognized equity. *Id.*

divorce bill dismissed: EQUITY, 33.
when need not be joined in EJECTMENT, 2.
signature to mortgage of HOMESTEAD, 6, 7.
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homestead and dower barred: MORTGAGE OF LANDS, 4.
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of words in promissory note: CONTRACTS, 18.

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of certificate of acknowledgment to BAIL, 1, 2.
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IMPROVEMENTS:
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INFANT:
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for horse-stealing: CRIMINAL LAW, 23.

INJUNCTION.
Injunction will lie to restrain an action on a contract delivered in violation of an agreement to hold it in escrow until certain changes in it had been made. *Wyckoff v. Victor Sewing Machine Co.*, 309.
of suit on replevin bond: REPLEVIN, 12.
of replevin suit: EQUITY, 13, 14.
against sale on paving assessment: DETROIT CITY, 7.

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from legislative act: MUNICIPAL CORPORATIONS, 6.
from neglect to repair street: MUNICIPAL CORPORATIONS, 7.

INSANITY:
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INSTRUCTIONS
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INSURANCE: *Policy*, 1; *vacancy of premises*, 2; *assignment*, 3, 4; *parties to suit*, 4, 5; *notice of defense*, 6; *burning by assured*, 7–9; *over-valuation*, 10; *proofs of loss*, 11, 12.

1. Insurance policies are not required by law to be in writing, and outside of the statute of frauds there is no rule of law which prevents written contracts from being changed by parol. *Roger Williams Ins. Co. v. Carrington*, 252.
2. A clause avoiding an insurance policy in case the premises should "become vacant or unoccupied," did not apply where a man and his family left home for twelve days to visit a sick daughter, and engaged a person to go to the house daily to look after it. *Stupetski v. Transatlantic F. Ins. Co.*, 373.

3. A clause in an insurance policy providing for its forfeiture if assigned without the company's consent cannot in Michigan prevent its assignment after the loss. *Roger Williams Ins. Co. v. Carrington*, 252.
4. Separate interests held by several persons under the same policy of insurance, may be united by the assignment of the policy to one individual who may bring suit upon it. *Mercantile Ins. Co. v. Holthaus*, 423.
5. Where each of several persons assured by the same policy has distinct insurable interests, they can enforce their rights under the policy in equity if they cannot at law. *Id.*
6. In assumpsit on an insurance policy, a notice attached to the plea of the general issue that defendant would show that plaintiff was guilty of fraud in procuring the insurance, is sufficient if it fairly apprises the plaintiff of the defense to be set up. *Farmers' Mut. F. Ins. Co. v. Crampton*, 421.
7. Where defendant in an action on a fire-insurance policy claimed that plaintiff himself set fire to the property, it was *held* proper to show that money belonging to the plaintiff, and personal property belonging to near relations of his, was destroyed; also, that the value of the property destroyed far exceeded the insurance. *Id.*
8. Where it was claimed in defense to an action on a fire insurance policy that the plaintiff himself set fire to the property, statements made by him before the fire, to third persons, to the effect that he was going away were inadmissible; so also was plaintiff's evidence as to why he went and where he was on the night of the fire. *Id.*
9. In assumpsit on a fire insurance policy, where the defense is that plaintiff himself burned the property, testimony tending to show that he had loose notions respecting the destruction of insured property is material, though the weight of such testimony might depend on whether he had expressed such views lately or long before. *Id.*
10. In an action on an insurance policy it is proper to cross-examine the plaintiff as to whether a fraudulent over-valuation of the property was not given at the time he applied for the policy. *Id.*
11. Where defects in the proofs of loss of insured property are found to have been waived, any objection to the certificate attached to the proofs is disposed of by the verdict, and presents no legal question. *Mercantile Ins. Co. v. Holthaus*, 423.
12. An insurer's neglect to object within a reasonable time to proofs of loss where the defects in them could be remedied if intelligibly pointed out, amounts to a waiver; the question whether he has acted in good faith and seasonably is for the jury. *Id.*

INTENT. See CRIMINAL LAW, 10-16.

INTEREST.
Interest cannot be allowed at ten per cent on an accounting if there has been no written agreement for that rate. *Godfrey v. White*, 171.
on advances by partners: PARTNERSHIP, 11.
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JUDICIAL DUTIES:
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of circuit courts, under $100: COURTS, 6.
of commissioner to dissolve ATTACHMENT, 6.
of JUSTICES OF THE PEACE, 1.
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power to acquire by appointing receiver: EQUITY, 36.
renewal of, sureties not bound: BAIL, 6.
upon auxiliary bill: EQUITY, 19.
JURY.
1. The provision in the Constitution of Michigan that "the right of trial by jury shall remain" means the right as it had become known to the previous jurisprudence of the State. *Swart v. Kimball*, 443.
2. A person accused of crime cannot waive any essential of the right of trial by jury, and no substantial and beneficial incident of that right can be divested by legislation. *Id.*
3. The right of trial by jury involves the indefeasible right to be tried by a jury of the vicinage. *Id.*

not concerned with appeal papers: TRIAL, 36.
conclusiveness of finding: TRIAL, 18.
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JUSTICE OF THE PEACE.

1. Justices of the peace in Michigan have constitutional jurisdiction in civil cases, and are necessary magistrates in cities, as well as outside of them; their criminal jurisdiction is given them by the general statutes, but is to some extent contemplated by the Constitution, and in cities can only be restrained by the special municipal criminal jurisdiction. *Allor v. Wayne County Auditors*, 76.
2. One justice cannot garnish a judgment rendered by another. The judgment may always be paid to the justice who renders it, and he must issue execution on application by the prevailing party, unless he has some excuse for refusing it. No other justice has any statutory right to stay his acts or direct his conduct. *Sievers v. Woodburn Sarven Wheel Co.*, 275.

action on labor debt: CORPORATIONS, 25.
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LARCENY. See CRIMINAL LAW, 26.

LEASE.

1. *It seems* that usage permits a lease to be executed by exchanging duplicates, each of which is signed only by the other party. *Campau v. Lafferty*, 429.
2. Recovery for the use and occupation of leased premises cannot be had against others than the lessees during the term of the lease if it has not been assigned or the lessees discharged from liability, or if they have not surrendered their interest or known or assented to any new lease that may have been made to the others. *Doty v. Gillett*, 203.
3. Where an action for use and occupation was brought against one of the original lessees and a stranger to the lease, and supported by evidence that the defendants acted as co-partners, the latter may show their actual relation, and the contract between them may be put in evidence. They may also show that the stranger had agreed to pay what would have been his proportion of the rent under the lease, to his co-defendant. *Id.*

parol, for a year, breaks adverse possession: REAL PROPERTY, 10.
estoppel from disputing landlord's title: REAL PROPERTY, 7, 8.

LEGACY.
executor's duty to pay over: ESTATES OF DECEDENTS, 19.

LEGISLATURE:
providing for location of county seat: COUNTIES, 3.
cannot bind its successors: STATUTES, 3.
right to change TAXATION, 1.

LICENSE:
of sale of liquors: MUNICIPAL CORPORATIONS, 9, 10.
lien for taxes: EJECTMENT, 10.
of attorney upon judgment: ATTORNEY AND CLIENT, 3.
for redemption from foreclosure: MORTGAGE OF LANDS, 31-37.

LIEN ON LOGS.
1. A petition to enforce a lien on logs, under Comp. L., ch. 43, is fatally defective if it does not allege the jurisdictional fact that they are within the county where the suit is begun. *Pine Saw Logs v. Sias*, 356.
2. A petition to enforce a lien on logs alleged that the petitioner had run them into a certain boom. *Held* that the court could not take judicial notice that the boom was within the county where the suit was begun so as to cure the omission of the averment that the logs were within the county and therefore subject to the jurisdiction. *Id.*
3. In proceedings to enforce a lien on logs the appearance and plea of a claimant does not waive previous jurisdictional defects in the proceedings, where the judgment is in form against the logs and there is no judicial determination that the claimant is the sole owner of them. *Id.*

cut off by delivery: SALE, 1.

LIMITATION OF ACTIONS. See STATUTE OF LIMITATIONS.

