CORRECTIONS.

Page 131, note 1, line 2—Read "possession."

Page 239, note 2, line 1—For "receive" read "*revive.*"

Page 539, line 2—Read "*Marquette, Houghton & Ontonagon R. R. Co. v. Harlow.*"

Page 598, note 8, line 1—For "mortgagee" read "*mortgage.*"

Page 634, line 10 from bottom—Read "*Jolly v. Terre Haute Bridge Co.*"

47

MICHIGAN REPORTS

CASES DECIDED

IN THE

SUPREME COURT

OF

MICHIGAN

FROM

OCTOBER 28 1879 TO FEBRUARY 11 1880

HENRY A. CHANEY

STATE REPORTER

VOL 42

CHICAGO
CALLAGHAN & CO
1881

SUPREME COURT RULE 28.

At a session of the Supreme Court held Jan. 19, 1881, Supreme Court Rule 28 was amended to read as follows:

RULE 28.—The priority of causes on the Calendar as first made up shall depend upon the date of filing notice of hearing with the Clerk. The party noticing a cause for hearing shall, at least ten days before the first day of the term for which the same is noticed for hearing, give notice to the Clerk to place such cause on the Calendar for the term. No cause shall be entered on the Calendar by the Clerk until the return, transcript or case shall have been filed in this Court, nor without the notice to the Clerk hereinbefore mentioned. By stipulation, on the forenoon of the first day of the term, cases may be placed lower down on the Calendar and grouped to suit the convenience of counsel. In cases where counsel are not present in court, notice of motions for a continuance, to be heard on the first day of the term, shall be given at least twenty-four hours previous thereto, and if for any subsequent day, two days notice shall be given.

CIRCUIT COURT RULE 6.

At a session of the Supreme Court held Jan. 27, 1881, Circuit Court Rule 6 was amended by adding the following:

In all cases where service of papers cannot reasonably be made, on account of the absence of the attorney of record from his usual place of abode, residence or office, or for any other reason, the court in which such cause is pending, or judge thereof at chambers, upon an *ex parte* application on cause shown, may direct in what manner and on whom service may be made.

Rec. Jan. 22, 1881

Copyright, 1881, for the State of Michigan, by William Jenney, Secretary of State.

SUPREME COURT OF MICHIGAN

CHIEF JUSTICE

JAMES V. CAMPBELL
[Until January 1, 1880]

ISAAC MARSTON
[After December 31, 1879]

ASSOCIATE JUSTICES

ISAAC MARSTON
[Until January 1, 1880]

BENJAMIN F. GRAVES

THOMAS M. COOLEY

JAMES V. CAMPBELL
[After December 31, 1879]

ATTORNEY GENERAL

OTTO KIRCHNER

CIRCUIT JUDGES.

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

The number of each circuit precedes the name of the Judge who presides in it, and follows the names of the counties which belong to it.

Alcona . . . 23	Emmet . . . 13	Lapeer . . . 6	Oceana . . . 14
Allegan . . 20	Genesee . . 7	Leelanaw . 13	Ogemaw . . 18
Alpena . . . 23	Gladwin . . 21	Lenawee . . 1	Ontonagon . . 12
Antrim . . . 13	G'd Traverse 13	Livingston . 7	Osceola . . 19
Baraga . . . 12	Gratiot . . 21	Mackinac . . 11	Otsego . . . 18
Barry . . . 5	Hillsdale . . 1	Macomb . . 16	Ottawa . . 20
Bay 18	Houghton . 12	Manistee . . 19	Presque Ile . 23
Benzie . . . 19	Huron . . . 24	Manitou . . 11	Roscommon . 21
Berrien . . . 2	Ile Royale . 12	Marquette . 12	Saginaw . . 10
Branch . . . 15	Ingham . . 4	Mason . . 19	Sanilac . . 24
Calhoun . . . 5	Ionia . . . 8	Mecosta . . 14	Schoolcraft . 12
Cass . . . 2	Iosco . . . 23	Menominee . 11	Shiawassee . 7
Charlevoix . . 13	Isabella . . 21	Midland . . 21	St. Clair . . 16
Cheboygan . 13	Jackson . . 4	Missaukee . 13	St. Joseph . 15
Chippewa . . 11	Kalamazoo . 9	Monroe . . 22	Tuscola . . 24
Clare . . . 21	Kalkaska . . 13	Montcalm . 8	Van Buren . 9
Clinton . . . 8	Kent . . . 17	Muskegon . . 14	Washtenaw . 22
Delta . . . 11	Keweenaw . 12	Newaygo . 14	Wayne . . 3
Eaton . . . 5	Lake . . . 19	Oakland . . 6	Wexford . . 19

MUNICIPAL JUDGES.

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

[1] Resigned November 3, 1879.
[2] Appointed November 3, 1879.

TABLE OF CASES REPORTED.

	PAGE.
Abels v. Ingham Sup'rs	526
Akeley, Ryan v.	516
Aldrich, Daniells v.	58
Allen, Parks v.	482
Anderson, Webster v.	554
Arno v. Wayne Circuit Judge	362
Attorney Gen., Coon v.	65
Att'y Gen. v. Hanchett	436
Attorney General v. Sanilac Supervisors	72
Ayres v. State Auditors	422
Bagley v. Pridgeon	550
Baker, Reed v.	272
Bartlett, Beecher v.	60
Bay City Bridge Company, Maxwell v.	67
Beam, Bennett v.	346
Beecher v. Bartlett	60
Benjamin v. Manistee River Improvement Co.	628
Bennett v. Beam	346
Berry, Burns v.	176
Berry, Morrison v.	389
Besley, Fildew v.	100
Bethany, McCallum v.	457
Bishop v. Freeman	533
Blanchard v. Brown	46
Blanchard v. Powers	619
Blough, Zook v.	487
Bond, Howard v.	131
Bowe v. Bowe	195
Bowes, Michigan Mutual Life Insurance Co. v.	19
Briggs v. Mette	12
Brigham v. Fawcett	542
Brong v. Brown	119
Brooks, Robbins v.	62
Brown, Blanchard v.	46
Brown, Brong v.	119
Brown v. Probate Judge	501
Brownell, Curtis v.	165
Buhl, Iron Cliffs Co. v.	86
Buhl v. Trowbridge	44
Bulte, Hebert v.	489
Burger v. Limbach	162
Burhans v. Mitchell	417
Burke v. Wilber	327
Burkle v. Ingham Circ. Judge	513
Burns v. Berry	176
Burrowes v. Gibson	121
Campau, Post v.	90
Campbell, Engle v.	565
Canada Southern Railway Co., French v.	64
Carleton v. Jenness	110
Carpenter v. Graham	191
Carter, McGuffie v.	497
Cassopolis, Dool v.	547
Central Car & Mfg. Co., Dewey v.	399

	PAGE.
Chandler v. Childs	128
Chapin, Hunt v.	24
Chapman, McOmber v.	117
Chester, Woodward v.	461
Childs, Chandler v.	128
Clark v. Field	342
Clegg, Witherspoon v.	484
Coe v. Wager	49
Cook v. Wiles	439
Coolidge, Wilson v.	112
Coon v. Attorney Gen'l	65
Cooper v. Detroit	584
Corrie v. Corrie	509
Cressinger v. Dessenburg	580
Crossman, Vanneter v.	465
Cummins v. People	142
Curtis v. Brownell	165
Daniells v. Aldrich	58
Dansby, Taylor v.	82
Day v. Toledo, C. S. & D. Ry. Co.	523
Dennis v. Kent Circuit Judge	249
Dessenburg, Cressinger v.	580
Detroit, Cooper v.	584
Detroit v. Houghton	459
Detroit v. Robinson	198
Dewey v. Central Car & Mfg. Co.	399
Dewey v. Ingersoll	17
Dool v. Cassopolis	547
Douglass v. Manistee Circuit Judge	495
Doyle v. Mizner	332
Drain Com'r Edwards, Willcheck v.	105
Dunham, Sullivan v.	518
Dupont v. Starring	492
Eberts v. Eberts	404
Eddy v. Manshaun	532
Engle v. Campbell	565
Evening News Association v. Tryon	549
Farmers' Mut. F. Ins. Co. v. Gargett	289
Farr, Osburn v.	134
Fawcett, Brigham v.	542
Ferguson v. Millikin	441
Ferguson v. Popp	115
Field, Clark v.	342
Fildew v. Besley	100
First Nat. Bank of Detroit, Fish v.	203
First Nat. Bank of Sturgis, Odd Fellows v.	461
Fish v. First Nat. Bank of Detroit	203
Fletcher v. Moore	577
Folkerts v. Power	283
Forrest v. O'Donnell	556
Fraser v. Fraser's Estate	275
Fraser v. Jennison	206
Fredenburg, Rynearson v.	412
Freeman, Bishop v.	533
French v. Canada Southern Ry. Co.	64
Frisbie, Lamore v.	186
Fulton Iron Works, Griffin v.	571
Gargett, Farmers Mut. F. Ins. Co. v.	289
Gehan, Markham v.	74
Gibson, Burrowes v.	121
Gies v. Green	107
Gifford, Willson v.	454
Gingrass, Iron Cliffs Company v.	30
Gladwin Supervisors, Scrafford v.	464
Gott v. Judge of Superior Court	625

	PAGE.
Graham, Carpenter v.	191
Green, Gies v.	107
Griffin v. Fulton Iron Works	571
Gunzberg v. Kent Circuit Judge	591
Hanaford, Moynahan v.	329
Hanchett, Att'y Gen. v.	436
Hathaway, Ruberts v.	592
Hebert v. Bulte	489
Heintzman, Stirling v.	449
Hendricks v. Rasson	104
Henry, Quackenbush v.	75
Hinchman, Watson v.	27
Hinderer, Neib v.	451
Hirth v. Pfeifle	31
Hiscock v. Norton	320
Houghton, Detroit v.	459
Howard v. Bond	131
Hoyt, Twogood v.	609
Hubbell, King v.	597
Hudson v. Judge of Superior Court	239
Hunt v. Chapin	24
Hursh, Jeffery v.	563
Ingersoll, Dewey v.	17
Ingham Circuit Judge, Burkle v.	513
Ingham Sup'rs, Abels v.	526
Iron Cliffs Co. v. Buhl	86
Iron Cliffs Co. v. Gingrass	30
Jeffery v. Hursh	563
Jenness, Carleton v.	110
Jenness v. Lapeer Circuit Judge	469
Jennison, Fraser v.	206
Johnson v. Stilson	541
Judge of Superior Court, Gott v.	625
Judge of Superior Court, Hudson v.	239
Just v. Wise Township	573
Kellogg v. Secord	318
Kent Circuit Judge, Dennis v.	249
Kent Circuit Judge, Gunzberg v.	591
Kilburn, McKay v.	614
King v. Hubbell	597
Kitts, Quincy Mining Co. v.	34
Knapp v. Lee	41
Knapp, People v.	267
Labadie, Senecal v.	126
Lamore v. Frisbie	186
Lange, McLaughlin v.	81
Lapeer Circuit Judge, Jenness v.	469
Larkin v. Mitchell & Rowland Lumber Co.	296
Lee, Knapp v.	41
Lewis, McDonald v.	135
Limbach, Burger v.	162
Lockwood v. Thunder Bay River Boom Co.	536
Lozo, Smith v.	6
Lyle v. Palmer	314
McCallum v. Bethany	457
McCarthy's Case	71
McClung v. McClung	53
McConnell, Worth v.	473
McDonald v. Lewis	135
Macdonald v. Muskegon Supervisors	545
McGuffie v. Carter	497
McKay v. Kilburn	614
McLaughlin v. Lange	81
McLaughlin v. Wilks	553
McOmber v. Chapman	117

	PAGE.
Maillet v. People	262
Mandigo, Pashby v.	172
Manistee Circuit Judge, Douglass v.	495
Manistee River Imp. Co., Benjamin v.	628
Manshaun, Eddy v.	532
Markham v. Gehan	74
Mason, Palmer v.	146
Matson v. Melchor	477
Maxfield, Mickle v.	304
Maxwell v. Bay City Bridge Co.	67
Melchor, Matson v.	477
Merchants' Bank of Canada, Ortmann v.	464
Mette, Briggs v.	12
Michigan Mutual Life Ins. Co. v. Bowes	19
Mickle v. Maxfield	304
Miles v. Skinner	181
Millikin, Ferguson v.	441
Mink v. Morrison	567
Mitchell & Rowland Lumber Co., Larkin v.	296
Mitchell, Burhans v.	417
Mizner, Doyle v.	332
Moore, Fletcher v.	577
Moore's Estate, Sperry v.	353
Morrison v. Berry	389
Morrison, Mink v.	567
Morrison, Odd Fellows v.	521
Moynahan v. Hanaford	329
Muskegon Supervisors, Macdonald v.	545
Neib v. Hinderer	451
Norton, Hiscock v.	320
O'Brien v. O'Brien	15
Odd Fellows v. First Nat. Bank of Sturgis	461
Odd Fellows v. Morrison	521
O'Donnell, Forrest v.	556
Ortmann v. Merchants' Bank of Canada	464
Ortmann v. Sovereign	1
Osburn v. Farr	134
Palmer, Lyle v.	314
Palmer v. Mason	146
Parks v. Allen	482
Pashby v. Mandigo	172
People, Cummins v.	142
People v. Knapp	267
People, Maillet v.	262
People, Printz v.	144
People, Semon v.	141
People v. Smith	138
People, Stuart v.	255
Perry Coon's Case	65
Pfeifle, Hirth v.	31
Phelps, Russell v.	377
Popp, Ferguson v.	115
Porter, Weimer v.	569
Post v. Campau	90
Power, Folkerts v.	283
Powers, Blanchard v.	619
Pratt v. Pratt	174
Preston, Thorp v.	511
Preston, Vogel v.	511
Pridgeon, Bagley v.	550
Printz v. People	144
Probate Judge, Brown v.	501
Quackenbush v. Henry	75
Quincy Mining Co. v. Kitts	34
Rasson, Hendricks v.	104
Reed v. Baker	272
Rice's (Willie) Case	528
Ritter v. Ritter	108
Robbins v. Brooks	62
Robinson, Detroit v.	198

	PAGE.
Ruberts v. Hathaway	592
Russell v. Phelps	377
Ryan v. Akeley	516
Rynearson v. Fredenburg	412
Sager v. Tupper	605
Sanilac Supervisors, Attorney General v.	72
Scrafford v. Gladwin Supervisors	464
Secord, Kellogg v.	318
Semon v. People	141
Senecal v. Labadie	126
Sheahan v. Wayne Circuit Judge	69
Skinner, Miles v.	181
Smead, Woolston v.	54
Smith v. Lozo	6
Smith, People v.	138
Sovereign, Ortmann v.	1
Sperry v. Moore's Estate	353
Stanton, Turner v.	506
Starring, Dupont v.	492
State Auditors, Ayres v.	422
Steele v. Thompson	594
Steinhauser v. Wayne Circuit Judge	463
Stilson, Johnson v.	541
Stirling v. Heintzman	449
Strohauer v. Voltz	444
Stuart v. People	255
Stuart v. Worden	154
Sullivan v. Dunham	518
Taylor v. Dansby	82
Thompson, Steele v.	594
Thompson, Vroman v.	145
Thorp v. Preston	511
Thunder Bay River Boom Co., Lockwood v.	536
Toledo, C. S. & D. Ry. Co., Day v.	523
Toms, Watson v.	561
Trowbridge, Buhl v.	44
Tryon, Evening News Association v.	549
Tupper, Sager v.	605
Turner v. Stanton	506
Twogood v. Hoyt	609
Vanneter v. Crossman	465
Vliet v. Westenhaver	593
Vogel v. Preston	511
Voltz, Strohauer v.	444
Vroman v. Thompson	145
Wager, Coe v.	49
Watson v. Hinchman	27
Watson v. Toms	561
Wayne Circuit Judge, Arno v.	362
Wayne Circuit Judge, Sheahan v.	69
Wayne Circuit Judge, Steinhauser v.	463
Webster v. Anderson	554
Weimer v. Porter	569
Westenhaver, Vliet v.	593
Wilber, Burke v.	327
Wiles, Cook v.	439
Wilks, McLaughlin v.	553
Willcheck v. Drain Commissioner	105
Willie Rice's Case	528
Willson v. Gifford	454
Wilson v. Coolidge	112
Wise Township, Just v.	573
Witherspoon v. Clegg	484
Woodward v. Chester	461
Woolston v. Smead	54
Worden, Stuart v.	154
Worth v. McConnell	473
Zook v. Blough.	487

164 CASES.

TABLE OF CASES CITED.

*Distinguished.

	PAGE.
Achey v. Hull, 7 Mich., 423-430	345
Adams v. Abram, 38 Mich., 302, 304	594
Adams v. Field, 25 Mich., 16	313
Adams v. Lee, 31 Mich., 440	397
Adams Mining Co. v. Senter, 26 Mich., 79	194, 555
Adams v. People, 63 N. Y., 621	302
Albro v. Agawam Canal Co., 6 Cush., 75	40
Aldrich v. Chubb, 35 Mich., 350	345
Allen v. Antisdale, 38 Mich., 229	545
Allen v. McKibbin, 5 Mich., 454	101
Allison v. Chandler, 11 Mich., 542	389
Ambler v. Aud. Gen'l, 38 Mich., 746	427
Ames v. Port Huron etc. Co., 11 Mich., 139	527
Anderson v. Robinson, 38 Mich., 407	460
Angier v. Ash, 26 N. H., 99	604
Appo v. People, 20 N. Y., 531	248
Arlin v. Brown, 44 N. H., 102	325
Arnold v. Shields, 5 Dana, 21	248
Auditor General v. Pullman Palace Car Co., 34 Mich., 59	427
Avery v. United States, 12 Wal., 304	427
Bagg v. Jerome, 7 Mich., 145	150
Bailey and Hope, see ex parte.	
Bailey v. Gould, Walk. Ch., 478	310
Ballard v. Ballard, 18 Pick., 41	412
Ballou v. Hill, 23 Mich., 60	460
Bank of Australasia v. Nias, 16 Q. B., 717	375
Banks v. Goodfellow L. R. 5 Q. B. 549	231
Barber v. Smith, 41 Mich., 138	553
Barker v. Binninger, 14 N. Y., 270	80
Barman v. Carhartt, 10 Mich., 338	490
Bassett v. Hathaway, 9 Mich., 28	310
Beekman v. Lansing, 3 Wend., 446	79
Bennett v. Robinson, 27 Mich., 26-30	565
Benoist v. Murrin, 58 Mo., 307	231
Berry v. DaCosta, L. R. 1 C. P., 331	351
Blackburn Ex parte, 5 Pike, 22	248
Blackwood v. Van Vleit, 30 Mich., 118	25
Blanchard v. Tyler, 12 Mich., 339	481
Boardman v. Woodman, 47 N. H., 120	231

†Disapproved.

	PAGE.
Bolles v. Beach, 22 N. J., 680	448
Bonner v. United States, 9 Wal., 156	427
Booth v. McNair, 14 Mich., 19	150
Boxheimer v. Gunn, 24 Mich., 372	479, 481
Boyd v. Corbitt, 37 Mich., 52	43
Boyd v. Watt, 27 Ohio St., 259	596
Brentwood Brick & Coal Co. See in re.	
Brewer v. Dodge, 28 Mich., 359	313
Briggs v. Briggs, 20 Mich., 34	225
Bronson v. Green, Walk. Ch., 56	160
Brown v. Co. Com'rs, 21 Penn. St., 37	402
Brown v. People, 36 Mich., 203	264
Bryan v. Smith, 10 Mich. 229	499
Buckland v. Pocknell, 13 Sim., 406	325
Burrell v. N. Y. etc. Salt Co., 14 Mich., 38	389
Burson v. Huntington, 21 Mich., 415	583
Butler v. Ladue, 12 Mich., 173	160
Camp v. Chamberlain, 5 Denio, 198	80
Campbell v. Campbell, 21 Mich., 438	325
Carey v. Guillow, 105 Mass., 18	131
Cary v. Hewitt, 26 Mich., 228	601
Carleton v. Jenness, 40 Mich., 343	110
Case v. Case, 26 Mich., 495	313
Case v. Terrell, 11 Wal., 199	427
Cathcart v. Bowman, 5 Penn. St., 317	95
Cazet v. Hubbell, 36 N. Y., 677	253
Chace v. Trafford, 116 Mass., 529	360
Chandler v. Lawrence, 3 Mich., 261	84
Clark v. Crane, 5 Mich., 151	624
Clark v. Huron Judge, 40 Mich., 166	313
Clark v. Stilson, 36 Mich., 482	325
Clark v. Swift, 3 Met., 390, 392, 395	94, 97
Cochran v. Flint, 57 N. H., 514-547	397
Cole v. Swan, 4 Greene (Iowa), 32	271
Columbia Bank v. Jacobs, 10 Mich. 349	153
Columbus Ins. Co. v. Peoria Bridge Association, 6 McLean, 70	634
Com'rs of Central Park, see In Re	
Comstock v. Howd., 15 Mich., 237	533
Comstock v. Smith, 26 Mich., 307	583
Cook v. Bell, 18 Mich., 387	479
Cooper v. Skinner, 124 Mass., 183	402

	PAGE.
County of Wayne v. Miller, 31 Mich., 447	589
Covert v. Rogers, 38 Mich., 363	341
*Crapo v. Seybold, 35 Mich., 169	194
Crawford v. Edwards, 33 Mich., 354	447
Crippen v. Morrison, 13 Mich., 23	397
Cross v. People, 8 Mich., 113	142
Cruikshank v. Gardner, 2 Hill, 333	84
Crum v. Thornley, 47 Ill., 192	231
Cumber v. Wane, Strange, 426	473
Cummins v. People, 42 Mich., 142	145
Dair v. United States, 16 Wall., 1	504
Dalton v. Laudahn, 30 Mich., 349	539
Dane v. Holmes, 41 Mich., 661	137
Daniels v. Eisenlord, 10 Mich., 454	161
Dann v. Cudney, 13 Mich., 242	468
Darling v. Hurst, 39 Mich., 765	544-5
Dart v. Barbour, 32 Mich., 267	440
Davis v. Detroit etc. R. R. Co., 20 Mich., 105	41
Davis v. Rider, 5 Mich., 423	120
Delavergne v. Norris, 7 Johns., 358	95
Denison v. Smith, 33 Mich., 155	552
Despard v. Walbridge 15 N. Y. 374	499, 500
Detroit v. Robinson, 38 Mich., 108	199
Deuel v. Higgins, 9 Mich., 223	477
Devaux v. Detroit, Har. Ch., 98	588
Dew v. Clark, 1 Add. Ec., 279: 3 Add. Ec., 79	231
Dewey v. Board of State Auditors, 32 Mich., 191	426
D'Eyncourt v. Gregory, L. R., 3 Eq. Cas., 382-397	398
Diehl v. Zanger, 39 Mich., 601	494
Disbrow v. Jones, Har. Ch., 59	324
Dixon v. Hill, 5 Mich., 404	481
Doty v. Martin, 32 Mich., 462	447
Downs v. Hawley, 112 Mass., 237	345
Doyle v. Howard, 16 Mich., 261	491
Doyle v. Mizner, 40 Mich., 160	335
Drake v. Regents of the University, 4 Mich., 98	429
Drury v. Imp. Co., 13 Allen, 168	448
Dudgeon v. Haggart, 17 Mich., 275	160
Dundalk W. Ry. Co. v. Tapster, 1 Q. B., 667	375
Dunham's Appeal, 27 Conn., 192	231
Dunlap v. Gleason, 16 Mich., 158	11
Dunn v. Dunn, 11 Mich., 284	268
Dunn v. Sutliff, 1 Mich., 24	416
Dunton v. Brown, 31 Mich., 182	134
Dwight v. Cutler, 3 Mich., 566	538
Dye v. Mann, 10 Mich., 291	160
Edwards v. Kilkenny & Great S. & W. Ry. Co., 2 C. B. (N. S.), 397	374
Elliott v. Van Buren, 33 Mich., 49	142
Ellison's Estate, 35 E. L. & E., 553	254
Emery v. Lord, 26 Mich., 431	393
Ex parte Bailey & Hope; In re Barnard, 14 Beav., 18: 7 E. L. & E., 203	254
Ex parte Hamilton, 51 Ala. 62	248
Facey v. Otis, 11 Mich., 213	160
Fellows v. Smith, 40 Mich., 689	480
Field v. Manchester, 32 Mich., 279	589
Final v. Backus, 18 Mich., 218	553
*First Nat. Bank of Marquette v. Crowley, 24 Mich., 496	194
Folsom v. Teichner, 27 Mich., 107	48
Foote v. Burnet, 10 Ohio, 332	98
Fosdick v. Perrysburg, 14 Ohio St., 472	402
Fowler v. Detroit & Milwaukee Ry. Co., 7 Mich., 79.	486
Frail v. Ellis, 17 E. L. & E., 457	324
Francis v. Francis, 2 DeG., M. & G. 73	254
Fryatt v. The Sullivan Co., 5 Hill, 116: 7 Hill, 529	394
Fuller v. Sweet, 30 Mich., 237	499
Ganssly v. Perkins, 30 Mich., 494	596
Gardner v. Gorham, 1 Doug. (Mich.). 507	22
Giddey v. Altman, 27 Mich., 206	11
Gies v. Green, 42 Mich., 107	309
Gilbert v. Cooley, Wal. Ch., 494	317
Gilbert v. Kennedy, 22 Mich., 117	389
Gott v. Brigham, 41 Mich., 227	626
Grand Rapids, Newaygo & L. S. R. R. Co. v. Gray, 38 Mich., 461	551
Grant v. Merchants' & M. Bank of Detroit, 35 Mich., 515	160
Greeley v. Stilson, 27 Mich., 153	127
Groom v. Wortham, 5 Scott, N. R. 799	376
Haggerty v. Wilber, 16 Johns., 288	79
*Hahn v. Fredericks, 30 Mich., 224	194
Hale v. Clauson, 60 N. Y., 339	253, 255
Hall v. Parker, 37 Mich., 590	503
Hamilton, see Ex parte.	
Hansford v. Elliott, 9 Leigh, 79	406
Hanson v. Donkersley, 37 Mich., 184	367
Hard v. Vermont etc. R. R. Co., 32 Vt., 473	40
Harris v. Deitrich, 29 Mich., 366	310
Harvey v. McAdams, 32 Mich., 477	486
Hayden v. Ahearn, 9 Gray, 488	500
Haynes v. Leppig, 40 Mich., 602	603, 605
Haywood v. Johnson, 41 Mich., 598	375-6
Heath v. Waters, 40 Mich., 457	250, 361
Hebel v. Amazon Ins. Co., 33 Mich. 400	33
Henry v. Root, 33 Mich., 371	150
Hilbourn v. Fogg, 99 Mass., 11	499, 500
Hill v. Bowman, 35 Mich., 191	545
Hinchman v. Detroit, 9 Mich., 103	589
Hinman v. Eakins, 26 Mich., 80, 82	301
*Hodson v. Van Fossen, 26 Mich., 68	105
Hogan v. Hoyt, 37 N. Y., 300	253
Hogsett v. Ellis, 17 Mich., 351	538

	PAGE.
Holland v. Hoyt, 14 Mich., 238	328
Holmes v. Russell, 9 Dowl., 487	471
Horn v. People, 26 Mich., 223	590
Hotchin v. Secor, 8 Mich., 494	22
Hovey v. Sebring, 24 Mich., 232	43
Howard v. Merriam, 5 Cush., 563-584	500
*Howard v. Patrick, 38 Mich., 795	320
Howe v. Lemon, 37 Mich., 164	309
Howry v. Eppinger, 34 Mich., 29	45
Hungerford v. Smith, 34 Mich., 300	310
Hunt v. Haven, 52 N. H., 162	619
Hunter v. Neck, 3 M. & G., 181	376
Hunter v. N. Y. etc. Salt Co., 14 Mich., 98	160
Hurd v. Robinson, 11 Ohio St., 232	160
Hurtford v. Holmes, 3 Mich., 460	533
In re Brentwood Brick & Coal Co., 4 Ch. Div., 562: 20 Eng., 758	325
In re Commissioners of Central Park, 50 N. Y., 493	402
Ives v. Tregent, 29 Mich. 390	388
Jackson v. Beaumont, 24 L. J. Exch. 301: 32 E. L. & Eq., 587	376
Jackson v. Rowland, 6 Wend., 670	500
James v. Biddington, 6 C. & P., 589	351
James v. Brown, 11 Mich., 26	18
Jenks v. Ward, 4 Met., 412	95
Jennison v. Haire, 29 Mich., 207	345
Jerome v. Hopkins, 2 Mich., 97	159
Johnson v. DeWitt, 36 Mich., 96 488,	489
Johnson v. Shepard 35 Mich. 115 309,	310
Johnston v. Kimball Township, 39 Mich., 187	503
Johnston v. Whittemore, 27 Mich. 463	11
Jolly v. Terre Haute Bridge Co., 6 McLean 237	634
Joyce v. Williams, 26 Mich., 332	494
Kehrig v. Peters, 41 Mich., 475	596
Kelley v. Riley, 106 Mass., 339; 8 Am., 336	351
Kimball v. Myers, 21 Mich., 276	160
Kimmell v. Willard's Adm'rs, 1 Doug. (Mich.), 217	185
Knadler v. Sharp, 36 Iowa, 232	98
Kreiter v. Nichols, 28 Mich., 496	596
Ladue v. Detroit & M. R. R. Co., 13 Mich., 380	604
Lamson v. Clarkson, 113 Mass., 348	499
Lancashire v. Mason, 75 N. C., 455	500
Lantis, Matter of, 9 Mich., 324	456
Lehigh Valley Coal Co. v. Jones, 86 Penn. St., 432	40
Lessee of Wilkins v. Wright, 6 McLean, 340	152
Le Tailleur v. S. E. Ry. Co., 3 C. P. Div., 18	376
Lindner v. Brock, 40 Mich., 618	518
Lingham v. Eggleston, 27 Mich., 328	194
Livingston's Ex'rs v. Tremper, 11 Johns. 101	460
Lucas v. Parsons, 24 Ga., 640	231
Lyon v. Coburn, 1 Cush., 278	601
McAndrews v. Burns, 39 N. J., 117	40
McCandlish v. Keen, 13 Gratt., 615	325
McCloskey v. Wayne Circ. Judge, 26 Mich., 100	375
McCormick v. Bay City, 23 Mich., 457 503, 504,	506
McCurdy v. Clark, 27 Mich., 445 184,	185
McFarland v. State Bank, 4 Pike, 410	402
McKillip v. McKillip, 8 Barb, 552	325
Mabley v. Judge of Superior Court, 41 Mich., 31	240
Mace v. Page, 33 Mich., 38	460
Mackreth v. Symmons, 1 L. C. in Eq., 194	325
Macumber v. Beam, 22 Mich., 395	489
Malone v. Hathaway, 64 N. Y., 9	40
Marble v. Whitney, 28 N. Y., 297	508
Marquette, Houghton & Ont. R. R. Co. v. Harlow, 37 Mich., 554	539
Martin v. Ash, 20 Mich., 166	396
Martin v. Kirby, 11 Gratt., 67	406
Martin v. O'Conner, 37 Mich., 440	515
Martus v. Houck, 39 Mich., 431	102
Martz v. Detroit F. & M. Ins. Co., 28 Mich., 201	512
Matter of D. & H. Canal Co., 69 N. Y., 209	402
Matter of Gleespin, 26 N. J. Eq., 523	230
Matter of Lantis, 9 Mich., 324	456
Maxfield v. Freeman, 39 Mich., 64	306
Maynard v. Pereault, 30 Mich., 160	313
Meeker v. Meeker, 75 Ill., 260-266	234
Meigs' Appeal, 62 Penn. St., 28	397
Merrick v. Town. Board, 41 Mich. 630	488
*Merrill v. Allen, 38 Mich., 487	324
Mich. State Bank v. Hastings, 1 Doug. (Mich.), 225	427
Miller v. Grandy, 13 Mich., 540	402
Miller v. Rosier, 31 Mich., 478	351
Mills v. Bliss, 55 N. Y., 139	324
Mitchell v. Warner, 5 Conn., 497	95
Molitor v. Robinson, 40 Mich., 200	82
Moore v. Mandlebaum, 8 Mich., 434	281
Moote v. Scriven, 33 Mich., 500	313
Morris v. McKay, 40 Mich., 326	515
Mountnoy v. Collier, 1 El. & Bl., 630	499
Neathway v. Reed, 3 DeG. M. & G., 18: 17 E. L. & E., 150	409
Nelson v. Cook, 19 Ill., 440	562
Newcomb v. Andrews, 41 Mich., 518	393
Nichols v. Bertram, 3 Pick., 342	402
Norris v. Hill, 1 Mich., 202	160
Norris v. Showerman, 2 Doug. (Mich.), 16	160

	PAGE.
Nye v. Van Husan, 6 Mich., 329	150
O'Brien v. O'Brien, 42 Mich., 15	146
†Odom v. Harrison, 1 Jones (N. C.), 402	129
Ottawa v. Lasalle, 12 Ill., 339	402
Paddack v. Pardee, 1 Mich., 421	160
Palmer v. Cuyahoga Co., 3 McL., 226	634
Palmer v. Williams, 24 Mich., 328	481
Parker v. Elding, 1 East, 352	375
Parker v. People, 22 Mich., 93	140
Parsell v. Thayer, 39 Mich., 467	150
Payne v. Avery, 21 Mich., 524, 551	325
Peabody v. McAvoy, 23 Mich., 526	453
Pearce v. B'k of Mobile, 33 Ala., 693	402
People v. Clark, 33 Mich., 113	268
People v. Ingham Supervisors, 20 Mich., 95	588
People v. Jones, 6 Mich., 176	588
People v. Lynch, 29 Mich., 274, 288	263-4
People v. Quigg, 59 N. Y., 83	402
People v. Seward, 7 Wend., 518	248
People v. Wayne Aud'rs 10 Mich. 308	547
Pereles v. Watertown, 6 Biss., 79	368
Philipson v. Earl of Egremont, 6 Q. B., 587	374
Phillips v. Raymond, 17 Mich., 287	160
Pidcock v. Potter, 68 Penn. St., 342	232
*Pierson v. Manning, 2 Mich., 445	150
Popple v. Day, 123 Mass., 520	160
Pound v. Turck, 95 U. S., 459	634
Powden v. Johnson, 7 Rep., 294	544
Prescott v. Trueman, 4 Mass. 627, 630	95
Preston v. Whitney, 23 Mich., 260	11
*Price v. Haynes, 37 Mich., 487	151
Proctor v. Robinson, 35 Mich., 291	190
Purkiss v. Benson, 28 Mich., 538 440,	614
Rabe v. Fyler, 10 Sm. & M., 440	500
Randall v. Higbee, 37 Mich., 41	194
Reading v. Beardsley, 41 Mich., 123	84
Reese v. Jared, 15 Ind., 142	398
Reeside v. Walker, 11 How., 272	427
Reid v. Sycks, 27 Ohio St., 285	160
Rex v. Severn & Wye Ry. Co., 2 Barn. & Ald., 646	428
Richard v. Bent, 59 Ill., 38	98
Roberts v. Highway Commissioners, 25 Mich., 23, 28	456
Roberts v. Miles, 12 Mich., 297	545
Roberts v. Wilkinson, 34 Mich., 129	31
Robertson v. Corsett, 39 Mich., 777	397
Rogers v. People, 34 Mich., 345	263
Rothschild v. Grix, 31 Mich., 150	330
Royce v. Goodwin, 22 Mich., 496	427
Runnells v. Webber, 59 Me., 488	95
Russell v. Inspectors, 4 Mich., 187	429
Rust v. Bennett, 39 Mich., 521	6
Ryerson v. Eldred, 18 Mich., 490	313
Ryerson v. Eldred, 23 Mich., 538	313