LIQUOR LAWS:
village license ordinance, invalid: MUNICIPAL CORPORATIONS, 9, 10.

LOCAL SELF-GOVERNMENT. MUNICIPAL CORPORATIONS, 1, 2.

LOCATION
of county seat: COUNTIES, 3–6.

MAJORITY:
of court, decision conclusive: COURTS, 5.
adoption of resolution by, presumed: CORPORATIONS, 16.

MALICIOUS PROSECUTION.
1. An unfounded prosecution cannot be justified, or the prosecutor's malice disproved, by evidence of offenses committed by the plaintiff other than those for which he was prosecuted by the defendant. *Carson v. Edgworth*, 241.
2. Malice is not implied from an unfounded prosecution, but it may be inferred from the want of probable cause for it. *Id.*

MANAGEMENT
of CORPORATIONS, 15.

MANSLAUGHTER
defined: CRIMINAL LAW, 17.
See CRIMINAL LAW, 14, 15, 17, 18.

MARITIME LAW.
1. A vessel-master has no authority as such to find bail for the ship in behalf of the owners. *Mitchell v. Chambers*, 150.
2. The ship's husband cannot bind co-owners by obtaining bail to release the vessel from seizure on civil process if the co-owners themselves were not personally liable and neither authorized him to obtain it nor acquiesced, and if there was no such emergency as would call for the assumption of personal responsibility. *Id.*

3. The interest of the managing owner of a vessel entitles him to act for himself in obtaining bail for its release from detention, and the bail cannot hold co-owners personally liable for the security without showing that they were parties to the transaction. *Id.*
4. The several part-owners of a vessel are usually co-tenants, not partners, and will not be regarded as partners unless it distinctly appears that they are so. *Id.*
5. The assent of vessel-owners to the acts of the ship's husband cannot be implied from their silence except as to such acts as are fairly appropriate to occasions with which he is usually allowed to deal. *Id.*
6. Co-owners of a vessel are not personally liable on claims incurred by it before they acquired their interest. *Id.*
7. The necessity for obtaining the release of a vessel from seizure does not necessarily imply that the release was obtained on such conditions as to bind owners personally. *Id.*
8. *It seems* that a ship's husband is not warranted in assuming extraordinary powers without obtaining authority from the owners if they can be readily communicated with, as by telegraph. *Id.*
9. Part-owners of a vessel are by construction of law, parties to any proceedings *in rem* against her, and are entitled to intervene actively and contest its liability, the extent of the claims against it, and the validity of its seizure and detention. *Id.*
10. Judgments against a vessel on a claim against her, and against her managing owner and the surety upon a recognizance for her release from detention, are part of a general adjudication of the liability. *Id.*

MARRIAGE:
dissolution of: HUSBAND AND WIFE, 10.
evidence of non-assent: HUSBAND AND WIFE, 1.
under irregularly issued license: CRIMINAL LAW, 19.
prosecution for bigamy: CRIMINAL LAW, 19–21.

MARRIED WOMEN:
liability of: HUSBAND AND WIFE, 4–9.

MARSHALING ASSETS. See MORTGAGE OF LANDS, 7.

MASTER AND SERVANT:
conversation admissible in suit for wages: EVIDENCE, 7.
competency to swear to value of services: EVIDENCE, 2.
proof of actual value of services: CONTRACTS, 26.
agreement to pay what services are worth: CONTRACTS, 19.
contracts of employment: CONTRACTS, 5, 6.

MEASUREMENT
of logs: CONTRACTS, 21; TRIAL, 30.
of lumber shipped: CONTRACTS, 16.

METROPOLITAN POLICE FORCE
cannot supersede local peace officers: DETROIT CITY, 2.

MICHIGAN:
must respect property rights of MUNICIPAL CORPORATIONS, 3.
trial of trespassers on lands of, venue: TRESPASS, 2.

MINORS:
right to claim HOMESTEAD, 3.
as parties to suit to recover HOMESTEAD, 4.

MISDEMEANORS
not to be ordained by village councils: MUNICIPAL CORPORATIONS, 8.

MISJOINDER
of defendants in fraud: EQUITY, 17.

MISTAKE.
money paid under: ACTION, 2, 3.

MISTAKES OF LAW
as ground of relief in EQUITY, 2.

MONEY PAID:
without consideration: CARRIERS OF GOODS, 2.
action against agent: ACTION, 1.
count in action by sureties on bond: PLEADINGS, 2.
under mistake: ACTION, 2, 3.

MORTGAGE
of franchises of CORPORATIONS, 10–13.

MORTGAGE OF CHATTELS.

1. A chattel mortgage cannot properly be given under an arrangement by which it is to fall due at once and be foreclosed, and the property is to be placed in charge of a receiver who is to manage it to the exclusion of other creditors. Such a course would amount to creating, by means of the mortgage and a court order, a trust which would be invalid if made by an assignment. *Merchants & Manufacturers' National Bank of Detroit v. Kent Circuit Judge*, 292.

selection of exempt property: EXECUTIONS, 1–3.
replevin for mortgaged property: REPLEVIN, 1.
possession by mortgagee: TROVER, 3.
seizure from mortgagees: ATTACHMENT, 2.

MORTGAGE OF LANDS: *Signature*, 1; *deed absolute*, 2–4; *subsequent grantee*, 5–10; *foreclosure in equity*, 11–26; *foreclosure by advertisement*, 27–37; *lien for redemption*, 31–37.

1. A signature to a mortgage is binding if made at the proper time and duly acknowledged, whether signed by the person owning the name or by some one else with his consent. *Johnson v. Van Velsor*, 209.
2. Parol evidence is admissible to show that a deed absolute on its face was intended as a mortgage. *Barber v. Milner*, 248.
3. Parol evidence that a deed *prima facie* absolute was only meant as a mortgage, must be explicit; mere general declarations to that effect by a party claiming the benefit of such a construction are not enough. *Johnson v. Van Velsor*, 208.
4. Where a wife has joined with her husband in an absolute deed of property which her husband had already mortgaged, a subsequent purchase of the property by her cannot revive her original rights so as to enable her, in resisting foreclosure of the mortgage, to claim homestead and dower in the lands. *Id.*
5. A mortgagee who has notice that since the mortgage was given a portion of the land has been sold, cannot release any part of the land to the prejudice of the purchasers. It is enough if he is notified by letter from the mortgager as to the names of the buyers, and if the deed is on record. *Hall v. Edwards*, 473.
6. Where mortgaged property has been wrongfully released to the prejudice of subsequent purchasers and the value of the parcel paid to the mortgager, the purchasers are equitably entitled on foreclosure to have the amount for which the parcel was released deducted from the mortgage debt before their parcel is sold. *Id.*
7. The first grantee of a portion of mortgaged property has a right to understand that all the rest stands charged with the payment of the mortgage debt before his portion can be resorted to. *Gilbert v. Haire*, 283.