	PAGE.
St. Jude's v. VanDenberg, 31 Mich. 287	51
Sands v. Davis, 40 Mich., 14	515
Scrafford v. Gladwin Supervisors, 41 Mich., 647	464
Scripps v. Foster, 41 Mich., 742	225
Scripps v. Reilly, 38 Mich., 23	550
Scriven v. Hursh, 39 Mich., 98	310
Secor v. Bell, 18 Johns., 52	376
Sheahan v. Barry, 27 Mich., 217	351
Sheldon v. Hawes, 15 Mich., 519	310
Shields v. Boucher, 1 DeGex & Smale, 40	235
Shirreff v. Wilks, 1 East, 48	460
Smith v. Dodge, 37 Mich., 354	533
Smith v. Hamilton, 20 Mich., 438	494
Smith v. Lloyd, 29 Mich., 382	94
Snook v. Davis, 6 Mich., 156	150
Spooner v. McConnell, 1 McL., 353	634
*Stadler v. Moors, 9 Mich., 264	386, 593
State Bank v. Chapelle, 40 Mich., 447	150, 152
State Insurance Co. v. Todd, 83 Penn. St., 272	345
State v. Rackley, 2 Blackf., 249	402
State v. Stoll, 17 Wall., 425	402
Stewart v. Carleton, 31 Mich., 270	494
Stockett v. Bird, 18 Md., 484	402
Stone v. Welling, 14 Mich., 514	481
Strachan v. Brown, 39 Mich., 138	106
Strang v. People, 24 Mich., 1	263, 266
Stroh v. Hinchman, 37 Mich., 490	211
Sullivan v. People, 31 Mich., 1	261
Supervisors v. Coffenbury, 1 Mich., 355	416
Supervisors of Houghton v. Rees, 34 Mich., 481	26
Supervisors of Midland v. Auditor General, 27 Mich., 165	427
Sutherland v. Governor, 29 Mich. 320	427
Sutphen v. Ellis, 35 Mich., 450	190
*Sutton v. Hanford, 11 Mich., 513	151
Tapley v. Goodsell, 122 Mass., 176	473
Taylor v. Boardman, 24 Mich., 287: 25 Mich., 527	313
Taylor v. Burnap, 39 Mich., 739	106
Taymouth v. Koehler, 35 Mich., 26	103
Teed v. Elworthy, 14 East, 210	135
Thomas v. Gain, 35 Mich., 155	548
Thomas v. Stone, Wal. Ch., 117	481
Thompson v. Jarvis, 40 Mich., 526	313
Thompson v. Kyner, 65 Penn. St., 368	231
Thompson v. Richards, 14 Mich., 172	130
Thurston v. Prentiss, 1 Mich., 193	160
Tillman v. People, 12 Mich., 405	589
Tufts v. Adams, 8 Pick., 547	95
Turner v. Bank of North America, 4 Dal., 11	552

	PAGE.
Turner v. McCarty, 22 Mich., 265	161
Turner v. People, 33 Mich., 363	263
United States v. Clark, 8 Pet., 436	427
Van Alstine v. People, 37 Mich., 523-524	402
Van Buren v. St. Joseph etc. Ins. Co., 28 Mich., 398	294
Vanderkarr v. Thompson 19 Mich. 82	127
Van Etten v. Eaton, 19 Mich., 187	401
Van Husan v. Kanouse, 13 Mich., 303	116
Vanneter v. Crossman, 39 Mich., 610	466
Vinton v. Peck, 14 Mich., 293	475
Vrooman v. Turner, 69 N. Y., 280	161
Walworth v. Holt, 6 E. L. & E., 50	254
Ward v. Fellers, 3 Mich., 281, 288	130
Ward v. Warner, 8 Mich., 508	539
Waring v. Waring, 6 Moore's P. C. Cas., 349	231
Warner v. Whittaker, 6 Mich., 133	481
Warren v. Grand Haven, 30 Mich. 24	624
Washburn v. Phillips, 2 Met., 299	248
Waterer v. Freeman, Hob., 266	96
Watkins v. Wallace, 19 Mich., 57	150
Watson v. Judge of Superior Court, 40 Mich., 729	376
Watson v. Stever, 25 Mich., 386	539
*Wattles v. Lapeer, 40 Mich., 624	622
Watts v. Kinney, 23 Wend., 484	376
Weld v. Bonham, 2 S. & S., 91	310
Wentworth v. Leonard, 4 Cush., 414	604
Wetherbee v. Green, 22 Mich., 311	565
Wetherwax v. Paine, 2 Mich., 555	33, 330
Wharam v. Broughton, 1 Ves. Sr. 180	255
Wheeler v. Bedell, 40 Mich., 693-696	397
Wilbur v. Flood, 16 Mich., 40, 44	268, 396
Willard v. Magoon, 30 Mich., 273	393
Willson v. Blackbird Creek Marsh Co., 2 Pet., 245	634
Wilmarth v. Palmer, 34 Mich., 347	539
Wilton v. Hill, 2 DeG. M. & G., 807	255
Winslow v. Herrick, 9 Mich., 380	460
Wisconsin River Imp. Co. v. Manson, 43 Wis., 255	635
Wonder v. Baltimore etc. R. R. Co., 32 Md., 417	41
Woodman v. Kilbourn Manuf. Co., 1 Biss., 546: 1 Abb. U. S., 158	634
Wordsworth v. Wood 1 H. L. Cas., 129	410
Worthington v. Hanna, 23 Mich., 534, 486	603
Wing v. Bishop, 9 Gray, 223	604
Wyman v. Ballard, 12 Mass., 304	95
Yaner v. People, 34 Mich., 286	257, 258
Young v. Mathews, L. R. 2 C. P., 127	194
Young v. McKee, 13 Mich., 552	310

OCTOBER TERM, 1879.*

CHARLES L. ORTMANN, SIGMUND ROTHSCHILD, LOUIS HEIDELBACH AND PHILIP HEIDELBACH v. EGBERT G. SOVEREIGN AND JOHN CAMPBELL.

Replevin for timber taken away under a license—Estoppel.

License to a grantee of land to cut and carry away the timber would not prevent the licensor from maintaining replevin against one who had purchased the timber from the licensee, where the latter had paid nothing for the land and it was understood by all parties that ownership should remain in the licensor until payment.

A license, like an estoppel, is limited to the fair understanding on which the parties are at liberty to act; it does not give the licensee a general authority to do what he pleases.

Error to Bay. Submitted Oct. 10. Decided Oct. 28.

REPLEVIN. Plaintiffs bring error.

Wheeler & McKnight for plaintiffs in error. A license to cut timber given under the terms of a sale of the lands is inoperative if the conditions are not performed, and is no defense to an action of replevin for the timber against a third person who has purchased it, Cooley on Torts, 305; *Mumford v. Whitney*, 15 Wend., 380; *Freeman v. Headley*, 33 N. J., 523; *Walsh v. Taylor*, 39 Md., 592; it cannot give him any rights, *Carleton v. Redington*, 21 N. H., 291; *Jackson v. Babcock*, 4 Johns., 418; *Ruggles v. Lesure*, 24 Pick., 187.

Luther Beckwith for defendant in error Campbell.

* Continued from Vol. 41.

A license or re-lease given by one tenant binds all. *Truesdail v. Ward*, 24 Mich., 134; *Morrill v. Mackman*, id., 282; *Wetherbee v. Green*, 22 Mich., 311; *Greeley v. Stilson*, 27 Mich., 157; *Pratt v. Ogden*, 34 N. Y., 20; *Baker v. Wheeler*, 8 Wend., 505; *Bradley v. Boynton*, 22 Me., 287; *Draper v. Williams*, 2 Mich., 536; *Austin v. Hall*, 13 Johns., 286; *Decker v. Livingston*, 15 Johns., 481; *Grossman v. Lauber*, 29 Ind., 621; 4 Wait's Actions, 180; all who unite to bring replevin must be entitled to possession, *Hunt v. Strew*, 33 Mich., 89.

COOLEY, J. This controversy concerns the title to certain logs cut by the defendant Sovereign and one Dease on lands belonging to the plaintiffs and sold to the defendant Campbell from whom the plaintiffs replevied them. The principal facts in the case are not in dispute but the parties differ on minor points.

The plaintiff Rothschild in 1877 resided in Detroit and the plaintiff Ortmann in East Saginaw. One of the other plaintiffs resided in Cincinnati and the other in New York. The four jointly owned pine lands in Michigan. In the fall of that year Ortmann, assuming to act for all, entered into negotiations with Sovereign to sel to him and Dease all the white pine timber then standing, lying or being on certain parcels of land in Bay county, and their negotiations ended in an agreement to sell at the gross price of $16,800. In payment they were to receive a note made by John Campbell & Co. for $3000, indorsed by the purchasers, and the notes of the purchasers for the remainder, the last of which was to fall due May 1, 1880. An agreement in writing, bearing date November 22, 1877, was drawn up—amended somewhat afterwards—among the provisions in which were the following: The logs cut and the lumber therefrom were to be and remain the property of the vendors until payment of the purchase price as stipulated therein; and the vendees were to pay for all the timber cut and removed five dollars per thousand feet, board measure,

for the numbers one and two logs, and three dollars per thousand feet, board measure, for the common logs, and the sums so paid were to be indorsed on the notes. This agreement was made at Bay City, Ortmann alone of the vendors being there, and it became necessary that he should send it to the other vendors for signature. He procured their signatures after a time, and the paper was signed by Sovereign also, but not by Dease. How far it embodied the final understanding of the parties is in dispute. It is conceded that Ortmann, Sovereign, Dease, and one McKay, acting for John Campbell & Co., on the eighth day of December following met at the office of Luther Beckwith in Bay City where their negotiations were further continued, and Ortmann was informed that three million feet of the logs were sold by Sovereign and Dease to John Campbell & Co. who were to pay as a part of the purchase price said note of $3000, and also make further payments to the plaintiffs, equal, together with the amount of said note, to five dollars per thousand feet of their purchase. A contract between Sovereign and Dease and John Campbell & Co. was entered into at this time, but dated November 22, 1877. According to its provisions one million feet of logs were to be delivered to Campbell & Co. at Bay City within ninety days, and two million feet in the spring of 1878. By this contract the sums to be paid by John Campbell & Co. to the plaintiffs were to be paid to Ortmann at East Saginaw monthly. Some of the terms of the original agreement between the vendors and Sovereign and Dease seem to have been modified at this time, but not in particulars requiring mention.

While the parties were thus together at Beckwith's and while the agreement of purchase remained unsigned it was talked over among them that the vendees desired to begin their operations in lumbering at once. Ortmann says he gave no consent to this, but the testimony seems to put beyond question the fact that it was understood all around that the terms of purchase were fully agreed

upon, and that while the contract awaited signature Sovereign and Dease could go on with their lumbering operations. Ortmann fully admits that this was to be done, and McKay, acting for John Campbell & Co., so understood it. Accordingly Sovereign & Dease commenced operations the very next day. It should be stated that at this time the vendees executed what purported to be an assignment of their contract of purchase to John Campbell & Co., so as to enable that firm to go on under it for their own protection, in case of any failure on the part of the vendees.

The contract between the vendors and vendees was never fully signed and duplicates were never delivered. To whose fault the failure was attributable was a mooted question on the trial. The three thousand dollar note of John Campbell & Co. was never delivered to the vendors, nor was any money paid to them. Sovereign and Dease cut a large quantity of logs,—near two million feet in all,—of which about 300,000 feet were delivered to John Campbell & Co., and the rest were in the woods when this suit was instituted. Campbell & Co. made to Sovereign and Dease considerable payments on the logs delivered to them, and converted some of the logs into lumber. The plaintiffs gave evidence tending to show that the failure to complete and exchange contracts was wholly the fault of Sovereign and Dease; that on their part they continued their efforts to close the transaction, so far as the completion of the papers was concerned, until March 7, 1878, and that, failing in these, they demanded of John Campbell & Co. the logs in their possession, and the lumber, so far as any had been cut from their logs, and on the refusal to comply with the demand they took out their writ of replevin. On their part, Campbell & Co. showed that they offered to pay to the plaintiffs the five dollars per thousand feet which they agreed to pay to Sovereign and Dease, if plaintiffs would give them a bill of sale of the logs received by them, but plaintiffs refused.

From the foregoing statement of facts it will appear that the principal question involved in the merits of the case must be whether the title to the logs cut remained in the plaintiffs. It was insisted on their behalf that until the contract was signed and delivered, Sovereign and Dease had no authority to cut timber upon the lands at all, and that even if Ortmann had consented to their doing so—which was denied—his consent could not bind the other joint owners. On the other hand the defendants claimed that the consent of Ortmann was fully proved, and that this consent was a full license for what had been done, not only on his own behalf, but on behalf of the others for whom he was acting. The circuit judge submitted the case to the jury on the facts, instructing them, in substance, that if Ortmann consented to Sovereign and Dease going on to cut timber as they did, the action could not be maintained.

It is to be observed that this suit is not brought for the trespass—if there was one—but only to recover logs cut. It may therefore possibly be maintained even though the court should be satisfied that such a license was given as would protect against liability in trespass. The only question is whether the title to the logs passed from the owners of the lands to the parties cutting them. And upon this question we cannot agree with the circuit judge that the license—if one was given—is at all conclusive.

It is plain from the evidence that if Ortmann gave consent to the cutting, it was in anticipation of the execution of the contract, and by way of accommodation to the vendees who would be delayed in their lumbering operations if they waited for the contract to be fully executed and delivered. It was not in Ortmann's mind that his consent was to give the vendees rights the contract would not give, or to waive any rights the contract would secure to himself and his associates. Neither is there any reason for believing that the vendees understood they were to be at liberty to do that which would

not be warranted by the written agreement, nor any room for the suggestion that John Campbell & Co., who had notice of all the facts, stand in any more favorable position than do the vendees.

Now if under such circumstances the contract which was agreed upon reserved to the vendors the title to the logs until paid for, the license to cut the logs in anticipation of the due execution of the contract would necessarily be subject to the same condition. The most the vendees could claim would be that the parties were proceeding under the contract, and were to be protected as long as they lived up to its provisions. A license, like an estoppel, is to be restricted to the fair understanding upon which the parties were at liberty to act. *Rust v. Bennett*, 39 Mich., 521. It cannot be understood as a general authority to the licensee to do what he pleases.

In view of the facts it is plain that the case was submitted to the jury under erroneous views respecting the rights which the license could confer upon the defendants. Many questions were discussed in the circuit court which seem to us of no moment; but conceding all that defendants claimed, the license, under the facts as now exhibited to us, could not pass the title to the logs so long as they remained unpaid for.

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

The other Justices concurred.

42 6
82 202

42 6
93 166

42 6
96 540

42 6
143 2 13

LEWIS H. SMITH v. ELIZABETH LOZO.

Liability for ratification of trespass.

One cannot be liable as for the ratification of a tort that was not committed in his interest; so *held* where suit was brought against the general agent of a sewing machine company for a

forcible trespass committed by employees while removing a machine by his direction and in compliance with the orders of the company from the premises of one who held it under a sewing machine lease which had been forfeited.

A "sewing machine lease" gave the privilege of purchasing the machine by paying the full amount of the rent at any time during the continuance of the lease, but reserved to the lessor all property in the machine, and the right to control it until the purchase money was paid in full, and also gave him the right to seize it on default in payment. *Held* that the title continued in the lessor, and that as matter of law he had a right to dispossess the lessee in case of default.

Error to Wayne. Submitted Oct. 14. Decided Oct. 28.

TRESPASS. Defendant brings error.

Moore & Moore for plaintiff in error, to the point that the sewing machine company was entitled to the possession of the machine after demand made for it, cited *Couse v. Tregent*, 11 Mich., 65.

Griffin & Dickinson for defendant in error. A purchaser under a contract has a reasonable time in which to pay after demand made, *DeYoe v. Jamison*, 33 Mich., 94.

GRAVES, J. Mrs. Lozo sued Smith before a justice of the peace in trespass *quare clausum*, and alleged therein acts in aggravation, and among others the exportation of a sewing machine.

On the 30th of October, 1875, the Wheeler & Wilson Manufacturing Company entered into a writing with Mrs. Lozo to lease her one of their machines, with the privilege of buying. The instrument containing the arrangement was in these terms:

"This agreement, made this 30th day of October, 1875, between the Wheeler & Wilson Manufacturing Company, party of the first part, and Elizabeth Lozo, of the city of Detroit, county of Wayne, State of Michigan, party of the second part,

WITNESSETH: That the party of the first part, in consideration of the agreements hereinafter mentioned, to be kept and performed by the party of the second part, does let and rent to the party of the second part one

Wheeler & Wilson 7 D. L. and D. sewing machine, number 9193, with the following tools for the same, viz.: 1 screw-driver, 1 oil can, 2 gauges, 1 thumb-screw, 1 needle wrench, 4 bobbins, 1 hemmer, 1 emery wheel, 4 glasses, 1 side spring, 1 thread hook and 12 needles, for and during the term of 16 months from the day and date hereof. And the said party of the second part in consideration of the leasing of said sewing machine by the said Wheeler & Wilson Manufacturing Company, to the party of the second part, agrees to pay the said Wheeler & Wilson Manufacturing Company, at their office 139 Woodward avenue, Detroit, without any demand whatever being made therefor, as rent for said sewing machine, the sum of eighty-five dollars; twenty-five dollars in advance this day, and five dollars on the first day of each succeeding month, until the whole sum of eighty-five dollars shall be paid. The above first payment is one second-hand Grover & Baker, taken in exchange.

And the said party of the second part covenants with said party of the first part, that he has received said sewing machine and the tools above described, in good order and condition, and at the termination of this lease by forfeiture or otherwise will deliver up the possession of said machine and tools to the said party of the first part, in as good condition as when the machine was received, ordinary wear excepted. It is further agreed by said party of the second part, that she will not underlet or assign this lease, remove or permit to be removed said machine from her house, number 56 Wight street, in said city, without the written consent of said party of the first part. It is expressly understood and agreed by and between the parties aforesaid, that if the rent above agreed to be paid, or any part thereof, shall be unpaid on the day agreed upon, or if default shall be made in any one of the conditions herein contained to be kept by said party of the second part, or in case said Wheeler & Wilson Manufacturing Company may fear removal loss or injury of said machine and tools, or if said party of the second part shall attempt to dispose of the same, or if the same shall be removed, or disposed of, or taken by any suit of any court, then in either case this lease shall be forfeited and ended without notice, at the option of the said Wheeler & Wilson Manufacturing Company; and the said Wheeler & Wilson Manufacturing Company may without process of law take possession of said sewing machine; and for that purpose may enter any of the said premises of the said party of the second part to recover for or obtain said machine, using such force as may be necessary in so

doing, and the said party of the second part hereby waives any trespass, or any right of action for damages which she might or could have against said party of the first part, or their agents for reason of such procuring or attempting to procure possession of said machine; and said party of the second agrees to pay all costs, expenses and fees of every kind which may arise to said party of the first part, by reason of said forfeiture and taking possession.

And the said party of the second part admits that the party of the first part is a legally constituted corporation under the laws of the State of Connecticut, and no proof thereof shall be required in any action by or arising under this lease.

It is agreed between the Wheeler & Wilson Manufacturing Company and Elizabeth Lozo, that if the said Elizabeth Lozo shall desire to purchase said machine she may have the privilege of doing so at any time during the continuance of said renting by payment to the said Wheeler & Wilson Manufacturing Company of the sum of eighty-five dollars, in which case all sums paid for rent within ten months (should said renting so long continue), will be deducted from said sum. But the privilege to purchase said machine shall in no way interfere with the right of the said Wheeler & Wilson Manufacturing Company to control said machine, (all property remaining in them the same as though the privilege of purchase had not been added to this agreement of renting), until the purchase money is paid in full.

In witness whereof, the said parties have hereunto set their hands on the day and year first above written.

WHEELER & WILSON MANUFACTURING COMPANY,
By A. H. WEST, Agent. [L. S.]
ELIZABETH LOZO. [L. S.]

In presence of A. F. WATT.

No salesman is authorized to make any contract or verbal promises different from that written or printed on the face of this lease and all payments subsequent to the first must be remitted to Wheeler & Wilson Manufacturing Company, 139 Woodward avenue, Detroit.

When this arrangement was entered into Mrs. Lozo delivered the Grover & Baker machine here mentioned at twenty-five dollars and received the Wheeler & Wilson machine. She made a number of little payments subsequently, and in May, 1878, the whole amount paid, including Grover & Baker machine, was $64.50. For several months prior to this time, however, she had paid nothing,

and was in default. The machine was in her possession at her residence, and she was using it as she had occasion.

Smith at this time was the company's principal agent at Detroit, and he received a letter from the company stating that Mrs. Lozo had paid nothing later than September 25, 1877, nearly eight months, and instructing him that unless she paid $5 at once, and a like sum regularly each succeeding month until the lease should be "paid out," to take possession and advise the company. He thereupon directed Mr. Coe, the person employed to collect money and take up machines, to execute the request contained in the letter; and the latter taking with him a man by the name of Roedecker, called at Mrs. Lozo's for the money. She was unable to pay anything and refused to let the machine go. They took it, however, against her remonstrance, and in opposition to some personal resistance, and Smith afterwards refused her application to repossess it, except upon the terms of payment or security. She then brought this action against him, and was allowed to recover $100. There was some evidence tending to show that the character of the writing was misrepresented when she signed, and that she was drawn in to execute it by deception and fraud. But no question was submitted to the jury on this evidence, and the case was decided on other considerations. She also gave evidence that there was some contention with the persons who took away the machine, and that they used harsh language, and that the machine was worth to her from three to four dollars per week.

The circuit judge instructed the jury that if this trespass took place and was reported to the defendant, the general manager, and he on her demand refused to give up the machine and place her in the same position she occupied before it was taken, he was liable in the action to such judgment as they should think the evidence warranted under the circumstances.

The effect of this charge was to hold Smith as a wrong-doer by adoption or ratification of the acts of Coe

and Roedecker. The case, however, afforded no ground whatever for applying that doctrine. In order to involve one as a wrong-doer by subsequent adoption, the act complained of must have been done in his interest or been designed to further some purpose of his own. Cooley on Torts, 127. There is no pretense, or any room for any, that any act of Coe or Roedecker in the transaction was done, or understood as being done, in the interest of Smith or for his benefit. The only interest was that of his principals, the company, and the charge itself very nearly implies it.

The jury were further instructed that Mrs. Lozo was entitled to the possession and use of the machine, and entitled to recover whatever was her actual loss on account of her dispossession, and to this was added that the evidence tended to show that the use was worth to her from three to four dollars per week. In this the court erred. Upon the terms of the writing between the parties it is too plain to justify discussion that the title continued in the company, and that in point of law they were entitled to dispossess her in case of her default. *Dunlap v. Gleason*, 16 Mich., 158; *Preston v. Whitney*, 23 Mich., 260; *Giddey v. Altman*, 27 Mich., 206; *Johnston v. Whittemore*, id., 463.

It is needless to refer to other grounds the company reserved for dispossessing her. Apart from the questions mentioned there is room for saying that upon the whole case a right of action in trespass against Smith hardly seems to be indicated.

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

The other Justices concurred.

42 12
71 466
71 467
42 12
98 335

CATHERINE BRIGGS v. PHILIP A. METTE.

Chattel mortgage—Renewal affidavit.

An affidavit for the renewal of a chattel mortgage is insufficient if it does not distinctly indicate the amount to which the mortgagee was entitled. So *held* where the mortgage secured an unexpired lease containing various stipulations, and there was nothing to show whether the lessee had observed the covenants or whether any rent remained due, the affidavit stating merely "that there was due and remaining unpaid on said mortgage the conditions as mentioned in said chattel mortgage lease, and that the mortgagee's interests in the chattels therein described remain unchanged and are hereby renewed for the amount above written."

The annual renewal of a chattel mortgage is required by Comp. L., § 4709, not only for the information of the mortgager's general creditors, but for that of subsequent purchasers or mortgagees in good faith.

Error to Wayne. Submitted Oct. 14. Decided Oct. 28.

REPLEVIN. Plaintiff brings error.

Henry M. Cheever for plaintiff in error. A general renewal of a chattel mortgage is not enough and is not a statement of the mortgager's interest, *Fitch v. Humphrey*, 1 Den., 163; the affidavit must so state the amount due as to enable other creditors to judge how far it would be safe to give credit to the mortgager, *Theriot v. Prince*, 1 Edm. (N. Y.) Sel. Cas., 219.

Lucius H. Collins and *F. A. Baker* for defendant in error. The omission to renew a chattel mortgage does not affect its validity as against purchasers or mortgagees intermediate the original filing and the time prescribed for renewing, *Meech v. Patchin*, 14 N. Y., 71; *Thompson v. Van Vechten*, 27 N. Y., 568; *Latimer v. Wheeler*, 30 Barb., 485; *Dillingham v. Ladue*, 35 Barb., 38.

GRAVES, J. By the terms of a lease from Waldo M. Johnson to Sarah Cheney, executed by both parties Oc-

tober 1, 1876, Mrs. Cheney covenanted to pay Johnson $1940 rent in advance payments at the rate of $53 per month from October 1, 1876, to May 1, 1877; and at the rate of $61.33 per month from May 1, 1877, to May 1, 1878; and at the rate of $69.67 from May 1, 1878, to May 1, 1879. The instrument embraced a clause by which Mrs. Cheney mortgaged to Johnson her personal property on the premises to secure these payments, and was duly filed as a chattel mortgage January 8, 1877.

Subsequently, and on the 8th of September in the same year, Mrs. Cheney gave her mortgage to Catherine Briggs on the same property for $600, payable in ten months, with interest at ten per cent. This was filed.

January 3, 1878, Johnson filed an affidavit to renew his security for another year.

July 8, 1878, Mette, acting on behalf of Johnson, took possession of the property and Mrs. Briggs replevied it the thirteenth.

The court found against her and she alleges error. Her counsel claims that Johnson's renewal affidavit was not in compliance with the statute, and that his mortgage consequently ceased to be valid as against her. Comp. L., § 4709. On the other hand it is contended that the affidavit was good; but even if it were not, that the defect gave no advantage to Mrs. Briggs. In taking the last position reliance is placed on certain decisions in the State of New York, where the courts have ruled, on a statute resembling our own, that an omission to renew a chattel mortgage does not affect its force against purchasers or mortgagees intermediate the original filing and the time prescribed for renewing; and under this ruling, as will be observed, it would be immaterial whether Johnson's renewal affidavit was good or bad. Without dwelling on the distinction between our statute and that of New York, which is somewhat marked, the opinion is held by the other members of the court that the reasoning of the New York cases is not apposite or agreeable to the view which has prevailed here, not only with the business public, but with the bench and bar. They feel

clear that it is the sense of the provision that annual renewals are to be made in case of an existing mortgage, not only for the information of the general creditors of the mortgagor, but quite as much for the information of those who may have become purchasers or mortgagees in good faith during the vigor of the earlier mortgage.

The case then depends upon the sufficiency of Johnson's renewal affidavit, and in regard to that we have no doubt. The statute requires the affidavit to set forth the interest which the mortgagee has by virtue of the mortgage in the property therein mentioned, and the affidavit filed set up "that there is due and remaining unpaid on said mortgage the conditions as mentioned in said chattel mortgage lease; that his interests in the chattels therein described remain unchanged, and are hereby renewed for the amount above written."

The lease contained various stipulations to be observed by the lessee, and which were secured by the mortgage clause, and the term had still some time to run, and no one, by inspecting the instrument put on file, could gather whether the lessee had observed the covenants or not, or whether any rent remained due or not. The affidavit was ambiguous. It gave no explanation as to the real state of things. No one desiring to redeem could ascertain from it what amount would be necessary. The sum the mortgagee was entitled to call for was not made known. It may have been five dollars, or it may have been five hundred, and it would be difficult to base any certain charge of false swearing upon it, if it were supposed, as it is not, to be dishonest. We are satisfied it failed to convey any such distinct information as the statute required.

It follows from this that the court erred in giving judgment for return of the property; and as the court found the value to be less than the claim of Mrs. Briggs, the judgment must be reversed and one entered here in her favor, with costs of both courts.

The other Justices concurred.

JAMES O'BRIEN v. JOHN O'BRIEN AND CHARLES E. BEURMANN. 42 15 82 167

Executions on transcripts of justices' judgments.

Execution issued from the circuit court on a transcript of a justice's judgment in a suit begun by summons, is invalid if the transcript was filed in the circuit court before the expiration of the five days allowed by Comp. L., § 5395, before execution may issue.

Proceedings in regard to transcripts of justices' judgments must conform strictly to statute.

Error to Livingston. Submitted Oct. 15. Decided Oct. 28.

TROVER. Plaintiff brings error.

E. D. Lewis and *Waddell & Montague* for plaintiff in error.

A. D. Cruickshank and *D. Shields* for defendants in error.

MARSTON, J. O'Brien brought an action of trover to recover the value of certain property. The defendant Beurmann justified as sheriff under an execution issued out of the circuit court upon a transcript filed therein, of a judgment rendered in justice's court in a cause wherein John O'Brien was plaintiff and James O'Brien was defendant. A number of questions were raised and brought here for review, but as a fatal error is met at the outset, which goes to the foundation of the entire defense, we need not examine further.

The suit in justice's court was by consent of parties set down for trial on June 13, 1878. On that day the parties appeared and proceeded to trial. After the evidence was all in, the justice's docket shows that he took four days, under the statute, to decide the matter, and on June 17th rendered judgment in favor of the plaintiff.

On the eighteenth day of June the plaintiff made and filed with the justice an affidavit for a transcript of the

judgment, which was made out June 19th, and filed in the circuit court on June 20th, and an execution issued thereon and forwarded to the sheriff on the same day. It was by virtue of this execution the sheriff seized the property in question.

The statute provides that whenever an execution may by law be issued upon any judgment rendered by a justice of the peace for twenty dollars or over, exclusive of costs, an affidavit may be made, and a transcript of the judgment and proceedings in the case made and filed in the circuit court. 2 Comp. L., §§ 5382, 5383.

In a case like the present, which was commenced by summons, execution shall issue at the expiration of five days from the rendering of the judgment. Id. § 5395. There are other sections which point how and in what cases an execution may be sooner issued, but this case does not come within any of them.

June 23d was the earliest period at which a transcript of the judgment could have been made and filed in the circuit. The whole proceeding in reference to transcripts is statutory, and must be strictly followed. The transcript when filed in the circuit was unauthorized, and no valid execution could be issued thereon, and the sheriff had no valid judgment under which he could justify in this case.

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

The other Justices concurred.

42 17
106 262
42 17
s3NW 235
d130 2569

THOMAS D. DEWEY AND JOHN STEWART v. CLARISSA S. INGERSOLL, AGNES A. DAKIN AND ORSEMUS C. HOUSE.

Notice to mortgagees of subsequent conveyances.

Mortgagees need not examine the records before releasing portions of the mortgaged premises, because the record of a later conveyance would not be notice to them; but if they have notice of facts enough to put a prudent man upon inquiry, they are bound to examine the records and act accordingly.

A purchaser of a portion of some mortgaged premises situated on one of the principal streets in the village where the mortgagee resided, promptly recorded the deed and went into actual possession, improving the premises and living on them. *Held* that the mortgagee's knowledge of this was enough to put him on inquiry before releasing other parts of the premises from the mortgage lien.

Appeal from Shiawassee. Submitted October 15. Decided October 28.

FORECLOSURE of a mortgage given by Clarissa Ingersoll, dated April 20, 1868, and covering premises a part of which she afterwards sold by warranty deed dated Nov. 26, 1872, to her daughter Agnes Dakin, who is sued as a subsequent encumbrancer, and who filed a separate answer claiming that in September, 1873, without her knowledge or consent, complainants had released from the mortgage lands worth more than double the amount claimed to be due, and which she insisted should have been sold first before resorting to the land she had bought. The bill was dismissed and costs allowed to defendant Dakin, and complainants appealed.

Gould & Lyon for complainant. A mortgagee cannot be affected by a subsequent conveyance of the mortgaged premises of which he has no notice, and the record of the conveyance is notice to him, but the burden of proving notice is on the purchaser, *James v. Brown*, 11 Mich., 25; *Cooper v. Bigly*, 13 Mich., 463; *Cheesebrough v. Mil-*

lard, 1 Johns. Ch., 173; *Stuyvesant v. Hall*, 2 Barb. Ch., 151; *Stuyvesant v. Hone*, 1 Sandf. Ch., 419; *King v. McVickar*, 3 Sandf. Ch., 192; *Patty v. Pease*, 8 Paige, 277; *Howard Ins. Co. v. Halsey*, 8 N. Y., 271; *Matteson v. Thomas*, 41 Ill., 110; *Iglehart v. Crane*, 42 Ill., 261; *Deuster v. McCamus*, 14 Wis., 307.

S. Titus Parsons and *Jerome W. Turner* for defendants. The notice which affects the good faith of a party is apparent fraud or clear and undoubted notice, and this is a proper ground of relief, but suspicion of notice, though a strong suspicion, is not enough, *Hine v. Dodd*, 2 Atk., 275; notice of a claim need not be in the form of a distinct and formal communication, 2 Lead. Cas. in Eq., 160; and need not be given by the party himself who relies upon it, *James v. Brown*, 11 Mich., 25.

MARSTON, J. According to the undisputed facts in this case, the defendant Agnes A. Dakin was in the actual unequivocal possession of a portion of the mortgaged premises, claiming title thereto under her deed of November 25, 1872, which had been recorded November 26th, at the time complainants released from their mortgage a part of the premises in the fall of 1873.

This release does not appear to have been made at her request, or with her consent or knowledge, and the important question is whether complainants at the time of the release, had notice of Mrs. Dakin's rights in the premises. If they did have, it is not claimed that they can, under the facts in this case, subject her portion to the payment of their mortgage.

A mortgagee is not bound to make an examination of the records before releasing a portion of the mortgaged premises, as the record of a subsequent conveyance or mortgage on the whole or a portion of the mortgaged premises would not be notice to him. *James v. Brown*, 11 Mich., 26; Thomas on Mortgages, 137; 1 Jones on Mortgages, § 562. But the recording of such subsequent conveyances may become material where it

appears the prior mortgagee had notice of facts and circumstances sufficient to put a careful, prudent man upon inquiry. In such a case the public records furnish the information if he desires to act fairly, and a failure to examine them would show an intentional disregard by him of the rights of the subsequent purchaser. See authorities above cited.

The mortgaged premises in this case were upon one of the principal streets in the village where the mortgagees resided. Mrs. Dakin promptly recorded her deed and went into the actual possession of the premises, made improvements and resided thereon, and there is evidence tending to show that one of the mortgagees had actual notice of these facts; and he, although examined as a witness, did not deny having notice. Under such circumstances we are of opinion that he had sufficient notice to put him upon inquiry, and that he is chargeable with a knowledge of the facts which such inquiry would have given.

I am of opinion that the decree should be affirmed with costs.

The other Justices concurred.

---

42 19
s51NW 962
129 309

THE MICHIGAN MUTUAL LIFE INSURANCE COMPANY v. MARY E. BOWES.