8. The mortgagee of land cannot enforce a promise to pay the mortgage, made to the mortgager by the latter's grantee, because it is a promise to a third person. *Booth v. Conn. Mut. Life Ins. Co.*, 299.
9. One who gives a mortgage to secure the payment of his own liabilities, is personally and directly liable at law, and the demand may be enforced against him by suit in any jurisdiction where service can be had; but one who has only purchased mortgaged land subject to the encumbrance is not personally liable, though if he has promised to pay the mortgage he may be made a defendant in foreclosure if he can be found in the jurisdiction where the land lies, and a decree may be rendered against him for any deficiency after sale. *Id.*
10. One who has bought mortgaged property and promised to pay the mortgage is made a defendant in foreclosure in order to enforce the equity by subrogation, and *it seems* that he is in turn subrogated to any collateral securities held by the mortgagee. *Id.*
11. A mortgagee is not entitled as such to bring ejectment, and cannot maintain a foreclosure bill as a proceeding auxiliary to the ejectment suit. *Livingston v. Hayes*, 129.
12. Regularity is presumed in foreclosure proceedings, if the reverse is not shown. *Ruggles v. First Nat. Bank of Centreville*, 192.
13. *It seems* that formal notice of an election to foreclose for the whole debt, if an instalment is overdue, is unnecessary, and a declaration in the bill, of such election, is enough. *Johnson v. Van Velsor*, 208.
14. Where a foreclosure case is tried on a bill and cross-bill, and the defendant, on information and belief, alleges in the cross-bill that the amount called for in the original bill is too much, it is for the defense to prove the allegation if opportunity is given. If no proof is offered, the complainant is not obliged to tender evidence to disprove it. *Id.*
15. Foreclosure decree is given for everything due when it is granted, though suit was begun when only an instalment of the debt had matured. *Id.*
16. The one year and six weeks that must elapse before the sale on foreclosure, may be computed from the date of taking out the subpœna, if it is taken out with the intention in good faith of serving it as soon as possible, and there is no laches in obtaining service. *Culver v. McKeown*, 322.
17. Transfer of a bid made on foreclosure sale will not be ground for ordering a new sale. *Id.*
18. It is not good practice, in directing the correction of a commissioner's report of a foreclosure sale, to order that on filing the corrected report "the said sale be and the same is hereby in all respects confirmed." But it does not make the proceedings void. *Ruggles v. First Nat. Bk. of Centreville*, 192.
19. An error in reciting the date of a foreclosure decree in the commissioner's report of sale is immaterial where the record furnishes the means of correcting it. *Id.*
20. The confirmation of a foreclosure sale covering growing crops relates back to the sale, and entitles the purchaser to control the crops from that time if no equities prevent, and after due notice to interested parties. *Id.*
21. The title of a purchaser on valid foreclosure of a mortgage regularly recorded, relates back to the delivery of the mortgage as against all intervening purchasers and incumbrancers who are made parties or who become interested *pendente lite*. *Id.*

22. A foreclosure deed to the mortgagee gives him the same estate as a foreclosure of the equity of redemption, and is as effective as against the owner of the equity as if executed by such owner. *Id.*
23. Growing crops pass with the soil under foreclosure deed, and on proper application the court may perhaps provide for their preservation until possession is given to the purchaser. *Id.*
24. Where a foreclosure sale was so managed that advantage was taken of the absence of one who had a lien on a portion of the land, and who had no notice of the proceedings, and the remainder of the land, though it would have abundantly satisfied the whole debt, was bid in at nominal prices, and the portion on which he had a lien was bid in at its full value in order to cut off his equities, it was *held* that equity would relieve, and that the sale should be reopened on petition of the encumbrancer upon his compliance with proper terms, as by giving security that on a re-sale he would bid for the parcels first charged with the satisfaction of the demand a sum equal to its amount, and repay to the foreclosure purchaser all sums spent by him in improving the land since its purchase, less a reasonable rent for that time. *Gilbert v. Haire*, 283.
25. A statute giving clear title to foreclosure purchasers does no injustice to general creditors. *Cook v. Detroit, G. H. & M. Ry. Co.*, 349.
26. *It seems* that a foreclosure sale is not necessarily invalidated by neglect to re-engross the foreclosure bill after amending it by adding a new party defendant. *Carpenter v. Ingersoll*, 433.
27. A statutory foreclosure is not invalidated by a change in the name of the newspaper in which the foreclosure advertisement is published, and by the removal of the publication office to another place in the same county, if the paper otherwise preserved its identity. *Perkins v. Keller*, 53.
28. A change in the place of publication does not destroy the identity of the publication. *Id.*
29. The neglect to file the sheriff's deed on statutory foreclosure within twenty days after the sale does not of itself invalidate the foreclosure, but extends the time for redemption by the period of the delay. *Id.*
30. A purchaser under a defective foreclosure is only in the position of a mortgagee, and can only recover possession by new foreclosure proceedings. *Nims v. Sherman*, 45.
31. A lien for redemption from foreclosure can only be satisfied by a payment or voluntary discharge. *Powers v. Golden Lumber Company*, 468.
32. A personal liability extinguished by statutory foreclosure is not revived by the creation of a lien for redemption therefrom where the land is sufficient to satisfy it. The lien is confined to the land and the declaration of personal liability in a decree for its enforcement is merely provisional, and the mortgagers cannot be compelled to pay it unless a deficiency arises. *Id.*
33. A lien for redemption money is an independent equity, and not merely appurtenant to the mortgage held by a mortgagee who has redeemed; so that proceedings to enforce the lien may be taken before such mortgage matures and the discharge of the mortgage does not cut off the lien. *Id.*
34. Any one who has any interest in mortgaged premises, or in any part of them, is entitled to redeem them from foreclosure, and he must redeem completely if at all. *Id.*
35. A sale on statutory foreclosure satisfies the mortgage debt and releases the personal obligation to the extent of its proceeds;

but a subsequent encumbrancer who redeems from it, thereby obtains such an interest in the land as will protect him, and later encumbrancers who are also benefited must not only repay the redemption money, but must pay his mortgage, and as the two claims are distinct, the liens therefor are not merged, and the payment of one cannot release the other. *Id.*

36. A bill to enforce a lien for redemption from a mortgage can be filed at any time after the lien becomes fixed, and must bring in all subsequent liens or titles. *Id.*

37. The liability of subsequent encumbrancers to a lien for the reimbursement of one who has redeemed from a foreclosure is not affected by the transfer or discharge of some intermediate lien, even though it be a mortgage held by the one who has redeemed from foreclosure. *Id.*

verbal sale of mortgage interest, enforcement: REAL PROPERTY, 13.
on chattel interests: REAL PROPERTY, 5.
requisites of foreclosure bill: EQUITY, 18.
payment of taxes by mortgagee: TAXATION, 4.
of HOMESTEAD: 6–8.
reorganization on foreclosure: RAILROAD COMPANIES, 1, 2.

MULTIFARIOUSNESS
in bill in EQUITY, 17, 18.

MUNICIPAL CORPORATIONS: *Local self-government*, 1; *boards*, 2; *property rights*, 3; *claims*, 4, 5; *liability*, 6, 7; *village ordinances*, 8–10.

1. Municipal government, under the Constitution of Michigan, must be managed by popular representatives and agencies deriving their authority from the inhabitants, and no municipal business can be controlled by State or other outside authorities. *Allor v. Wayne County Auditors*, 76.

2. Local legislative authority is not infringed by having boards or other executive servants to do, under proper conditions, what is not legislative work. *Butler v. Detroit*, 552.

3. Municipal corporations are protected in their rights to property which they have lawfully acquired for local purposes, and cannot be deprived of it by the State. *Detroit v. Detroit & Howell Plank Road Co.*, 140.

4. A municipal council, after allowing claims with no effort to investigate them, cannot order an investigation and rescind their action and recover back the money paid because of facts which they did not know of, but might have ascertained by reasonable diligence. *Advertiser & Tribune Co. v. Detroit*, 116.

5. A common council empowered to audit and allow all accounts against the municipal corporation is presumed to investigate all claims presented and to have had full knowledge of all existing facts relating thereto before allowing them. *Id.*

6. A municipal corporation is not liable as for misfeasance for the legislative action of the common council in widening a street so as to bring within its limits an existing nuisance. *McCutcheon v. Homer*, 483.

7. A municipal corporation is not liable for an injury sustained by an individual in consequence of neglect to put and keep a public way in repair. *Id.*

8. The General Village Incorporation Act does not empower village councils to ordain misdemeanors. *Mt. Pleasant v. Vansice*, 361.

9. Authority given to a village council "to license saloons, taverns and eating houses" does not authorize it to license the sale of liquors. *Id.*

10. A village ordinance making provision for licensing the sale of liquors, adopted under the authority of a charter granted at a time when the Constitution forbade the enactment of license laws, is void, and the subsequent repeal of the constitutional prohibition does not make it valid. *Id.*

contracts with: CONTRACTS, 27, 34.

MUNICIPAL COURTS
not authorized to try extra-municipal crimes: DETROIT CITY, 1.

MURDER. See CRIMINAL LAW, 18.

MUTUAL PROMISES
as consideration for subscription: CORPORATIONS, 7.

NAME.
1. A change of name does not necessarily destroy identity so long as that to which the name pertains remains the same. *Perkins v. Keller*, 53.

inference from identity of: EJECTMENT, 7.
of newspaper, change in: MORTGAGE OF LANDS, 27.