Insurance—Notes in payment—Renewal receipts.

Where an insurance company takes a note when a premium falls due, and gives therefor renewal receipts, the policy continues in force and the company cannot afterwards insist upon its forfeiture as for non-payment.

Where an insurance company takes the notes of some other person than the assured when the premium falls due, it cannot, as against the assured, insist that they did not amount to a payment. So *held* where a husband's life was insured for his wife's benefit and his notes were given in renewal of the policy.

Where interest-bearing notes are taken instead of a cash payment, it is a legal presumption that the transaction was for the interest of the party taking them.

A provision in an insurance policy that if a policy for its surrender value is taken, it must be demanded within one year from the time an accrued premium falls due, refers to an accrued premium for the non-payment of which the company can determine the policy.

Error to Wayne. Submitted Oct. 15. Decided Oct. 28.

ASSUMPSIT on insurance policy. Defendant brings error.

Wilkinson, Post & Wilkinson and *C. A. Kent* for plaintiff in error.

Maybury & Conely for defendant in error. Where an insurance company accepts a note for a premium that has fallen due, and does not insist upon payment or the forfeiture of the policy, nor stipulate that it shall be forfeited on non-payment of the note, the law will not imply such an agreement to aid a forfeiture, but should leave the parties to insist on a strict forfeiture when it may be asserted, or save that right by express agreement in the policy or by other stipulation, *New England Mut. Fire Ins. Co. v. Butler*, 34 Me., 451; *New England Mut. L. Ins. Co. v. Hasbrook*, 32 Ind., 447; *McAllister v. New England Mut. L. Ins. Co.*, 101 Mass., 558; the custom of an insurance company in repeatedly receiving notes for premiums after former premium notes have become past due, waives the punctual payment of them and estops them from asserting a forfeiture of the policy, *Cotton States L. Ins. Co. v. Lester*, 8 Rep., 141.

COOLEY, J. There are no disputed facts in this case. On the fifteenth day of November, 1873, the plaintiff in error issued to Mary E. Bowes, the defendant in error, a policy of insurance by which the payment of ten thousand dollars was assured to her on the death of her husband, William R. Bowes, in consideration of the payment of an annual premium of four hundred and thirty-

four dollars and eighty cents. Mr. Bowes himself effected the insurance, and instead of paying the first premium in money, gave his note therefor. November 15, 1874, the second premium was paid, and the note which was given for the first was taken up. November 15, 1875, Mr. Bowes gave his note for the third premium, less sixty-two dollars, the amount of certain allowances made to him by the insurer. November 15, 1876, the amount of this note was added to the fourth premium, and two notes were given by Mr. Bowes therefor, one of $538.83, due in seven months with ten per centum interest, and one of $222.39, due in sixty days. This last note when it fell due was renewed for ninety days, and was made to bear ten per centum interest. Neither of these notes was ever paid. The premium which fell due November 15, 1877, was not paid, nor was any note or other security given for it. Mr. Bowes died November 17, 1878.

It was provided in the policy that if the premiums should not be paid when due, the company should not be liable for the payment of the sum insured or any part thereof, and the policy should cease and determine, excepting only that on the surrender of the policy duly receipted, within one year after an accrued premium was due, the insured being then alive, the company would issue a paid-up policy for the amount the surrender value would purchase as a single premium. Claiming that the notes were in legal effect payments of the premiums for which they had been given, Mrs. Bowes, on November 8, 1878, tendered to the company a surrender of the policy and demanded a paid-up policy for the surrender value, which the company refused to issue while the notes remained unpaid. The surrender value would at that time have purchased a paid-up policy for $1210.85. For this sum Mrs. Bowes thereupon brought suit, and in the circuit court recovered judgment.

There was no express agreement to receive the notes in payment of the premiums, and it is therefore insisted

that, according to the well settled rule in this State, they cannot amount to payment until actually paid. *Gardner v. Gorham*, 1 Doug. (Mich.), 507; *Hotchin v. Secor*, 8 Mich., 494. It appears, however, that renewal receipts were given when the notes were taken, so that by the express act of the company the policy was kept alive, and the company precluded from any right to insist upon a forfeiture up to November 15, 1877.

In determining whether the notes shall be considered payments, it is important to note that the paper given for premiums was not the paper of the insured. It was indeed the paper of the person on whose life the risk was taken, but had Mrs. Bowes given the paper of any third person, the case would have been no different. The company has taken the paper of another person than the assured for the premiums the assured was to pay, and if the paper is paid, will receive a large interest thereon. Now, although it is conceded that the taking of this paper was for the accommodation of the assured, it is nevertheless a legal presumption that the insurer found it to its interest to make the arrangement, so that the delay in the payment in consideration of the promise to pay interest is to be considered as agreed upon for the mutual advantage of the parties. And had the notes been paid at any time prior to the demand for a paid-up policy, it cannot be disputed that Mrs. Bowes would have been entitled to receive it.

But although the notes were not then paid, the insurance company had an undoubted right to proceed and collect them, together with the interest, which was the legal inducement for giving credit. The company might also have sold them; and this as between the company and Mrs. Bowes would have been equivalent to collection. And the notes, so far as we know, remain in the hands of the company as its property to this day, and may be collected of the estate of Mr. Bowes if that is solvent.

Under these circumstances we are of the opinion that the insurance company is precluded from denying that the notes were taken in payment for the premiums. As

has been stated above, there could have been under the circumstances no forfeiture of the policy prior to November 15, 1877. It was in full force at that day, and if the premium then falling due had been tendered, the company could not have refused it because of the notes remaining unpaid. Now, although the contract provides that a policy for the surrender value must be demanded within one year from the time an accrued premium was due, we think this means an accrued premium for the non-payment of which the company had a right to determine the policy; and there was no such accrued premium due until November 15, 1877,—the company having expressly renewed the policy to that day.

There is another consideration which is not unimportant. The fair meaning of the policy, and of the statute in accordance with which it was given, is that the insured, when he becomes unable or for any reason fails to keep up his payments, shall have the advantage of all he has made, in a paid-up policy proportioned to the amount. If instead of receiving currency the company has taken the commercial paper of third persons which may be collected afterwards, it is obvious that the assured cannot have the full benefit of his contract unless such paper is treated as payment. Suppose, for example, that Mr. Bowes were still living, and that his notes should now be collected; it is manifest that the company would then receive the full benefit of the contract on its side, including full consideration for the delay, but that the insured would be wholly deprived of the benefit promised to her in a surrender policy, if any other view were taken than is here adopted.

We think the judgment must be affirmed with costs. If in this particular case the company proves to be a loser in consequence of the insolvency of the maker of the notes, it is a result that can be provided against in the future by express stipulations.

CAMPBELL, C. J., and GRAVES, J., concurred. MARSTON, J., did not sit in this case.

42 24
66 222
42 24
90 320
42 24
98 329

THEOPHILUS C. HUNT v. EBEN J. CHAPIN AND ROBERT H. FOSS.

Tax titles—Presumption of validity of tax.

A tax-deed based upon distinct taxes of different years is valid if any one of the sales was valid, whether the others were or not.

Where the board of supervisors had ordered certain specified taxes spread upon the rolls, it was *held* that the fact that others were added would not invalidate the tax without an affirmative showing that they were not duly authorized. Comp. L., § 1129.

The county clerk is not required to certify to the township treasurer's return to the county treasurer, but to the proceedings had on extending the time for collecting taxes, and to the accuracy of the county treasurer's transcript to the Auditor General.

Error to Osceola. Submitted Oct. 15. Decided Oct. 28.

EJECTMENT. Defendant brings error.

Frank Dumon for plaintiff in error.

Brown & Palmer for defendants in error.

GRAVES, J. The final controversy between these parties is upon the validity of a conveyance made by the Auditor General, and transferring the right acquired by the State, if any, through sales for the taxes against the land for the years 1869 and 1870. The defendants in error held the original title, and Hunt, who was defendant below, holds the tax title derived from the State. The cause comes before us on a finding by the circuit judge, who reached the conclusion that the tax-title was invalid, and so decided. The question is whether the facts reported warrant this determination.

If one of the two sales was valid according to the finding, it vested a transferable title on which the grantee could stand, and in case the other was not valid, its inclusion in the State deed could not impeach the grant as to the other. Hence the title under the State deed must be deemed sufficient, unless it appears upon the facts that both sales are impeached.

The circuit judge has found that the board of supervisors at their annual session in 1869, directed the supervisor of the township in which the land is situated, to spread upon the roll a State and county tax, but did not direct spreading any other. That in fact, however, there was spread additional taxes for township, highway and school purposes, and that an item of each was assessed against the land in question; that in 1870 the board directed him to spread a State, county and township tax, and no other; but that he added a school and highway tax, and that some of each was assessed against this land. There is no finding whether these local taxes, added by the supervisor without direction of the board of supervisors, were or were not raised or authorized by any authority, or whether the school tax was the usual mill tax or some other. On these subjects the finding gives no explanation.

In this state of the case the plaintiff in error, who relies on the tax-title, contends that as there is nothing found to the contrary, it is a presumption of law that these taxes were duly authorized and were regular; and on the other hand, the defendants in error, who dispute this title, assume the position that as there is no finding of any proceeding for the raising of those taxes, the conclusion must be that they were placed on the roll without any authority whatever. We think the position taken by the plaintiff in error is upon this record the true one.

That these taxes might have been lawfully authorized must be admitted. The circumstances do not show that there was any lack of occasion or lawful impediment. The statute not only enacts that the Auditor General's deed shall be *prima facie* evidence of the regularity of all the proceedings (Comp. L., §§ 1057, 1091; *Blackwood v. Van Vleit*, 30 Mich., 118), but in section 1129 it provides further that "all taxes assessed upon any property in this State shall be presumed to be legally assessed until the contrary is affirmatively shown."

These regulations are controlling. As we have seen, the fact is found that these township, school and highway taxes for 1869 and school and highway taxes for 1870 were actually assessed against the land, while at the same time there is no affirmative finding or any finding whatever that they were not duly authorized. Here then the law comes in aid of what is actually found and fills up the gap. If there were facts to show affirmatively that the taxes were authorized, there would be no occasion for presumption; and on the other hand, if there were facts to show affirmatively that they were not authorized, there would be no room for any. There is hence no place for the application of the rule of presumption enacted by the statute, except one like this where the point is left neutral on the reported facts. It was for defendants in error as assailants of the tax-title, if the case permitted, to leave no room for this presumption on the subject. It was incumbent on them to bring upon the record an affirmative showing indicative of the want of authority to assess these taxes. On this part of the case the tax-title must prevail.

But there is a further ground of complaint against it. It is found that there was no certificate by the county clerk to the return, or statement made by the township treasurer to the county treasurer for either year, and no certificate by the county treasurer to the township treasurer's return for 1870. These omissions are claimed to invalidate the sales of both years.

There is no provision for the clerk to certify to the township treasurer's returns to the county treasurer. The clerk's duty to certify applies to proceedings where the time for collecting is extended (Comp. L., § 1005), and to the accuracy of the county treasurer's transcript to be sent to the Auditor General (§ 1033). *Supervisors of Houghton v. Rees*, 34 Mich., 481.

This disposes of the objection so far as it relates to the sale for 1869. What is left of it only concerns the sale for 1870, and the point is whether the omission of

the county treasurer to certify to the correctness of the return made by the township treasurer is a fatal defect in the proceedings for that year. The question is important, and some members of the court think it desirable to have more discussion before giving an opinion upon it. The result on this hearing does not depend upon it. The sale for 1869 stands by itself, and as it seems to have been valid, the Auditor General's conveyance is not void. It was an effective grant of all the interest which the State acquired by virtue of that sale, and was sufficient to show title in the plaintiff in error. There is consequently no necessity at present for going into the objection made to the sale for 1870. Its decision one way or the other could make no difference.

We think the court erred in finding against the tax-title on the facts reported, and that the judgment should be reversed and one entered here for the plaintiff in error, with costs of both courts, and the case be remanded for such other proceedings as may be proper.

The other Justices concurred.

CHARLES A. WATSON v. THEODORE H. HINCHMAN ET AL.

Fraudulent Debtors Act—Commissioner's finding—Complaint against partners.

It is good practice for a circuit court commissioner to file a written statement of his conclusions on a complaint made to him under the Fraudulent Debtors Act.

The Fraudulent Debtors Act does not cover cases of mere constructive fraud nor apply to those who are guilty of no personal delinquency and compel them to account for transactions of others which they cannot be presumed able to explain.

A complaint that specified partners had disposed of their property with intent to defraud, and a finding that one of them had failed to account for the firm assets and to explain the doings of all,

will not sustain a conviction of the individual partner under the Fraudulent Debtors Act.

Certiorari to Circuit Court Commissioner for Wayne county. Submitted October 15. Decided October 28.

Wisner & Speed for plaintiff in certiorari.

Griffin & Dickinson for defendants in certiorari.

GRAVES, J. The plaintiff brings this certiorari to revise proceedings taken before a circuit court commissioner against him under the statute for the punishment of fraudulent debtors. Comp. L., ch. 230.

The defendants complained to the commissioner that the firm of Watson, Waite & Co., composed of Charles Watson (the present plaintiff), William Waite and Thomas G. Sutherland, were indebted to them on contract, and that complainants had commenced a suit against said partners for such indebtedness in the Superior Court of Detroit. As ground for the application to the commissioner the complaint set up that Watson, Waite & Sutherland had assigned and disposed of their property with intent to defraud their creditors, and that Watson and Waite had assigned and disposed of their property with such intent.

The commissioner issued his warrant against the three partners, but no one besides Watson was arrested, and the case was prosecuted against him individually. Considerable testimony was taken, and numerous questions raised which will not be noticed. At the close the commissioner prepared a written statement of his views, and placed it on file. While we do not decide that this formality was necessary, we have no doubt of its regularity and propriety. It was certainly competent for the commissioner, and was good practice, to put his determination in writing and explain upon the record the way he found upon the facts, and having done so, his finding is to be consulted as the medium of his judgment. The first inquiry is whether the complaint, finding and final judgment are compatible and agreeable to law.

The proceeding was prosecuted before the commissioner on the theory that Watson was bound to satisfactorily account for the effects that had gone into the hands of the firm, and not only give such transactions and results as were brought about by himself, but such also as were brought about by either of his partners.

We are satisfied that no one under this statute can be held for any mere constructive fraud, or where he is guilty of no personal delinquency, and the act complained of is the immoral conduct of another. And we are quite certain that the law will not command a person, at the peril of being committed as a fraudulent debtor, to discover what he cannot be presumed to know, and to fully account for operations involving the transactions of others, and which transactions no one can assume he has the means of knowing or explaining.

Now, the statute allows final commitment only for some one or more of the acts specified in Comp. L., § 7177, and charged in the complaint. And we have seen that the misconduct charged was, *first*, against all three of the firm, and *second*, against Watson and Waite, and was confined to the definition in the 3d subdivision of said section. It was that the parties had assigned and disposed of their property with intent to defraud, etc.

The finding is that Watson failed to account for the firm assets, and such property as the firm had received, and satisfactorily explain the doings of the three partners.

We are not able to read it in any sense more conformable to the complaint. The proceedings are inconsistent with themselves, and not reconcilable with the statute. The effect of the commissioner's action was to acquit of the charge actually made, and convict of one neither suggested by the complaint nor authorized by the statute. The case has several aspects which would justify discussion, but it is unnecessary to go further.

The commitment was erroneous and the conviction must be quashed, with costs.

The other Justices concurred.

The Iron Cliffs Company v. Peter Gingrass.

Offset of mutual claims under one contract—Payment.

A labor contract also bound the employer to rent certain premises to the employee, and provided for monthly settlements of wages and rent. *Held* that in a suit for wages due, the amount of rent due might be proved as payment.

Error to Marquette. Submitted Oct. 16. Decided Oct. 28.

Assumpsit. Defendant brings error.

W. P. Healy for plaintiff in error. Where the parties to a suit on a contract have claims against each other, each can retain what is due him as payment. *Roberts v. Wilkinson*, 34 Mich., 129.

M. H. Crocker and *D. H. Ball* for defendant in error.

Marston, J. Gingrass brought assumpsit to recover a balance claimed by him, the greater portion of which it appeared upon the trial had been earned under a written contract. The defendant sought to introduce as payment, rent due under the same contract from the plaintiff to the defendant, which was objected to and excluded.

In this we are of opinion the court erred. The contract provided that the plaintiff should receive one dollar and fifty cents per ton for ore delivered by him on the cars; and this was to be paid for monthly by estimate, the final settlement to be by railroad weights. The defendant agreed in this contract to furnish Gingrass with a barn and blacksmith shop free of charge or rent, and to put up what buildings they deemed necessary, and Gingrass agreed to pay the company monthly a reasonable rent for the same.

It cannot well be supposed either party contemplated that when the monthly estimate and settlement were made, the company should pay in full the amount due Gingrass for ore delivered, without deducting therefrom

the amount of rent due from Gingrass for the use of the buildings; or that the company should pay him in cash according to the monthly estimate of ore delivered, and then he pay back the amount of rent due.

The whole agreement must be considered in order to ascertain the amount due either party thereunder. It contemplated a monthly settlement, an estimate of the ore delivered; also the rent due, a deduction therefrom, and payment of the balance. No other sensible construction can be given such a contract, and although the parties may not thus have met and settled monthly, or may have met at some time and estimated and agreed as to the amount of ore delivered, and the sum to be credited to Gingrass therefor, yet he would not thereby be enabled to sue for and recover such amount without any reference to the deductions to be made therefrom on account of rent. The case of *Roberts v. Wilkinson*, 34 Mich., 129, and cases there cited, apply here.

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

The other Justices concurred.

42 31
96 359
42 31
97 405
42 31
98 650
42 31
s3NW 239
131 1443

J. M. HIRTH AND ABRAHAM HIRTH v. ANNA BARBARA PFEIFLE.

Waiver by garnishee—Estoppel by garnishment proceedings.

A garnishee cannot waive or admit away the rights of the principal defendant, as by disclosing that the debt was due to some other person.

The lawful owner of a claim can only be estopped by garnishment proceedings in which the garnishee has been placed, by regular course of law, in position to bind him.

It is no defense to a suit on a joint note that one of the defendants had been garnished in a former suit as indebted to the husband of the plaintiff in the later one, and had admitted that he was indebted to the husband on the note in suit.

Garnishment process cannot reach a joint debt where there is service on only one of the debtors.

Error to Washtenaw. Submitted October 16. Decided October 28.

ASSUMPSIT. Defendants bring error.

Frazer & Hamilton for plaintiffs in error. Judgment against a garnishee bars any subsequent action upon the claim on which he admitted his indebtedness, *Webster v. Lowell*, 2 Allen, 123; *Noble v. Merrill*, 48 Me., 140; *Edson v. Sprout*, 33 Vt., 77; one of two joint makers of a note may be held by garnishment proceedings where process is served on him alone, if the other's interest is not harmed, *Ladd v. Baker*, 26 N. H., 76; *King v. Vance*, 46 Ind., 246.

James McMahon and *E. D. Kinne* for defendant in error. Judgment against a garnishee will not be a protection unless he availed himself of every possible defense, *Pierce v. C. & N. W. Ry. Co.*, 36 Wis., 283; judgment against one joint maker of a note as garnishee where both were not summoned does not bar a subsequent action on the note (*Wetherwax v. Paine*, 2 Mich., 555; *Rix v. Elliot*, 1 N. H., 184; *Hudson v. Hunt*, 5 N. H., 538; *Atkins v. Prescott*, 10 N. H., 120; *Nash v. Brophy*, 13 Met., 476; *Warner v. Perkins*, 8 Cush., 518; *Pettes v. Spalding*, 21 Vt., 66; *Wilson v. Albright*, 2 Green (Ia.), 125; *Hoskins v. Johnson*, 24 Ga., 625; *Ellicott v. Smith*, 2 Cr. C. C., 543), though it might be different if the obligations were joint and several, Drake on Attachment [4th ed.] §§ 560-1; *Macomber v. Wright*, 35 Me., 156.

CAMPBELL, C. J. Plaintiffs in error, being sued on a joint note given by them payable to the order of defendant in error, set up in defense that one of them, John M. Hirth, had been previously garnished in a suit against one Adam Pfeifle whom they averred to have been always the real owner of the note, and that John M. Hirth

thereupon disclosed that he was indebted to said Adam Pfeifle on the note, and upon that disclosure judgment was rendered against him for its amount.

The record shows that on the 2d day of November, 1877, one Christian Schmidt sued John M. Hirth as garnishee of John A. Pfeifle in the circuit court for the county of Washtenaw, the suit against Pfeifle having been begun in that court. The disclosure is entitled in a cause against Adam J. Pfeifle and the judgment in a cause against John Adam Pfeifle.

The disclosure contains no reference to Abraham Hirth as signer of the note, and does not describe any note payable to Anna Barbara Pfeifle.

We might be called upon to consider the very peculiar defects in these proceedings, if they were not otherwise fatally defective. It is very certain that a person summoned as garnishee cannot waive or destroy by his admissions the rights of the owners of claims against him, and that Mrs. Pfeifle cannot be affected by his admissions or assertions that he owes her husband and not her. The lawful owner of a claim can only be estopped by garnishee proceedings in which the garnishee has been put by regular course of law into a position to bind such owner. *Hebel v. Amazon Insurance Co.*, 33 Mich., 400.

In *Wetherwax v. Paine*, 2 Mich., 555, it was held that garnishee process could not reach a debt due from two joint debtors by service on one. It is a garnishee's duty when he makes a disclosure to set forth the true condition of the liability, and if he sees fit to admit a different liability than the true one, or to admit a debt which does not exist, such an admission may authorize a judgment against himself, but it cannot affect any one else.

In the present case not only was Mrs. Pfeifle a stranger to the garnishee proceedings, but they were ineffectual to reach a joint debt at all.

The court below decided correctly that they made no defense to this action.

The judgment must be affirmed with costs.

The other Justices concurred.

42 34
67 66
67 109
67 526
42 34
78 289
78 502
78 519
42 34
79 426
79 428
42 34
80 63
42 34
84 295
42 34
87 579
42 34
89 252
89 530
42 34
93 368
42 34
96 547
42 34
97 336
97 346
42 34
103 201
103 217
42 34
106 472
106 614
42 34
113 157
42 34
120 628
42 34
126 513
42 34
s3NW 240
129 4 85
129 391
j129 492
j129 493
42 34
s 3NW 240
132 2541
e133 4196
42 34
f137 5430

The Quincy Mining Company v. Joseph Kitts.

Master and servant—Negligence of fellow-employees.

A servant cannot recover from his master for an injury received in his service without showing some fault on the part of the master.

A servant assumes all the usual risks of his employment including the risk of injury from the carelessness of fellow-servants, provided they have been prudently chosen and not retained in the employer's service after he has knowledge of their unfitness or negligence.

A master cannot, by delegating it to another, relieve himself of the duty of exercising due care in the employment and retention of competent servants; and if he does delegate it to a general manager, foreman or superintendent, he remains responsible.

A servant does not assume the risk of the master's negligence, or of that of any one to whom the master entrusts his superintending authority.

A servant assumes the risk of a fellow-servant's negligence even though the latter is in a position of greater responsibility or a different line of employment, so long as both are in the same general business, so that the negligence of one may contribute to the danger of the other.

Error to Houghton. Submitted October 16 and 17. Decided October 28.

Trespass on the case. Defendant brings error.

Chandler & Grant, *T. L. Chadbourne*, and *Ashley Pond* for plaintiff in error. Mere proof of an accident and consequent injury to an employee are not sufficient proof of the negligence of his employer, who is not bound by

42 34
141 1 68

42 34
143 383

42 34
153 1371

a fellow-servant's knowledge of defects, *Steffen v. C. & N. W. Ry. Co.*, 46 Wis., 259: 18 Am. L. Reg., 435; *Mobile & Ohio R. R. v. Thomas*, 42 Ala., 672; *Columbus, etc. R. R. v. Troesch*, 68 Ill., 545; *Altreuter v. H. R. R. R.*, 2 E. D. Smith, 151; *Robinson v. F. & W. R. R.*, 7 Gray, 92, unless he is a superintendent or person to whom is committed the general conduct of a particular branch of the business, *Ladd v. New Bedford R. R.*, 119 Mass., 412; Cooley on Torts, 542–5; Whart. Neg., §§ 223–4; the knowledge of a servant of a lower grade would not bind the master, *Ft. Wayne, Jack. & Sag. R. R. v. Gildersleeve*, 33 Mich., 134; it is only in certain cases that negligence is presumed from the fact, *LeBarron v. East Boston Ferry Co.*, 11 Allen, 312; Shearman & Redf. on Negligence, § 12; the knowledge of a foreman, managing agent or superintendent, that machinery or appliances in use are defective, is not sufficient to charge the employer, *Wigmore v. Jay*, 5 Exch., 354; *Searle v. Lindsay*, 11 C. B. (N. S.), 429; *Gallagher v. Piper*, 16 id., 669; *Feltham v. England*, 7 B. & S., 676; *Wilson v. Merry*, L. R. 1 H. of L., Scotch, 326; *Howells v. Steel Co.*, L. R. 10 Q. B., 62; *Railroad Co. v. Arnold*, 31 Ind., 174; *Hanrathy v. Railroad Company*, 46 Md., 280: but see *Cumberland, etc. R. R. v. State*, 44 Md., 283; if an employer obtains competent servants and furnishes safe machinery, he is not liable to an employee for an injury resulting from a subsequent defect in the machinery, unless he, or an agent to whom he has delegated general control of the whole or a particular branch of the business, knows or ought to have known of the defect in the appliances, *Harrison v. Railroad Company*, 31 N. J. Law, 293; *Warner v. Erie R. R.*, 39 N. Y., 468; *Flike v. Bost. & Alb. R. R.* 53 N. Y., 550; *Booth v. Bost. & Alb. R. R.*, 73 N. Y., 38; *Colorado Cent. R. R. v. Ogden*, 3 Col., 499. See *Keegan v. Western R. R.*, 8 N. Y., 175; *Cayzer v. Taylor*, 10 Gray, 274; *Noyes v. Smith*, 28 Vt., 59; *Wedgwood v. C. & N. W. R. R.*, 41 Wis., 478; *Mullan v. Steamship Co.*, 78 Penn. St., 25; *Rail-*

road Company v. Cavan's Adm'r, 9 Bush, 559; *Long v. Pacific Railroad*, 65 Mo., 225.

Dan. H. Ball for defendant in error. The nature of an injury may be evidence of negligence, *Mullen v. St. John*, 57 N. Y., 567; *Brickner v. N. Y. Cent. R. R.*, 2 Lans., 506; *Stokes v. Saltonstall*, 13 Pet., 181; Whart. on Neg. § 421; an employer who entrusts to agents the execution of duties which he personally owes to his employees is as responsible for the negligence of such agents in executing such duties as for the negligence of any of his agents in the execution of the duties which he owes to others than employees, *Ford v. Fitchburg R. R.*, 110 Mass., 255-6, 259-61; *Avilla v. Nash*, 117 Mass., 318; *Laning v. N. Y. Cent. R. R.*, 49 N. Y., 521; *C. & N. W. Ry. v. Swett*, 45 Ill., 202; *C. & A. R. R. v. Shannon*, 43 Ill., 344; *C. & A. R. R. v. Sullivan*, 63 Ill., 295; *C. B. & Q. R. R. v. Gregory*, 58 Ill., 284-5; *C. & N. W. Ry. v. Jackson*, 55 Ill., 496; *T. P. & W. Ry. v. Conroy*, 68 Ill., 562; *Thompson v. Drymala*, 1 N. W. Rep., 255; *Brabbits v. Railroad Company*, 38 Wis., 289; *Shanny v. Androscoggin Mills*, 66 Me., 420; Wood on Master and Servant, § 438; Whart. Neg. § 232 et seq.; Cooley on Torts, 557, 561; see 5 Southern Law Review, N. S., 200, 380.

Cooley, J. Kitts sued the mining company to recover damages for an injury alleged to have been suffered by himself through the company's negligence while in its employ as a miner. The declaration is given in the margin.* It appears from the evidence that what in

---

*County of Houghton, ss.

Joseph Kitts, of said county, complainant herein, by Ball & Owen, his attorneys, complains of the Quincy Mining Company, a corporation, existing under the laws of this State and doing business in said county of Houghton, defendant herein, of a plea of trespass on the case, filing this declaration as commencement of suit. For that whereas, the said defendant, heretofore, to wit: on the 20th day of April, A. D. 1876, and for a long time prior thereto, to wit: at said county of Houghton, was the owner of, and was operating and working a certain copper mine there situated, for the working of which said defendant required and employed a large number of men,

the declaration is called a bridge over the chasm where the accident occurred, consisted merely of two timbers laid side by side, one of which broke and fell with the plaintiff as he was passing over. The timbers were of pine, and had been in place some five years. The evidence tended to show that they disclosed no defect when put in, and that if sound originally, five years was not time sufficient to cause dangerous decay or weakness. The only evidence of any effort to examine the broken timber after the accident, showed that it fell among others where it could not be distinguished, and the occasion of the breaking was therefore wholly unexplained. Other persons including the plaintiff himself had crossed upon these timbers with safety on the same day.

It was suggested, rather than urged, on the part of the defense, that the timber may have been weakened by a fragment of a rock falling upon it from above, and an inference to this effect might be drawn from the proofs. On the other hand the effort of the plaintiff seems to have been directed to satisfying the jury that

---

and wherein were shafts and other excavations, sunk to a great depth, and sundry and numerous drifts or levels, in which, for the purpose of operating said mine, a large number of men employed as aforesaid were required to work, and to pass and repass; and that in the floor of one of said "drifts" or "levels" of said mine, to wit: that known as the "hundred fathom level," along which the employees of said defendant were required to pass and repass many times daily, was a deep and dangerous excavation, which required to be bridged over and was bridged over by said defendant, in order that its said employees, while engaged about the work of said defendant, and under its direction and requirement, might pass along said "drift" or "level," and said employees were, by said defendant, required to pass over said excavation upon the bridge so constructed by it, about their work in said mine.

And by reason of the premises, it became and was the duty of said defendant to use and exercise reasonable care and diligence, in the construction and maintenance of such bridge, and to keep the same in a secure and safe condition for its said employees to pass over, so long as they were so required to pass over said bridge, in doing the work of said defendant.

Yet the said defendant, well knowing the premises, did not nor would keep and maintain said bridge in such condition as to be safe for its said employees to pass over, but negligently and carelessly suffered the same to become unsafe, weak and insecure, and suffered the planks of which said bridge was constructed to become decayed, and negligently and carelessly suffered said decayed and weak planks to remain in said bridge, for its said employees to pass over,

the timber must have been weak originally, or become weakened from some unexplained cause, and that from want of proper supervision the defect had never been discovered. An effort was made to bring home the want of proper supervision to one Wagner, who was said to be charged with the duty, and who, though he had casually examined the timbers sometimes, had never applied some of the most simple and usual tests, such as striking with a hammer, and piercing with a sharp instrument. Wagner was what was called a timberman in the mine: the timbermen put in and looked after such bridges or passages, and Wagner was sometimes called captain, as he had some authority over other timbermen, and might direct them as to their work. He, however, as well as the others, was under the general supervision and control of Capt. Cliff who had the entire charge of the underground work. No claim was made that either Cliff or Wagner was incompetent, or that the company had been negligent in the employment of incompetent persons, and the principal reliance of the

---

although the same were unsound and of insufficient strength for said employees to pass over with safety.

And the said plaintiff avers that heretofore, to wit: on the day and year first aforesaid, he was an employee of said defendant, and was hired by said defendant to labor for it in said mine, in and about the working thereof, and that while he was carefully and prudently passing along said "drift" or "level" and over said bridge, in obedience to the orders and requirements of said defendant, and in the course of his said employment, ignorant of the unsafe condition of said bridge, and of the danger to wit: on the day aforesaid, one of the planks of said bridge, upon which he was necessarily walking, being weak and decayed as aforesaid, gave way and broke, and by reason thereof, and by reason of the negligence, carelessness and misconduct of the defendant as aforesaid; the plaintiff, without fault or negligence on his part, fell down said excavation, to a great depth, to wit: to the depth of one hundred feet, upon the rocks at the bottom thereof, and was greatly wounded and injured by said fall, in the thigh, leg, side and head, and thereby became and was sick, disordered and sore for a long space of time, to wit: hitherto, during all which time he has suffered great pain, and has been put to great expense for medical attendance, care and nursing, to wit: the sum of one thousand dollars; and by reason thereof, he has become permanently disabled and crippled in his left leg, and is entirely deprived of the use thereof, and to the damage of the said plaintiff of twenty thousand dollars, and thereupon he brings suit, etc.

BALL & OWEN,
Attorneys for Plaintiff.

plaintiff seemed to be on such inferences of negligence on the part of Wagner as might be drawn from the evidence.

The circuit judge was requested to instruct the jury that even if they found that Wagner was negligent, yet his negligence was the negligence of a fellow servant of the plaintiff, and of this the plaintiff took the risk. This was refused on the ground, as would seem, that in respect to the supervision of this bridge or passage way Wagner was charged with the responsibility of the company, and his neglect was the neglect of his principal. As between the company and any third person, the extent of the authority or responsibility of Wagner would have been immaterial: but when a servant demands from his master compensation for an injury received in his service, it is necessary that he trace some distinct fault to the master himself. The mere fact of such injury is no evidence of such fault; neither is the mere fact that it resulted from the carelessness of some other person in the same employment. The servant assumes all the usual risks of his employment, and among these is the risk that fellow-servants will sometimes be careless and that injuries will result. All that can be required of the master in that regard is that his servants shall be prudently chosen, and that they shall not be retained in his service after unfitness or negligence has been discovered and has been communicated to him. This duty of due care in the employment and retention of competent servants is one the master cannot relieve himself of by any delegation, and if it becomes necessary to entrust its performance to a general manager, foreman or superintendent, such officer, whatever he may be called, must stand in the place of his principal, and the latter must assume the risks of his negligence. The same is true of the general supervision of his business: if there is negligence in this, the master is responsible for it, whether the supervision be by the master in person or by some manager, superintendent or foreman to

whom he delegates it. In other words, while the servant assumes the risk of the negligence of fellow-servants, he does not assume the risk of negligence in the master himself, or in any one to whom the master may see fit to entrust his superintending authority. *Albro v. Agawam Canal Co.*, 6 Cush., 75; *McAndrews v. Burns*, 39 N. J., 117; *Malone v. Hathaway*, 64 N. Y., 9; *Hard v. Vermont etc. R. R. Co.*, 32 Vt., 473.

But Wagner did not stand in respect to this company in any such position. He was no superintendent or manager; he was nothing but a fellow-servant of the plaintiff. The duties of the two were different, it is true, but so commonly must the duties of fellow-servants be. He had one thing to do and the plaintiff another, but neither stood in the master's place in respect to the other; and if it be true, as the plaintiff claimed, that Wagner had special authority and was charged with special duty in respect to the particular passage way, this cannot vary the legal aspects of the case. In any such business there must be division of employments among servants: one looks after one thing and another after another: but this each understands when he enters the service: he knows that his fellow-servants are to be charged with duties and responsibilities of differing natures and differing grades, and he also knows that one of the necessary risks of the employment is that any one of them may be negligent and cause him injury. This risk he assumes. It is immaterial that the negligent servant was in a position of greater responsibility than himself, or in a different line of employment, so long as both were in the same general business, so that the negligence of the one might contribute to the danger of the other. *Lehigh Valley Coal Co. v. Jones*, 86 Penn. St., 432; *McAndrews v. Burns*, 39 N. J., 117.