NECESSITY.
what is work of: CONTRACTS, 11–13.

NEGLECT
of widow to claim HOMESTEAD, 3.
to object to proofs of loss: INSURANCE, 12.

NEGLIGENCE
of sheriff, to make inquiry: BAIL, 7.

NEGOTIABLE INSTRUMENTS.
1. The addition "Vestryman, Grace church," to each of the names attached to a promissory note does not make it any thing but the note of the individuals signing it, if it does not purport to bind the corporation. *Tilden v. Barnard*, 376.
2. Where the cashier of a bank is one of the makers and payees of a note, the bank cannot take it as a *bona fide* holder without notice. *Id.*
3. A finding that a note was transferred before maturity for a valuable consideration and that at the time the transferee had no knowledge of the details of its origin, cannot be regarded as equivalent to a finding that he was a *bona fide* holder for value. *Id.*
4. The payee of a draft had testified to an interview with the drawee in which the latter objected to paying because he had an unsettled account with the maker of the draft. *Held* proper on cross-examination to draw out all that the drawee said on the subject during that conversation. *Lichtenberg v. Mair*, 387.
5. The omission to file an affidavit denying the execution of a note precludes the right to dispute its execution. Circuit Court Rule 79. But it does not waive defendant's right to show want of capacity to execute the note except for a particular consideration. *Kenton Ins. Co. v. McClellan*, 564.

note of married woman: HUSBAND AND WIFE, 4, 5, 7.
note made on Sunday: CONTRACTS, 14.
ascertaining identity of words on note: CONTRACTS, 18.
recovery limited to COMPROMISE, 1.

NEWSPAPER:
change in name and place: MORTGAGE OF LANDS, 27, 28.

NEW TRIAL:
refusal, when not reviewable: TRIAL, 40.

NON-JOINDER
of co-defendants: PLEADINGS, 5.
of plaintiffs in error: PRACTICE, 5

NON-RESIDENCE
of bastard: BASTARDY, 1.

NON-USER:
abandonment or surrender not inferred of REAL PROPERTY, 1.

NOTICE:
in ejectment: HOMESTEAD, 8.
of election to foreclose for whole debt: MORTGAGE OF LANDS, 13.
name, of agency, when agent liable to ACTION, 1.
of intention to appeal: HIGHWAYS, 2.
of meetings to lay out HIGHWAYS, 1.
of publication, change in paper's name: MORTGAGE OF LANDS, 27.
to agent: AGENCY, 1.
to controller, city not bound: CONTRACTS, 34.
to mortgagee, of subsequent purchase: MORTGAGE OF LANDS, 5.
attached to plea: INSURANCE, 6.
of special defense attached to plea: PLEADING, 14.
of special defense: REPLEVIN, 6.
of trial, waiver of irregularity: PRACTICE, 3.
to common council: MUNICIPAL CORPORATIONS, 5.

NUISANCE:
obstruction of ALLEYS, 3.
brought within street: MUNICIPAL CORPORATIONS, 3, 6.

OBJECTIONS:
to record in Supreme Court: PRACTICE, 12.
to admission of testimony: TRIAL, 3.
must be brought to notice of trial judge: PRACTICE, 13; TRIAL, 33.
to evidence taken by commissioner: EQUITY, 29.

OBLIGATION OF CONTRACTS. See CONTRACTS, 33.

OBSTRUCTION
of ALLEYS, 2, 3.

OFFER
of employment: CONTRACTS, 5.
to pay commissions: CONTRACTS, 7.

OFFICER:
1. Officers named in the Constitution are there contemplated as having a known legal character, and though their duties may sometimes be varied by legislation, they cannot be so changed as to destroy the powers of the office or to essentially alter it. *Allor v. Wayne County Auditors*, 76.
2. The imposition of new duties upon an officer does not change his office, but invests him with a new office. *White v. East Saginaw*, 567.
3. Where an officer has a particular authority to exercise on his judgment upon an investigation of facts of which he is made the judge, his finding of the facts in the absence of any controlling provision is final as to their existence. *Sheldon v. Stewart*, 574.
4. An officer is not protected in what he does under the authority of a superior, if the latter acts under an invalid law. *Swart v. Kimball*, 443.
5. A public officer is liable to private individuals for injuries resulting to the latter from his failure to perform ministerial duties in which the latter have a special and direct interest.

He is also liable for a failure to perform duties of a judicia nature, if he neglects them maliciously. *Raynsford v. Phelps*, 342.
See CONSTABLES.
not protected unless he keeps within his powers: TAXATION, 9.
not justified by invalid writ of ATTACHMENT, 2.
duties of SHERIFF, 1, 2.
sureties on official bond: SURETYSHIP, 1–3.
addition to names on promissory note: NEGOTIABLE INSTRUMENTS, 1.

OPINIONS OF SUPREME COURT:
head-notes to: CONTRACTS, 33; COURTS, 8.

PARENT AND CHILD. See BASTARDY, 1, 2.
PAROL EVIDENCE
to supplement CONTRACTS, 23.
PARTIES:
in EJECTMENT, 2.
defendants in foreclosure: MORTGAGE OF LANDS, 9, 10.
evidence of character: TRIAL, 9.
non-joinder of co-defendants: PLEADINGS, 5.
right to testify in one's own behalf: TRIAL, 4.
to action for use and occupation: LEASE, 2.
to action for money paid without consideration: ACTION, 1.
to bill to vacate taxes assessed: TAXATION, 3.
to proceedings *in rem* against vessel: MARITIME LAW, 9.
to suit to recover HOMESTEAD, 4.
to suit upon policy of INSURANCE, 4, 5,
to writ of error: PRACTICE, 5.
PARTITION:
enforced in what courts: EQUITY, 40.
of lands of PARTNERSHIP, 12.
PARTNERS,
evidence of action as: LEASE, 3.
part owners of vessel are not: MARITIME LAW, 4.
See PARTNERSHIP.
PARTNERSHIP: *Constructive*, 1, 2; *purchase of assets*, 3–5; *accounting*, 6–13; *conversion*, 14, 15.
1. A firm composed of two women put the husband of one in absolute charge of the business, and he thereafter made purchases on his own credit, and with his wife's knowledge and consent acted in all respects as if he instead of his wife was one of the partners. *Held* that as to creditors who had no notice to the contrary, he was to be considered as a partner; that his statements to a creditor to that effect were admissible in defense to an action of trover for goods taken on attachment; and that unless superior equities had arisen, a judgment against the firm concluded the other partner. Such equities could not arise from the purchase alone in favor of the partner whose responsibility did not appear. *Parshall v. Fisher*, 529.
2. An estoppel may arise against a partner from allowing another person to be put forward as the real party in interest and to be represented after dissolution of the firm as the only owner of the business. *Id.*
3. Good faith in the purchase of partnership assets is not presumable from the payment of a valuable consideration if it appears that the purchaser knows that creditors are urgent,

and that there is no change in possession or in the control of the business. *Id.*