If therefore it had appeared that Wagner was negligent, as the plaintiff claimed, the action must nevertheless have failed. But we look in vain in the record for any evidence that Wagner was negligent. It may be

guessed or surmised that there was negligence somewhere, and one juror may guess that it was in the want of careful selection of timber; another, that it was in the want of subsequent inspection, or in the want of care to prevent rocks falling on the bridge; but the case affords no safe ground for any thing beyond conjecture; and if the master can be held liable under the circumstances which the record discloses, on mere guesses or inferences respecting the existence of fault somewhere, the rule that an employee assumes the ordinary risks of his employment will be wholly done away with. It is too late at this day to enter upon any discussion or defense of that rule: it has been too often enforced in this State and is too salutary in its effects upon the care and diligence of those engaged in employments where these qualities are especially requisite, to be now disturbed or questioned. *Davis v. Detroit etc. R. R. Co.*, 20 Mich., 105; *Wonder v. Baltimore etc. R. R. Co.*, 32 Md., 417.

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

The other Justices concurred.

MILTON H. KNAPP v. SETH LEE.

Suit by foreign executor—Set-off—Judgment in bar.

A foreign executor can sue in his own name on a note belonging to the estate and payable to bearer; and any claim held by the defendant against the estate can be presented as set-off. But if the note were non-negotiable, or payable to order and not indorsed, the executor should sue in his official character.

Judgment recovered in Michigan by a foreign executor suing in his own name on a note belonging to the estate and payable to bearer, would bar any subsequent proceeding against the defend-

ant, and the executor would be accountable officially in the court which had jurisdiction of the estate.

Case made from Muskegon. Submitted October 17. Decided October 28.

ASSUMPSIT. Defendant had judgment below.

James G. Campbell for plaintiff. A *bona fide* holder of a promissory note payable to bearer or to order and indorsed in blank, can sue on it in his own name, even if he is not the real owner, or is only an agent for collection, *Hovey v. Sebring*, 24 Mich., 232; *Brigham v. Gurney*, 1 Mich., 350; *Boyd v. Corbitt*, 37 Mich., 52; *Mauran v. Lamb*, 7 Cow., 174; *Lovell v. Evertson*, 11 Johns., 52; *Tompkins v. Elliot*, 5 Wend., 496; the owner of such a note can sue on it in the name of a stranger, *Gage v. Kendall*, 15 Wend., 640; it makes no difference that the holder is a foreign administrator, as no attention is paid to foreign letters of administration, *Patchen v. Wilson*, 4 Hill, 57; *Robinson v. Clandall*, 9 Wend., 425; *Sanford v. McCreedy*, 28 Wis., 103.

Keating & Allen for defendant. One cannot sue as a foreign executor in a Michigan court, *Vickery v. Beir*, 16 Mich., 50; a husband may not recover on a note belonging to his wife, *Blackwood v. Brown*, 32 Mich., 104; want of ownership is admissible as a defense to a suit on a note payable to bearer, *Reynolds v. Kent*, 38 Mich., 246.

MARSTON, J. Assumpsit was brought upon a promissory note executed by defendant Lee and made payable to Mary A. Washburn or bearer. Mary A. Washburn, who resided in Ohio, died, and Knapp was duly appointed her executor by the probate court of Erie county under her last will and testament.

The action was commenced in this State by Knapp as plaintiff, but not describing himself in any way as executor.

After plaintiff had introduced the note and given evidence as to the amount due thereon and rested, counsel

for defendant stated that as a defense they would show that the plaintiff was then a citizen of the State of Ohio, and executor under the laws of said State of the estate of said Washburn deceased; that plaintiff was not the owner of said note; that it was a part of the assets of the estate, and that plaintiff held such note as executor, but not otherwise. Evidence to this effect was introduced, and the court found such to be the facts. Counsel for defendant also stated that in defense they would show that defendant had a large claim against the estate which they were prepared to prove as a set-off. The court held that the plaintiff could not maintain the suit thus brought in his individual name, and judgment was rendered accordingly.

We are of opinion that under the showing made and facts found the plaintiff was entitled to recover. The note was payable to bearer, and was rightfully in the custody and possession of the plaintiff. *Hovey v. Sebring*, 24 Mich., 232; *Boyd v. Corbitt*, 37 Mich., 52.

Admitting this note to be a part of the assets of the estate, the plaintiff would be accountable therefor officially in the court having jurisdiction over the estate of the deceased. The action brought in this State would be a bar to any future proceeding brought against the defendant on this note, and so long as it was the property of the estate, any proper claim which the defendant had against the estate could be presented as a set-off in this action, equally as though the action had been brought by the plaintiff as executor. The defendant, therefore, is not and cannot be injured or prejudicially affected in any way because of the manner in which this action was brought. If the note had not been negotiable, or if made payable to the order of the payee, and it had not been endorsed by her, then the action should have been brought by the executor as such.

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

The other Justices concurred.

FREDERICK BUHL ET AL. v. JEROME TROWBRIDGE, LORENZO D. LEONARD AND SETH HOLCOMB.

Indorsement not part of a note—Idem sonans—Swearing the jury.

A receipt written upon a note for a part of the amount, and a memorandum that it had been protested for non-payment are no part of the note and need not appear in the copy served with the declaration in a suit on it.

"Trobridge" for "Trowbridge" is not a material variance in naming defendant in a declaration on a promissory note.

A stipulation was made between the plaintiffs on a note and one of the defendants, that the cause might be dismissed as to him, but he did not avail himself of it, and no order of discontinuance was entered. Only one of the other defendants pleaded. *Held* that the technical irregularity of swearing the jury to try the issue between the plaintiffs and the *defendants*, when no issue had been joined with two of them, was a harmless blunder, and as no order was entered on the stipulation the party with whom it was made remained a defendant in form.

Case made from Kent. Submitted October 17. Decided October 28.

ASSUMPSIT. Plaintiffs had judgment below.

Simonds & Fletcher for plaintiff. Irregularities in the form of the oath administered to the jury should be objected to at the time. *Looper v. Bell*, 1 Head (Tenn.), 373; *Candler v. Hammond*, 23 Ga., 493.

J. Mason Reynolds for defendant. The omission from the copy of a note served with a declaration on it, of an indorsement of part payment and a memorandum of protest, and a variance between the names of a defendant as given in the declaration and the copy are fatal defects under the statute authorizing the commencement of suits by declaration, Comp. L., ch. 185, sec. 7.

GRAVES, J. This is a case made in the circuit court for Kent county, after judgment.

The plaintiffs recovered under the general counts in assumpsit on a promissory note, and the defendant Holcomb suggests error. He pleaded the general issue, but the other defendants did not defend.

The note was made by "Jerome Trowbridge," and was endorsed by Leonard & Holcomb. On the trial of the issue against Holcomb the note was offered in evidence, and it then bore a receipt for $118 paid on it, and a memorandum stating that it had been protested for non-payment. These items did not appear on the copy served on Holcomb, or on that on which the sheriff made his certificate of service. For these variances Holcomb objected to the introduction of the note. The exception is void of merit. These items were no part of the note. *Howry v. Eppinger*, 34 Mich., 29; 2 Bishop on Criminal Procedure, § 407.

The accidental misspelling of the name of Trowbridge was wholly unimportant. The omission of the letter "w" produced no change in the sound.

A stipulation was made between plaintiffs and Trowbridge stating that as he had been declared a bankrupt the cause might be dismissed as to him. But he did not avail himself of it, and no order was ever entered.

An objection was made against any verdict, by Holcomb's counsel, because the jury had been sworn to try the issue between plaintiffs and all the defendants, when in fact no issue had been joined with the other defendants, and also on the ground that the action had been discontinued as against Trowbridge by virtue of the stipulation. As already stated, Trowbridge had not elected to base any order on the stipulation, and he consequently remained a defendant in point of form.

The other defendants have not complained on any ground, and if the clerk in swearing the jury committed the technical irregularity of speaking of the issue as one between the plaintiffs and the other defendants, as well

as Holcomb, it was a harmless blunder, and no one has been injured.

There is nothing further worthy of notice.

The judgment is affirmed with costs.

The other Justices concurred.

GEORGE P. BLANCHARD v. JAMES H. BROWN.

Damages for wrongful attachment—Custody of the property.

In a suit for damages from a wrongful attachment, the affidavit for attachment and the other proceedings are properly put in evidence by the defendant.

A writ of attachment is good if the party who sues it out has good reason to believe that a proper cause exists for it; but in proceedings to dissolve it, the existence of reasons for his belief is not necessarily in issue, but the court inquires whether the defendant had actually done as plaintiff believed.

In an action for damages from a wrongful attachment, where malice is neither alleged nor shown, it is assumed that there was no wrong in issuing the writ.

Attached property is under the control of the officer attaching it, and not of the plaintiff in attachment, and the latter is not responsible for its detention after dissolution of the writ; it is for the defendant to see to the enforcement of the order restoring the property.

Error to Superior Court of Grand Rapids. Submitted October 17. Decided October 28.

TRESPASS ON THE CASE for damages with a count in trover for conversion. Plaintiff brings error.

D. E. Corbitt for plaintiff in error. One whose goods are attached wrongfully may recover damages (*Kirksey v. Jones*, 7 Ala., 622) and need not rely on the attachment bond, but may proceed at common law, *Saunders*

v. Hughes, 2 Brev. S. S., 495; the right of action on the bond accrues as soon as the defendant in attachment is disturbed in his possession, *Campbell v. Chamberlain*, 10 Iowa, 337; in an action on the case for wrongful attachment, it is enough to show the want of probable cause, *Kirkham v. Coe*, 1 Jones (N. C.) Law, 423; if the alleged cause does not exist, the plaintiff is answerable for the injury sustained by defendant in suing out the attachment, *Alexander v. Hutchison*, 9 Ala., 825; if the property attached has been converted, but the wrong-doer offers to return it, the owner is not bound to receive it, *Higgins v. Whitney*, 24 Wend., 379; *Otis v. Jones*, 21 Wend., 394; where the attachment bond was defective, trover lay for the value of property attached, *Tiffany v. Lord*, 65 N. Y., 310.

J. W. & O. C. Ransom for defendant in error. Trover will not lie for goods taken under process and in the custody of the law, *Jenner v. Joliffe*, 9 Johns., 381; nor will replevin lie for goods in the custody of the law, *Thompson v. Button*, 14 Johns., 84; *Gardner v. Campbell*, 15 Johns., 402; *Mills v. Martin*, 19 Johns., 7; *Ilsley v. Stubbs*, 5 Mass., 282; *Hall v. Tuttle*, 2 Wend., 475; where the facts do not of themselves amount to actual conversion, it is incumbent on the plaintiff to give evidence of a demand and refusal before suit, 2 Greenl. Ev., § 644; *Vincent v. Cornell*, 13 Pick., 294; *Kinder v. Shaw*, 2 Mass., 398.

CAMPBELL, C. J. Plaintiff sued defendant for damages claimed to have resulted from a wrongful suit in attachment under which plaintiff's property was levied on by the under-sheriff of Kent county. The attachment was dissolved, and the action of the circuit court commissioner was affirmed by this court on certiorari in November, 1878. Some facts were relied on to show a wrongful detention which plaintiff claims to have been equivalent to a conversion, after the affirmance of the action of the commissioner.

The plaintiff on the trial proved a taking by the under-sheriff under claim of an attachment, and of Brown's co-operation therein, and showed the value of the property. He introduced no other testimony.

The defendant then offered the affidavit and other attachment proceedings, which were admitted under objection. There is some difficulty in determining which party showed the subsequent proceedings, which included in addition to the certiorari and affirmance of the commissioner's order, an order by the circuit judge staying proceedings under the dissolving order pending the certiorari. There was also evidence of what occurred after the affirmance of that order, on which the claim of conversion is founded.

We cannot understand the reason for objecting to proof of the attachment proceedings, when plaintiff expressly declared on them as the chief ground of action. They were clearly admissible.

There was no allegation in the declaration, of malice, and there was no proof whatever that Brown had not good reason to suppose Blanchard guilty of such conduct as justified him in suing out the writ. The record does not show on what allegations it was sued out. Under our statutes, if a party has good reason to believe a proper cause exists, his writ is good. It is not denied this showing was made. Counsel for plaintiff seem to have supposed that a commissioner in acting on a petition to dissolve an attachment must necessarily pass upon the question whether plaintiff had good reason for his belief. This is a mistake. The commissioner inquires whether the defendant has actually done what plaintiff believes him to have done. His exoneration of the defendant is perfectly consistent with the existence of good reasons for the plaintiff's belief in such guilt. The existence of reasons for plaintiff's belief is not necessarily in issue at all. *Folsom v. Teichner*, 27 Mich., 107.

Assuming, therefore, what we are not prepared to hold without further consideration, that want of good

reason to believe defendant's misconduct, where there is no malice alleged, is a ground of action, there was in the present case no legal evidence of that fact; and in the absence of such testimony it must be assumed there was no wrong in suing out the writ.

The property after levy was under control of the officer and not of the plaintiff in attachment, and the latter is not responsible for its further custody. If there was any necessity for urging the officer to diligence in restoring the property, it was the business of the defendant in attachment to see to the enforcement of the order of restoration which he had procured.

There was no evidence that Brown was responsible for anything but suing out the attachment, and no evidence that this was wrongful. We do not, therefore, deem it necessary to discuss the other law points, which in our opinion are foreign to the record.

The judgment must be affirmed with costs.

The other Justices concurred.

42 49
73 588

42 49
74 408
74 663

42 49
97 14

42 49
118 546

42 49
128 138

WILLIS H. COE v. AUSTIN I. WAGER.

Voluntary services—Waiving tort—Common interest—Work on shares.

No one is bound to pay for volunteered services rendered under circumstances which do not fairly indicate an expectation of reward. So *held* where a man living in his father-in-law's family without paying board sued for work which he did on the latter's farm.

Under a contract by which lessees work a farm on shares, *it seems* to be their duty to deliver to the lessor his share, and not his duty to parcel their shares out to them.

One may waive trover and sue in assumpsit for property which defendant has appropriated, but he must show just what property has been so used.

Where parties live in common in expectation of the land of one of

them which the others work on shares, the latter cannot recover back from the land owner anything that was meanwhile used in the common interest. Each party would be estopped meanwhile by daily acquiescence from claiming pay for services rendered or articles consumed, and a contract to refund cannot be implied against the distinct understanding on which the parties have acted. If it was understood that property belonging to one of them should go into the common stock, he cannot claim, if anything, more than so much of it as was not consumed with his consent in the common service.

Where one who lives in his father-in-law's family without paying board, works for his father-in-law under circumstances that do not indicate that his services are to be compensated, it is for the jury to determine whether wages are due him.

Error to Wayne. Submitted Oct. 17. Decided Oct. 28.

ASSUMPSIT on the common counts and special contract. Defendant brings error.

Moore & Moore for plaintiff in error. Where one lives in the house of his father-in-law without paying board, but giving voluntary services, and there is nothing to indicate that either party expects compensation, there can be no recovery for either the board or the services. *Davies v. Davies*, 9 C. & P., 87.

Griffin & Dickinson for defendant in error.

CAMPBELL, C. J. This suit was originally brought before a justice upon the common counts, and on a special contract whereby Coe, the defendant below, leased a farm which he owned to Wager and one William Otto, on the terms that Wager should have one-third of all the products and stock with some named exceptions,—the breach being a refusal to allow Wager to have his share, and an appropriation of it.

The case set up on the trial was for services of Wager in person and with his team during the winter and spring of 1877 from February 10 to April 1. In February, as he testified, he made a contract with Coe for working his farm whereby Coe was to furnish seed

and Wager and Otto to do the work, and each to have one-third of the yield. During the occupancy, Coe, and Wager who had just become his son-in-law, with Wager's wife and Otto, lived as one family on the farm, and seem to have furnished supplies indiscriminately. There was a difference between the witnesses as to whether the share of products was to be the net produce after deducting what was fed out and used upon the farm, or whether Wager and Otto were to have two-thirds of the gross products. In the latter part of 1877 a new arrangement was made that all should live together as one family, and put in their property together, and Otto and Wager should have the property when Coe was done with it. This arrangement continued until spring, when Wager left.

The record is very vague on several points, but enough appears to guide us to some legal results.

There is testimony tending to show that what Wager did in the way of services in the spring of 1877 was done as a volunteer, not expecting pay but only helping as any member of a family would help on a farm. He was at this time living in Coe's family and paying no board. Where such relations exist no wages are payable unless the head of the family is bound to suppose they are expected. No one is bound to pay for volunteered services rendered under circumstances which do not fairly indicate an expectation of reward. So far as this record shows, the inference that Wager and his wife should pay board is quite as natural as that which would require pay for his work. It is not claimed that any board was due, and it is certainly not so unlikely that no wages were due as to authorize that fact to be determined by the court, without leaving it to the jury. *St. Jude's v. Van Denberg*, 31 Mich., 287.

Inasmuch as it would seem the relations between the parties were such under the special contract declared on that Coe was lessor and Otto and Wager lessees, it

would seem that the duty under the lease lay on the lessees to deliver his share to the lessor, and not on him to parcel out the produce to them. Moreover it would seem this was a joint contract, and it is not clear how Wager alone could sue on it.

If he has any grievance it is that Coe got possession of some of his property and appropriated it. For this he could waive trover and sue in assumpsit, but he must show just what has been so used. Under this record, if it contains all the testimony, we do not discover on what basis any verdict could be rendered for this share. It may be there was more definite proof. The exceptions are broad enough to cover this objection.

As the case must go back for a new trial, it becomes necessary to consider another point on which we think there was a misdirection.