4. In an action of trover for goods taken on attachment against a firm, the testimony of those who had dealt with it, showing their understanding as to who composed it and the whole state of facts as to how business was done, was admissible. *Id.*
5. Where a female member of a firm had allowed her husband to be held out as a partner in her place, a conversation concerning the payment of a claim, carried on between the husband and the attorney of an attaching creditor in the wife's absence, but in the presence of a transferee of the firm property, and before the latter had parted with any consideration, was held admissible to show the bad faith of the transferee. *Id.*
6. Lands that are part of a common partnership stock have in equity the character of personalty; and the legal title thereto is subordinated to the incidents of partnership funds and accounting. *Godfrey v. White*, 171.
7. Partnership lands cannot, in Michigan, be distinguished from other assets for purposes of settlement. *Id.*
8. Proceedings between partners for an accounting are always for the principal purpose of reaching a statement of money balances and a division of assets as personalty, and being essentially a personal and not a real controversy, may be carried on in courts within whose jurisdiction the parties live and do business, irrespective of the location of the partnership lands. *Id.*
9. Partners cannot ordinarily claim allowances for services exceeding those of their associates; but where those who do not expect to be personally charged with the business of the firm perform special services, it is proper to allow them compensation beyond their share of the profits if they had an understanding with the others that they were to be compensated for them. *Id.*
10. Failure in duty as a partner may be a ground for dissolving the partnership, but not for a claim by diligent partners for compensation. *Id.*
11. Advances by partners for the benefit of the business do not draw interest unless an intent that they shall do so can be inferred from usage or from circumstances, or unless it is understood by the partners that it shall be allowed. *Id.*
12. Partition may be made by consent; but it is not an incident to a suit for a partnership accounting in which the partners usually have a right to have the assets disposed of. If land belonging to the firm is not disposed of, it must be left as a distinct tenancy in common so that the tenants may have it partitioned in a separate suit. *Id.*
13. Where all the parties to a partnership accounting appealed and the case was so disposed of that neither prevailed rather than another, the cost of printing the record was apportioned according to the interest of the parties in the firm, and in other respects each party paid his own costs. *Id.*
14. Where it was claimed in defense to a suit for converted property, that the defendant took it by right of survivorship as partner, testimony that he lacked means was immaterial and had no tendency to disprove the partnership relation, which would have to be made out. *Howard v. Patrick*, 121.
15. Where the defense to a suit for converted property was that defendant had taken it as surviving partner, testimony as to his business capacity would not be relevant standing alone, but might not be prejudicial if connected with evidence of the

extent and manner of his management and the trust reposed in him in the partnership. *Id.*

PATENT FOR LAND
cannot be attacked at law by equitable title: REAL PROPERTY, 12.

PATENT RIGHT.
1. A machine may be sold independently of the patent right; and if sold or taken on execution a purchaser does not acquire a right to use it under the patent. *Rodgers v. Torrant*, 113.
agreement to pay royalty: CONTRACTS, 20.

PAVING CONTRACTS:
conditions precedent to bids for: DETROIT, 4.
not to be extended, when: DETROIT, 6, 7.

PAYMENT.
1. Payment or delivery of money from one person to another is not of itself evidence of a loan, but rather of the payment of a debt. *Downey v. Andrus*, 65.
2. The good faith of an offer to pay money cannot always be tested by an inquiry whether the person making the offer had the money necessary to fulfill it. *Snow v. Nowlin*, 383.
3. One who desires the benefit of exceptions to a general rule must bring himself within such exceptions. *Id.*
4. An agreement to take pay in goods or their proceeds will not sustain a demand for a cash payment without the consent of both parties, especially where it would compel the debtor to resort to funds which he had guarded by this arrangement. *Mason v. Warner*, 439.
5. W manufactured shingles for M, and agreed to take his pay in shingles, or their proceeds. M sold a quantity and received, besides some cash, a note made payable to W, to whom he turned it over, but refused to indorse it. W took it on condition that he found the maker to be responsible, but while holding it the maker failed. *Held* that W could not recover the amount of the note from M, but could only claim his *pro rata* share of the cash and available paper received for the shingles. *Id.*
recovery of part payment on purchase of land: STATUTE OF FRAUDS, 1.
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PLEADINGS: *Declaration*, 1-9; *before justice*, 6-9; *amendment*, 10-12; *demurrer*, 13; *notice of special defense*, 14.

1. Where defects in a declaration are not substantial and are not demurred to, they cannot be relied on in the appellate court. *Cook v. Perry*, 623.
2. A general count for money paid is sufficient in an action by a bondsman to recover back money paid for the benefit of his principal; and if the action is brought on both general and special counts, any objections based on the latter are immaterial. *Mitchell v. Chambers*, 150.
3. A declaration upon a promise to pay presently is consistent with the defendant's having been at liberty to take a year's time or more on giving his note, if he did not do so. *Allen v. Duffie*, 1.
4. Where there is no misjoinder of counts or of causes of action, the refusal of the court to compel the plaintiff to elect between the counts of the declaration is not reviewable. The union of different statements is allowed by the rules of pleading. *Cook v. Perry*, 623.
5. Non-joinder of proper co-defendants must be taken advantage of by plea in abatement and does not continue open to objection till the submission of the case. *Mitchell v. Chambers*, 150.
6. A declaration in a justice's court for breach of warranty must show the nature of the warranty and state the breach. *Smith v. Hobart*, 465.
7. Pleading to the merits and going to trial before a justice precludes the defendant from objecting to evidence on the ground that the declaration was not specific enough to warrant it, if it sufficiently states a cause of action and he was not misled. *Chancey v. Skeels*, 347.
8. Pleadings in justices' courts are to be viewed with liberality; and where a declaration, though informal, fairly apprises the defendant of the claim made against him, it will be held sufficient if not demurred to. *Wilcox v. Toledo & Ann Arbor R. R. Co.*, 584.
9. Suit on a conditional promise to pay money to the order of a railroad company. The promise was in writing, and was filed with the justice as the sole cause of action. Upon it was endorsed the name of a person who added to his name the word "assignee." The defendant pleaded the general issue, and went to trial. It was shown on the trial that the payee in the promise had been put in bankruptcy, and the endorser of the paper was assignee in bankruptcy thereof. *Held* that the objection that the plaintiff did not by its declaration aver its right to recover as assignee would not be sustained on the final submission of the case. *Id.*
10. Judgment in replevin was given by a justice in a suit brought against a defendant designated as D. T. Baldwin instead of David T. Baldwin, but no misnomer was pleaded, and the judgment was appealed by Baldwin under his full name after pleading to the merits. *Held* that the informality, if any, could be amended by reference to the records and was no longer material. *Baldwin v. Talbot*, 11.
11. Where a declaration for obtaining money on false pretenses is so amended as to describe the fraudulent representations differently, and add to them, as by differently stating localities and amounts of payments made by the plaintiffs, the variance is material. *Fish v. Barbour*, 19.

12. An order for the amendment of pleadings will not sustain an exception if both parties conformed to its terms. *Ruggles v. First Nat. Bank of Centreville*, 192.
13. A ground of demurrer should be so stated as to apprise the court of the real objection, and if it is not, the party demurring can claim nothing under it. *Kellogg v. Hamilton*, 269.
14. Notice of special defense attached to a plea of the general issue is not required to be as precise as special pleading. *Farmers' Mut. Fire Ins. Co. v. Crampton*, 421.

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IN CIRCUIT COURTS: *Capias*, 1, 2; *notice of trial*, 3; *discontinuance*, 3, 4.
IN SUPREME COURT: *Writ of error*, 5; *appeals*, 6–9; *bill of exceptions*, 10, 11; *objections*, 12–14.
1. Whether an affidavit that does not state that plaintiff has suffered damage will warrant holding defendants to bail on *capias* —*Q. Fish v. Barbour*, 19.
2. The grounds of arrest by *capias* and the proceedings to bind the bail must conform strictly to the statutes. *Id.*
3. An action based in part on a charge of conspiracy was noticed for trial without bringing in a portion of the defendants. A defendant who had pleaded asked that the case be set down for trial on a day certain, and at the day fixed objected that the others had not been brought in. On motion the plaintiff was allowed to discontinue as to those who had not been brought in. *Held* that the right to object to the irregularity in noticing the case for trial was cut off by consenting to go to trial and by the order of discontinuance, and that it was of no consequence that the discontinuance was not entered on the record, and that there was no formal amendment of the declaration. *Cook v. Perry*, 623.
4. The omission to enter an order of discontinuance upon the records of the court is cured by the statute of amendments. *Id.*
5. A writ of error to bring up a judgment against joint parties should be taken out in the name of all, and if any do not wish to prosecute it, a severance may be had under Supreme Court Rule 35. But a writ taken out in the name of only one is amendable, if it identifies the judgment; and if the party who

was not joined afterwards files his election not to proceed, the writ will not be dismissed for the non-joinder, but the other may be allowed to proceed separately. *Spencer v. Fish*, 226.

6. Where a common law form of reviewing statutory proceedings does not exist, or is not resorted to, the conditions and form of appeal depend entirely upon statute, and cannot be changed or aided by judicial action. *People's Ice Company v. Steamer Excelsior*, 336.
7. Appeals in equity, under Michigan statutes, must be heard on the identical facts shown in the lower court, and the trial judge must settle the testimony, which he may do with the aid of the stenographer's minutes and on hearing counsel; but the stenographer's notes are not admissible as evidence on the appeal, and the judge must set out his own statement. *Id.*
8. The Supreme Court cannot act on a mere transcript of the stenographer's notes of the testimony not authenticated by the certificate of the trial judge. *Id.*
9. An appeal will not be dismissed where the case was not settled within the time limited by law, if the appellant used due diligence to obtain a settlement and was prevented by causes beyond his control, such as the court stenographer's inability through sickness to finish a transcript of the testimony. *Cameron v. Calkins*, 191.
10. Questions relating to the taxability of costs cannot be included in the bill of exceptions. *Stebbins v. Field*, 333.
11. The clerk's neglect to enter an oral order extending the time to settle a bill of exceptions is not ground for striking out a bill settled in pursuance of it; and the omission may be cured by an order for extension made *nunc pro tunc* at the next term. *Spencer v. Fish*, 226.
12. All objections to a record as it stands at the beginning of the term should be made then, and not by separate motions, made on different motion days, to dismiss the writ and strike out the bill of exceptions. *Id.*
13. An objection cannot be raised in the Supreme Court if it was not brought to the notice of the trial judge. *Allen v. Duffie*, 1.
14. A point not sufficiently presented by demurrer cannot, on appeal, be raised for the first time. *Kellogg v. Hamilton*, 269.

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of validity of marriage: HUSBAND AND WIFE, 1.
none, of validity of married woman's note: HUSBAND AND WIFE, 5.
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of regularity of foreclosure: MORTGAGE OF LANDS, 12.
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PROOFS OF LOSS. See INSURANCE, 11, 12.

PUBLICATION.
change in place of: MORTGAGE OF LANDS, 27, 28.

PUBLIC RECORDS.
1. There is no common-law right to make copies or abstracts of public records for speculative purposes, as for the compilation of a set of abstract books for selling abstracts of title. Nor is such a right given by Act 54 of 1875, "to facilitate the inspection of the records and files in the offices of the registers of deeds." *Webber v. Townley*, 534.

PUBLIC WORKS ACT:
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what is work of necessity or charity: CONTRACTS, 13.

QUO WARRANTO.
1. Proceedings by *quo warranto* for the office of alderman were dismissed for want of jurisdiction upon a finding which did not show how many votes were cast, or how many for either party, or that either received more than the other, and which recited the acts of the election inspectors without deciding upon their accuracy. *Held* that the finding was not full enough to justify final judgment in the appellate court. *Cooley v. Ashley*, 458.

RAILROAD COMPANIES.

1. Act 96 of 1859 permits the purchasers on a foreclosure sale of the track and appurtenances of a railway company to exercise the charter powers of the corporation on certain conditions, and frees them from liability for any debts embraced in the foreclosure. *Cook v. D., G. H. & M. Ry. Co.*, 349.
2. A common law action for the debt of a railway corporation cannot be maintained against those who have obtained control of its franchises by a purchase of its track and appurtenances on foreclosure of a mortgage securing other indebtedness. *Id.*
3. Where the assets of a railroad company are sold in bankruptcy, and the purchaser of its assets transfers them to another who organizes a new company, and in the papers expressly recognizes the new company as assignee from him of the assets, this is a sufficient assignment to enable the new company to bring suit upon obligations given to the old company. *Wilcox v. Toledo & A. A. R. R. Co.*, 584.
4. A railroad company having completed a railroad, and being engaged in operating it, must be deemed, in suits brought by it, a corporation *de facto*, and a private individual thus sued cannot contest its legal organization. Swartwout v. Railroad Co., 24 Mich., 389. *Id.*

trover for ties annexed to road: TROVER, 4.
liability as CARRIERS OF GOODS, 1–3.

REAL PROPERTY: *Abandonment*, 1; *estoppel*, 2–8; *adverse possession*, 8–10; *attacking patent*, 11; *sale of mortgage interest*, 12.

1. Abandonment or surrender of interests in real estate cannot be inferred from non-user alone. *Doty v. Gillett*, 203.
2. One cannot be estopped from asserting a title against one who has always recognized it. *White v. Hapeman*, 267.
3. Title to lands cannot pass by estoppel, nor can the right to permanent possession. *Id.*
4. The doctrine of estoppel by actions, oral statements, or silence can never pass a title which under the statutes can only be transferred by deed. *Nims v. Sherman*, 45.
5. The principle by which a mortgagee, who has misled a purchaser into believing that the mortgage is no longer a lien is estopped from claiming under it, applies to personal property, since mortgages in Michigan are chattel interests and may be transferred, paid or extinguished without writing. *Id.*
6. S bought land from W, who claimed it under a defective foreclosure, and after consulting N who was in possession. N did not tell S that he owned the equity of redemption or that he held other than as a tenant of W, and on the other hand gave N to understand that he would give up possession without foreclosure. *Held* that although S purchased on this understanding N was not estopped from afterwards insisting on his legal title. *Id.*
7. A tenant in fact cannot dispute the title under which he obtained possession, even though he has since acquired a better title; but when he has surrendered the possession obtained by tenancy he may then try titles. These principles do not apply to cases where the party in possession did not enter under the other and has never made himself the other's tenant in fact. *Id.*
8. Where a trespasser, in whom title by adverse possession has not been perfected, accepts a lease and agrees to give up possession when it expires, he is estopped from repudiating his recognition of his landlord's title and from claiming adversely to such title. *Campau v. Lafferty*, 429.

9. Where by reason of an adverse possession of lands for twenty years, the occupant has acquired a perfect right in the law to defend his possession, he has for all practical purposes a title, and may maintain suits upon it against parties afterwards found upon the land. *Bunce v. Bidwell*, 542.
10. A parol lease for a single year, if accepted, is enough to break a period of adverse possession and bar the statute of limitations against actions for real estate. *Campau v. Lafferty*, 429.
11. An adverse holding cannot exist if the holder does not believe in his title. *Id.*
12. One who holds only an equitable title to land cannot attack a patent thereto by proceedings at law. *Carpenter v. Ingersoll*, 433.
13. If a verbal sale of a mortgage interest in lands is to be considered a sale of chattels, and the purchaser, after paying part of the price refuses to carry out the bargain, it can be enforced only by a suit for the remainder or by foreclosure, allowing what has been paid. *Nims v. Sherman*, 45.

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REPLEVIN: *Right of action*, 1-6; *description of property*, 7; *returns*, 8, 9; *forthcoming bond*, 8, 10, 11; *suit on bond*, 12, 13.

1. Where mortgaged property is in foreclosure in a suit in which a receiver had been appointed, a third person who has a right of action in replevin for it, cannot properly be restricted to an action of trover, in which he could only recover the net proceeds after deducting the costs of the receivership which he did not desire or assent to, and which would thus compel him to submit to such management and disposition of the property as the receiver might see fit. *Merchants & Manufacturers' National Bank v. Kent Circuit Judge*, 292.
2. Replevin lies against a United States deputy marshal to recover goods belonging to the plaintiff and attached by defendant under process against another person. *Cooper v. Tompkins*, 406.
3. Replevin for timber cannot be maintained on a showing by plaintiff of title to an undivided half of the land from which it was removed. *Hess v. Griggs*, 397.
4. A presumption of the ownership of timber and the right to recover it *in specie*, by an action of replevin, does not arise from proof that plaintiff had an interest in the land in common with another person. *Id.*
5. Where replevin rests on plaintiff's possession through another person who holds under a contract with him which the other contracting party had signed only by his mark, the contract must be proved by the subscribing witness. *Id.*
6. Where the notice of special defense to an action of replevin for timber cut from land merely puts in issue the title to the land at the time of cutting, the existence of a remedy for waste is not in question. *Id.*
7. A judgment in replevin for a quantity of stacked wheat, upon which plaintiff had a lien under a chattel mortgage, was reversed because the description of the land on which it grew, as given in the writ of replevin, differed from the description in the chattel mortgage as given in the record, which contained nothing showing that it was incorrect. *Coman v. Thompson*, 389.
8. The sheriff's return to a writ of replevin, certifying that the plaintiff in replevin had not filed a forthcoming bond, is conclusive upon all the parties to the replevin suit, and defeats an action upon an alleged bond. *Green v. Kindy*, 279.
9. A sheriff's return to a writ of replevin may be amended on due notice and proper showing, but if not amended, is conclusive as made. *Id.*
10. Delivery of a forthcoming bond in replevin to the defendant's attorney is not an assignment to the defendant, and will not enable him to maintain an action on it.—By two Judges. *Id.*
11. Sureties upon a forthcoming bond in replevin will not be bound if the principal's signature was attached without his knowledge or consent, unless they signed with full knowledge of the fact. —By two Judges. *Id.*
12. One who replevies property transferred to him in fraud of creditors, and levied upon accordingly, cannot after suffering judgment in replevin enjoin a suit on the replevin bond, on the ground that the debtor has made a composition with creditors and thereby recovered his assets. *Jacobson v. Metzgar*, 403.
13. If the pendency of bankrupt proceedings invalidates a levy, they should be shown in an action of replevin to recover the

value of the goods levied on, and not withheld to be litigated in proceedings relating to the replevin bond. *Id.*
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1. A point that is not contested and is assumed without consideration in deciding a case, is not itself decided. *Allen v. Duffie*, 1.

RETURN:
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SALE:
1. A contract for logs provided that the vendor should drive them to the main stream to be taken in charge by a booming company when its drive went down, and if too late should follow and overtake the drive. The vendor engaged another person who was taking a large quantity of other logs to meet the drive, to take these logs with them, but he missed the drive, and as he could not separate the logs and had engaged to take the other logs farther, he took these also, the vendor apparently acquiescing. When he reached his destination the main drive had not been overtaken, and as he was going no farther, the purchaser, without objection from the vendor, engaged the booming company to go back and collect the logs and run them to a designated place. *Held* that the course of the parties to the contract of sale amounted to a delivery which cut off any lien the vendor might have had on the logs, and his right to stop them in transit. *Muskegon Booming Co. v. Underhill*, 629.
2. One who agrees to take his pay from the proceeds of a sale must lose ratably with the other party if the purchaser becomes insolvent and neither party interested in the payment is at fault in the matter. *Mason v. Warner*, 439.
on foreclosure in equity: MORTGAGE OF LANDS, 16-26.
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1. The existence of litigation over property is enough, in the absence of a defense showing a right to it, to render immaterial any evidence that there had been no settlement. *Howard v. Patrick*, 121.
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1. A sheriff's duties relate to the execution of orders, judgments and process of courts; the preservation of the peace; the arrest and detention of persons charged with the commission of public offenses; the service of papers in actions etc.; they are connected with the administration of justice and not with the collection of the revenue. *White v. East Saginaw*, 567.
2. The collection of taxes by the sheriff is assumed to be a duty foreign to his position by Comp. L. § 1027, which provides for independent security for its performance. *Id.*
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STATUTE OF FRAUDS.
1. A sale of lands is void if not made in writing; and the purchaser, after making part-payment, can refuse to carry out the contract, and recover back what he has paid. *Nims v. Sherman*, 45.
STATUTE OF LIMITATIONS.
1. The statute which limits the time for bringing suits for the recovery of land held under probate sales, to five years, only applies to cases in which the suit brings in controversy the validity of such a sale. If the plaintiff's title is such that the probate sale is immaterial to it, the statute has no application. *Showers v. Robinson*, 502.
equitable remedy outlawed: EQUITY, 6.
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STATUTES.
1. A statute is to be construed in view of its title and its lawful purposes, assuming as far as possible that broad language should be confined to lawful objects, and inferring no unlawful intent except where too plain to be mistaken. *Allor v. Wayne County Auditors*, 76.
2. The validity of particular provisions in a statute cannot properly be decided unless expressly involved in a case, and are not passed on where the only questions concern other provisions in the law. *Id.*
3. A legislature cannot bind its successors where the elements of contract, concession and consideration do not appear. A legislative provision in a particular statute that the act shall bind only those who assent to it, may limit the scope of that statute, but is void as to any subsequent act on the same subject. *Detroit v. Detroit & Howell Plank Road Company*, 140.
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1. Sureties on an official bond are discharged when the duties and obligations of the office are essentially changed by statute and their risk increased. *White v. East Saginaw*, 567.
2. Duties not yet existing and not germane to an office are not within the contemplation of sureties on the official bond, nor properly covered by their obligation. To bind the sureties the duties must plainly belong to the office. *Id.*
3. One who consents to become surety for a party in a legal proceeding must see to it that he acts on the request of the party himself or his attorney or agent duly authorized to represent him in that respect. *Mitchell v. Chambers*, 150.

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1. The right of the Legislature to change the methods or the extent of taxation must always exist where there is no express contract to the contrary. *Detroit v. Detroit & Howell Plank Road Co.*, 140.
2. The supervisor's certificate of valuation attached to an assessment roll cannot be contradicted in any proceeding to enforce the tax. *Gamble v. East Saginaw*, 367.
3. Counties and townships are necessary parties to a bill to vacate taxes assessed, where a decree would make it necessary to charge the taxes back against the county, or spread them upon the land of the township. *Adams v. Auditor General*, 453.
4. Taxes can generally be enforced only by the statutory remedies, and payment made by the mortgagee of land does not necessarily give him a right of action as against the mortgager as for money paid to his use, since the mortgagee would not have been personally liable for the payment of the tax, and the mortgager's failure to pay it would only have rendered the property subject to seizure while the warrant was good for their collection. *Raynsford v. Phelps*, 342.
5. A law prescribing who shall be liable for the payment of taxes, and whose property may be levied on therefor, impliedly forbids the tax collector to seize the property of others, or by act or omission make the tax a charge on it; and the owner is at liberty to buy and sell in reliance upon the officer's implied duty toward him and to understand that the latter is not protected by his commission unless he keeps within the powers given by it. *Id.*
6. One who had purchased the equity of redemption of certain mortgaged lands, after a tax had been assessed thereon, had certain personal property on the land, but the tax collector falsely returned *nulla bona*, and the tax became a lien on the land from which the owner of the mortgage had to redeem after foreclosure. *Held* that the latter had a right of action at common law against the collector for injury resulting to him in being compelled to redeem from the tax sale. *Id.*
7. Where complainant in a bill to remove a cloud caused by a sale for a city tax had been a city official connected with the tax business when it was levied, and had bought afterwards and expressly subject thereto, he may be presumed to have been allowed to retain enough of the consideration to pay it, and has no equity to entitle him, on dismissal of his bill, to have leave to file another. *Gamble v. East Saginaw*, 367.
8. In a bill to remove a cloud caused by a tax-sale, an averment that the assessor did not make any legal or valid assessment, does not point out a specific defect, and an averment that he had no right, authority or jurisdiction to assess the amount actually assessed, is not an averment of fact, and gives no information as to the real ground of complaint. *Id.*
9. Dismissal of a bill to clear a title clouded by tax-sales does not prevent a defense at law against the tax-titles. *Id.*
10. A tax-deed cannot relate back to the time of the sale for the

purpose of making parties trespassers by reason of acts done on the land before the deed was given. *Hess v. Griggs*, 397.
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1. Under a contract transferring all the pine trees the vendee "may choose to take," the latter agreeing to pay a certain sum "for the said pine so cut," etc., title did not pass until the pine was cut, and until then the vendee had neither actual nor constructive possession, and could not bring trespass for damages against a grantee of the vendor who had cut timber on the land. *Pfistner v. Bird*, 14.
2. Act 100 of 1857 (Comp. L., ch. 256) is tyrannical, oppressive, unconstitutional and void in so far as it authorizes persons charged with trespasses on State lands to be tried in some other county than that where the offense was committed. *Swart v. Kimball*, 443.
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1. It is not necessarily important that a plaintiff should show why a certain line of proof was not introduced on a former hearing. *Howard v. Patrick*, 121.
2. Where testimony is competent for one purpose, it is properly admitted in the absence of any request limiting its application. *Cook v. Perry*, 623.
3. Objections to the admission of testimony cannot be considered if the answers given do not come within them. *Howard v. Patrick*, 121.
4. The statutory right of a party to testify on his own behalf does not dispense with the necessity for calling the subscribing witness to prove a contract to which he was a party. *Hess v. Griggs*, 397.
5. A witness may be contradicted by showing that he gave materially different testimony on a former trial or did not testify at all to matters to which he did testify at the later one. But the witness may explain the variance and omissions. *Doty v. Gillett*, 203.
6. Where one who complains of being cheated in a land trade, testifies to having offered defendant a certain sum to trade back, it was *held* proper to exclude on cross-examination the question whether he had the necessary amount of money. *Snow v. Nowlin*, 383.
7. In an action for misrepresenting the value of land to a purchaser, it was *held* that the exclusion, on plaintiff's cross-examination, of the question whether he had not tried to sell or trade the land after visiting it, was not necessarily prejudicial, in the absence of something to show its materiality, since such an offer to sell may have been under circumstances that would not tend to show that he ratified the sale to himself. *Id.*
8. Cross-examination of a witness as to his contribution to the expenses of the suit bears on his interest or bias, and is admissible. *Howard v. Patrick*, 121.
9. Proof of the character of parties is allowed in criminal cases, but rarely as independent testimony in civil suits, though it might perhaps be proper to cross-examine a witness thereon where it would bear on his belief as to their sincerity. *Id.*
10. Impeaching testimony is governed by strict rules as to relevancy, and ought not to be received unless clearly competent. *Id.*
11. In showing the admissions of a witness for purposes of impeachment, the time and place of the admissions should be given with certainty. *Id.*
12. A witness cannot be impeached by showing her to be a thief, prostitute and brothel keeper, though she may perhaps be asked on her own cross-examination as to such matters. *People v. Whitson*, 419.
13. Impeaching testimony against a person not yet called as witness cannot be admitted. *Id.*
14. In an action on a note which a third party had either bought or made payment on, the latter was asked if there had been any talk in his presence as to whether the party indebted was

to say anything more, and answered "not the slightest. I would not have taken it under any such circumstances." *Held* proper to strike out the latter clause, as it was inadmissible for the witness to tell what he would have done under circumstances that did not happen. *Van Deusen v. Cathcart*, 258.

15. A trial judge cannot strike out relevant evidence which the parties are willing to retain, nor stipulate conditions to the reception of evidence, as by refusing to allow testimony to stand unless a party consents to an answer at large. *Campau v. Lafferty*, 429.
16. The rejection of depositions cannot be held error if there is nothing in the record to show that material testimony was thereby excluded. *Snow v. Nowlin*, 383.
17. A finding of facts is not merely a narration of evidence, but must determine what is proved. *Downey v. Andrus*, 65.
18. The finding of a jury cannot be disturbed if there was evidence to justify it, unless the jury were allowed to find under improper directions. *Roger Williams Ins. Co. v. Carrington*, 252.
19. The finding of a trial judge as to the weight of evidence in law cases cannot be reviewed, nor can the Supreme Court supplement it by a finding of facts. *Johnson v. Crispell*, 261.
20. Findings are not open to dispute; but additional facts cannot be presumed, and must be regarded as not having occurred. *Mitchell v. Chambers*, 150.
21. A finding of fact will not be reviewed unless there was no testimony tending to support it. *Farrington v. Sexton*, 454.
22. A judgment will not be reversed for a defect in the judge's finding, which a stipulation in the record shows was pure inadvertence. *Sherrid v. Southwick*, 515.
23. Final judgment cannot be given by the Supreme Court on findings that do not cover the whole case. *Briggs v. Brushaber*, 330.
24. Where a rule of law is in accord with the finding of a jury the verdict may be allowed to stand even though the question was improperly left to them. *Allen v. Duffie*, 1.
25. Judgment will not be reversed for the omission to charge on a question fairly within the issue but not raised on the trial. *Doty v. Gillett*, 203.
26. Exceptions to a charge for misstating the testimony should indicate in what respect the statement was erroneous. *Keystone Lumber & Salt Manufacturing Co. v. Dole*, 370.
27. Rulings upon a point that has no legal foundation and is immaterial to the case do not furnish any ground of complaint to a plaintiff in error who relies on it. *O'Rourke v. O'Rourke*, 58.
28. Refusal of an instruction is not error where it is asked without reference to any particular circumstances and there is no testimony on either side of any such state of things as it contemplates. *Van Deusen v. Cathcart*, 258.
29. In an action involving the measurement of logs sold, the jury were charged that if the parties agreed that a certain scale should be followed unless the purchaser was notified to the contrary, that scale must govern, but if they did not so agree, and the vendor told the purchaser to notify him if he wanted the logs rescaled, and the purchaser said nothing, it would not be an assent. Afterwards the court sent for the jury and told them, in the absence of the vendor's counsel, that he did not mean to charge them that they could not find an assent from the purchaser's silence, and that they might draw their own inferences from the conduct of the parties. *Held* that the original charge would not have been erroneous unless the no-

tice to the purchaser was given before the contract was closed and the logs paid for, and that the absence of the vendor's counsel did not prejudice him when the possible false impression was corrected. *Smith v. Kelley*, 390.

30. Where, at the beginning of a trial, the judge informed a party how he should rule as to the measure of damages, and the party made no objection and offered no suggestion in his requests for instructions, he could not properly assign error on a charge embodying the same views. *Cook v. Perry*, 623.
31. Where the record shows that exceptions were taken to a commissioner's report, but does not show what they were, it cannot be assumed, for the purpose of finding error, that they were of any force. *Ruggles v. First Nat. Bank of Centreville*, 192.
32. Irregularities in proceedings before a commissioner are waived by the parties afterwards appearing in court and consenting that the circuit judge may himself take up and proceed with the reference in the course of which the irregularities occurred. *Barnebee v. Beckley*, 613.
33. The objection relied on as error, or the correct theory of the case to be presented, must be brought to the notice of the trial court when not readily apparent, so it may be distinctly passed upon. *Advertiser & Tribune Co. v. Detroit*, 116
34. It is not error and is in accord with established practice to permit a jury to take to the jury-room a computation made by the plaintiff's attorney showing the amount claimed to be due; it is not evidence, and the jury are not bound thereby. *Millar v. Cuddy*, 273.
35. A jury cannot pass upon the competency of testimony, but must consider all the testimony before them and come to a conclusion thereon. *Collins v. Jackson*, 558.
36. A jury in a circuit court has no concern with the appeal papers in a case brought up from before a justice. *Richardson v. McGoldrick*, 476.
37. Where an instrument disputed for uncertainty in its wording is not sent up with the bill of exceptions, the existence of a doubt is assumed in support of a charge submitting it to the jury. *Paine v. Ringold*, 341.
38. An action for the price of goods sold involved the construction of an expression in the order given for them unless the goods were accepted and the question of construction thereby waived. *Held* that the question of waiver was for the jury. *Hale Manufacturing Co. v. American Saw Co.*, 250.
39. A general verdict in a case submitted to the jury on more than one point, does not show how they determined either question considered alone. *Dewey v. School District*, 480.
40. When an application for a new trial is based on matters pertaining to the discretion of the court, and not on absolute legal right, its refusal is not open to review in the appellate court. *Mahoney v. People*, 39.
41. The refusal of a new trial presents no question for review where the affidavits therefor, though given in the bill of exceptions, are not accompanied by any finding of the facts they are claimed to prove. *Id.*

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1. An assignee cannot bring trover against the United States Marshal for goods taken by him from the possession of mortgagees holding adversely to the assignee, whatever may be the right thereto as between the marshal and the mortgager. *Axford v. Mathews*, 327.
2. In trover for goods claimed by different persons, it is for the jury to decide from whose possession they were taken. *Id.*
3. Possession by a mortgagee of chattels will not be assumed to be unlawful as against the mortgager's assignee, for the purpose of reversing a judgment against the assignee in an action of trover brought by him against an officer who had levied upon them. *Id.*
4. Where ties were taken and used by the sub-contractor for building a railroad, and the road was in use before it was delivered to the company, the owner of the ties, after waiting until they had become realty, cannot bring trover against the company as for their conversion. *Detroit & Bay City R. R. Co. v. Busch*, 571.

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