We think it very clear that whatever may have been the validity or invalidity of the contract that the parties should live in common in expectation of Coe's property, there can be no recovery back of anything that was by common consent used in the common interest so long as the parties lived on those terms. Each would be estopped by his daily acquiescence from claiming that he should be paid for either services rendered or articles consumed. No contract to refund can be implied in any case against the distinct understanding of the parties on which they have acted in this way. If it was understood when they made this new arrangement that the grain or other articles belonging to Wager should go into this common stock, the utmost that he can claim would be so much of it as was not consumed with his assent in the common service. If there can be any broader claim for a proportionate allowance for what he may have furnished beyond his share, (upon which we need not pass), Otto as well as Coe must be a party to such an inquiry, unless there have been dealings not hinted at in the record. These matters were not dis-

tinguished, as we think, in such a way as to guide the jury.

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

The other Justices concurred.

MARTHA McCLUNG v. JOSEPH McCLUNG.

42 53
117 527

Alimony—Valuation of lands.

A decree for alimony to be paid in land set off by a commissioner at a fair valuation, contemplates that it shall be set off according to the value of the property as shown by the testimony taken in the case, and not by some new estimate after values have changed.

APPEAL from an order confirming the report of James A. Kellogg, circuit court commissioner, fixing the amount of real estate to be set apart in satisfaction of a decree for alimony. Submitted October 17. Decided October 28.

Edwards & Sherwood for complainant appellee.

Edward Bacon and *Spafford Tryon* for defendant appellant.

COOLEY, J. The general intent of the decree for alimony in this cause was to award to the divorced wife one-third of the husband's property. To reach an apportionment, the husband was permitted to elect to pay ten thousand dollars in land, and a reference was ordered to a commissioner to set off land worth at a fair valuation that sum. But the proper amount of alimony had been determined from the evidence taken in the cause, and if the woman's share were to be set off by some new

estimate, after values had changed, great injustice might result. This was not contemplated by the court.

We find nothing in the papers sent up on this appeal to indicate that the commissioner adopted an erroneous basis for his action, or that wrong has been done. The appeal will therefore be dismissed. No costs will be awarded on this dismissal, but as the respective interests of the parties are now fully determined, any further litigation should be at the expense of the party who shall be found in fault in causing it.

The other Justices concurred.

42 54
70 269

William Woolston v. William Smead.

Replevin—Showing of interest—Practice.

Testimony in a replevin suit that plaintiff's son had offered to sell the property would not tend to show the son's actual ownership, but would tend to show his assertion of ownership, which would be some evidence that he did not recognize his father's title, and might bear upon the father's acquiescence; it would be of the same quality as testimony of the father's conduct showing the nature of his possession.

Where a fact has been shown without objection, *it seems* that farther testimony on the same point will not damnify the party against whom it is given.

One who has a present right of possession may maintain replevin, and possession is *prima facie* lawful.

A plaintiff in replevin in opening his case should set forth any special or proprietary interest on which he relies, and not rest it on a mere presumption of possession; he should not reserve evidence of his special interest to make out a new case, if necessary, by way of rebutting evidence that the real right of possession was in another.

Error to Clinton. Submitted October 21 and 22. Decided October 28.

REPLEVIN. Plaintiff brings error.

H. & H. E. Walbridge for plaintiff in error. The plaintiff in replevin need not be the owner, *Lansing v. Sherman*, 30 Mich., 49; as against a stranger bare possession will support the action, and defendant cannot, in defense, show title in a third party with whom he is not in privity, *Van Baalen v. Dean*, 27 Mich., 104; *Johnson v. Carnley*, 10 N. Y., 570.

Randolph Strickland for defendant in error. A plaintiff in replevin cannot recover without showing that he has a general or special property in the thing replevied, and a right to possess it when it was taken from him, and the writ was issued, Tiff. Justices' Guide, 92-3; *Sharp v. Whittenhall*, 3 Hill, 576; *Dunham v. Wyckoff*, 3 Wend., 280; *Wheeler v. Train*, 3 Pick., 258; *Hatch v. Fowler*, 28 Mich., 205; *Bank v. Crowley*, 24 Mich., 492; the object of replevin is to recover actual possession of property wrongfully detained from the plaintiff, *McKay v. Ross*, 40 Mich., 548; *Hickey v. Hinsdale*, 12 Mich., 99; the plaintiff's rights depend on the condition of the title and the right of possession at the beginning of suit, *Crouse v. Derbyshire*, 10 Mich., 482; *Cary v. Hewitt*, 26 Mich., 228.

CAMPBELL, C. J. Plaintiff replevied a buggy from Smead, which the latter was shown to have taken, so far as the record shows, without any right from plaintiff's barn. The defense rested entirely on the question whether the buggy at the time was in possession of the plaintiff or in the possession of his son James Woolston.

Upon this fact there was evidence before the jury and the charge of the judge was as strong in favor of the right of a party in possession as against a trespasser as could very well be made. If there was no error in other respects, there was nothing to complain of.

The defense undertook to show, and the jury were

satisfied that father and son lived together, and that the buggy belonged to the son, and was actually kept by him, and not by his father, in the building from which defendant took it.

The son's title and possession were shown by the declarations and conduct of the father and by the exercise of continued acts of ownership by the son. Among other things, this testimony of the acts and declarations of both in connection with the actual use and possession of the buggy, related to injuries and repairs to the buggy upon various occasions. Evidence was received without objection that the buggy was broken at a camp-meeting in 1878, and that it was then in possession of James, who had it repaired as his own, and at that time offered to sell it as his own. After this testimony was all in, a witness named Chamberlain was asked and allowed under objection to show the offer by James to sell the buggy just after it was broken.

This testimony did not tend to show actual ownership, but it did tend to show the assertion of ownership, which was some evidence that he did not at the time act in recognition of his father's title. It was of the same quality as the testimony received of the conduct of the father showing the nature of his possession. The same testimony on the precise point had already been received from other witnesses without objection, and no ground for this objection was given. The objection was made to the question and not to the answer, and it was certainly possible for such acts to have been done so as to bear upon the acquiescence of the father. We do not see under the circumstances that the testimony may not have been received without doing any prejudice to plaintiff, and it is not made clear to us how he was damnified by its reception after allowing the same fact to be shown by testimony not objected to.

It is also assigned as error that the court refused to allow plaintiff, in rebuttal, to show that he was himself the purchaser of the property shown by the defense to

have been purchased by the son. Upon this there is more plausibility than force in the ground stated.

There is no doubt, and it was so held below, that a person who has a present right of possession may maintain replevin without any further valuable interest; and it is also true that possession is *prima facie* lawful. But in this as in other actions a plaintiff ought to make out in his opening the case on which he chooses to rest his rights, unless what the defendant proves is something more than a disproof of his claim thus shown. In the present case his apparent possession was not the question in issue, but was merely introduced as evidence of his right to possession. He did not undertake to show a purchase directly, but he did undertake substantially to show that he controlled and used it, and had done so for some years; but he also showed, on his direct examination, that his sons used it as well as himself. It seems to us that after going thus far, he was bound, if he desired to rest on any proprietary or special interest, to show what interest he claimed.

The defendant sufficiently denied and did not merely avoid his possession by matter raising a new issue. He disproved plaintiff's possession by showing possession in James Woolston. The attempt of plaintiff in what he called rebuttal was practically to make out a different right from that on which he rested his case in the first instance; and it necessarily would have opened the door for a new controversy, in which defendant might have met this proof by a still different showing on his own behalf. It is undoubtedly not very easy to determine in all cases what is a new case and what is rebuttal, but we think in such an action as this, where there may be room in many instances for substantial damages for the detention or for injuries to the property, there is no injustice in requiring the plaintiff to make an honest showing of his rights. It would, we think, be the duty of a trial court to give him the benefit of any fair doubts by allowing testimony wherever justice requires it, and

in the present case it would not have been improper. But the plaintiff in this case undertook to use some care to avoid showing more than the merest presumption, and evidently prepared in advance to get the supposed benefit of the last word by re-offering himself as a witness in rebuttal, instead of making a frank showing in the first place. He did not ask relief by way of favor, but of right, and we think he could not do this.

The judgment must be affirmed with costs.

The other Justices concurred.

42 58
69 429
69 475

NELSON DANIELLS v. ADELBERT ALDRICH.

Warranty of a horse—Evidence—Hypothetical questions.

In a suit on a warranty of a horse, evidence that two years after he was bought he killed himself in a fit of balking, is not too remote if it is shown that his balking was a common habit extending through the whole time. Evidence may also be given that he was balky three years before the sale.

Hypothetical questions are not erroneous if they contain no assumption not justified by the evidence.

In a suit on a warranty of a horse, it was shown positively, and was undisputed, that defendant assured plaintiff that the animal was a good work horse; that he was true and all right, and true as a dollar, kind as a kitten, and as good a horse as any in the county. *Held* that a refusal to require the jury to find specifically and report whether the defendant warranted the horse, and if so, in what words, was not error, as the evidence, if believed, was enough to make out a warranty and there could not have been any finding inconsistent with it.

Error to Clinton. Submitted Oct. 22. Decided Oct. 28.

ASSUMPSIT. Defendant brings error.

A. Stout for plaintiff in error. In an action on a warranty of a horse, testimony as to defects existing

long before or after the sale is too remote, Hilliard on Sales, 372, *n; Smith v. Swarthout*, 15 Wis., 550.

Randolph Strickland for defendant in error.

GRAVES, J. This action was brought by Aldrich to recover damages for breach of warranty of a horse Daniells sold to Aldrich. The purchase was made in the spring of 1877, and Aldrich claims that Daniells warranted the horse as kind and true, and that he was not so, but was balky. Aldrich recovered $105.

After the purchase Aldrich kept him and worked him until the next winter. But at that time, whilst being used in drawing wood, he balked, and becoming fractious, threw himself down and broke his neck. There was evidence of his balking the next day after Aldrich got him, and from time to time when put to service down to his death, and these freaks were not confined to any special service or circumstances, but were a common habit.

The objection that his behavior at the time he killed himself was too long after the trade was not well taken. It was the last of a series of vicious actions which began immediately after the purchase, and not an isolated instance, and went to prove, with the other occasions, a fixed vice in the animal at the time of the warranty, and the circuit judge was very careful to instruct the jury that it was only admissible to show his character and disposition at that time. The evidence that he was in fact a balky horse three years before was also unobjectionable. If balky at that time, it was much more likely that he would prove to be balky afterwards than if he had always been true.

We see nothing incompetent in the hypothetical questions objected to. They contained no assumption not justified by the evidence, and their admission was not error.

It is objected that the judge refused to ask the jury, at defendant's instance, to find specifically and report

whether the defendant warranted the horse in question to the plaintiff when he sold him, and if he did, then in what words. The evidence for the plaintiff was positive that the defendant assured him that the horse was a good work horse; that he was true and all right, and true as a dollar, and kind as a kitten, and was as good a horse as any in the county; and this evidence was not questioned by the defendant, and if credited by the jury it was enough to make out the warranty. The judge submitted it fairly, and the result is conclusive that they believed the evidence. A separate submission of the question would have been an idle ceremony, as there was no room for any inconsistent finding. The other question, if not otherwise objectionable, was immaterial. There was no dispute about the words imputed. The only thing open was whether they were in fact used, and the jury in effect decided that they were.

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

The other Justices concurred.

LUTHER BEECHER v. CHARLES A. BARTLETT.

Covenants in a lease do not bind strangers to them.

A hotel lease covenanted that new furniture added by the lessees should be included in the inventory to be made up when the lease expired, and accounted for accordingly, and that the lessor should have the right to take possession of it. *Held* that this covenant could not cover furniture belonging to a third person but allowed by the lessee to be placed on the premises.

Error to Superior Court of Detroit. Submitted October 22. Decided October 28.

REPLEVIN. Defendant brings error.

Henry M. Cheever and *Joseph P. Whittemore* for plaintiff in error, drew analogies between this lease and real covenants.

Moore & Moore for defendants in error.

CAMPBELL, C. J. Bartlett had four billiard tables belonging to one Foster until paid for, but which Bartlett had a right to keep and use under a contract of sale, to belong to him fully when paid for. These tables were in use in a billiard room in the Biddle House, Detroit, and when taken there by Bartlett it was by arrangement with Gay & Van Norman who were then lessees of the premises. At the time when Bartlett was put in possession of the billiard room this lease was to run for over four years longer; but by a new arrangement made during the same year, the lease was terminated and the premises agreed to be surrendered.

By the original lease it was agreed that all additions to the furniture and equipments made by the lessees should be added to and become a part of the furniture and equipments of the house and added to the inventory and at the end of the contract the surplus either way was to be allowed to the proper party.

Beecher had the right at any time to resume possession of the billiard rooms and use them for other purposes. The tables which were in these rooms at the date of the lease had been taken out and turned over to him, and the lessees proposed to put in more modern and better ones than the old ones.

By the surrender arrangement the inventory was to be balanced as before arranged, and any disputed property was to remain until the dispute was settled.

Bartlett knew nothing of any of these terms, and Beecher knew nothing of the arrangements made with him. Beecher undertook to hold these tables as belonging to him under the arrangement. Bartlett had paid for the tables and replevied them. Judgment passed for him below, and Beecher brings error.

The case is too plain for discussion. Whatever agreements or covenants the lessees may have made on their own behalf, they could pass no title and create no lien on the property of third persons. The learning concerning real covenants is foreign to the controversy.

The judgment must be affirmed with costs.

The other Justices concurred.

42 62
79 439

42 62
92 221

42 62
98 454

NATHANIEL ROBBINS AND ELKANAH NICKERSON v. CATHERINE BROOKS.

Set-off of joint demands—Joint debtor on a note.

The right of set-off in courts of law is purely statutory and cannot be enlarged.

Joint debtors can set off only joint demands (Comp. L., § 5796, subd. 6) in the circuit courts, though in justice's courts a demand of the principal debtor alone may possibly be set off when the other debtor is only a surety.

One who has signed a note after it has become operative against the maker, but in order to induce others to take it, must be held as a joint debtor.

Error to Berrien. Submitted Oct. 23. Decided Oct. 28.

ASSUMPSIT. Defendants bring error.

Clapp & Fyfe for plaintiffs in error. If the principal debtor on a note has a set-off against the holder, it can be used to reduce the debt, *Andrews v. Varrell*, 46 N. H., 17: 5 Am. L. Reg., 702; 2 Dan. Neg. Inst., § 1431.

N. A. Hamilton for defendant in error. Sureties are not outside of the rule that a demand owing to one only cannot be set off against joint parties, *Warren v. Wells*, 1 Met., 80; *Van Middlesworth v. Van Middlesworth*, 32 Mich., 183-9.

CAMPBELL, C. J. Mrs. Brooks sued Robbins & Nickerson as joint makers of a promissory note made payable to the order of Alfred Osborne, endorsed by Osborne to Hopkins & Jackson, and by them to her. The chief defense relied on was a set-off belonging to Robbins against Hopkins & Jackson. It was claimed this set-off was acquired in season to attach against the note, and also that Robbins being principal and Nickerson surety, the claim, although a sole claim in favor of Robbins, was available for the benefit of both defendants.

A minor question was raised that Nickerson signed the note after it had become operative against Robbins and that his liability did not rest on any consideration. But it appeared that he signed it in order that Hopkins & Jackson might be induced to take it, and this would preclude any such question.

Under the statutes regulating proceedings before justices of the peace there is a provision which might favor the set-off if this suit had been brought before a justice. But we have no such statute which applies any where else. The general set-off law does not allow joint debtors to use any but joint demands by way of set-off. Comp. L., § 5796, subd. 6. The right of set-off in courts of law is purely statutory, and we cannot enlarge it beyond what the statutes allow.

The court below so held rightly. The judgment must be affirmed with costs.

The other Justices concurred.

JOSEPH M. FRENCH v. THE CANADA SOUTHERN RAILWAY COMPANY.

Stipulation disregarded as against legal rights of one who was not a party to it.

Suit was brought against joint parties, but summons was served on only one, who stipulated for taking a deposition. The other afterwards appeared, and on the trial the deposition was ruled out on his objection that it was taken without his consent and without notice to him. *Held* that the defendant who stipulated could not bring error on this ruling.

Error to Wayne. Submitted Oct. 24. Decided Oct. 28.

ASSUMPSIT. Defendant brings error.

W. B. Jackson for plaintiff in error.

Frank H. Culver for defendant in error.

COOLEY, J. The railway company in August, 1876, brought suit against Joseph M. French and Lewis B. Lent in justice's court, on a liability asserted against the two jointly. The summons was served on French only. The case was adjourned from time to time, until September 15, 1876, when Lent also appeared by attorney, and all parties without objection proceeded to trial on the merits.

On the trial, after the plaintiff had rested his case, the defendant French offered in evidence a deposition taken under a stipulation between himself and the plaintiff before Lent had appeared in the cause. The defendant Lent objected to its reception on the ground that it was taken without his consent, and without notice to him. On this objection the deposition was ruled out. The plaintiff had judgment in the cause, which the defendant French removed to the circuit court on certiorari, where it was affirmed. It is now here on writ of error, and the sole error assigned is the rejection of this deposition.

From the foregoing it will be seen that the error, if any, was not committed on the motion or in the interest of the plaintiff. The plaintiff stipulated that the deposition might be taken, and made no objection to its being read. The plaintiff is therefore in no fault whatever. But if the deposition was not admissible under the objection of defendant Lent, we are unable to perceive that French is in position to complain of any one. The plaintiff kept faith under the stipulation, Lent only asserted his legal rights, and the justice only accorded them. The fault, if any, must therefore lie with French himself, who should have been prepared for objections from Lent, if in fact Lent and himself did not harmonize in their defense.

The judgment must be affirmed, with costs.

The other Justices concurred.

---

42 65
89 151

42 65
111 660

42 65
119 530

EX REL. PERRY COON v. ATTORNEY GENERAL.

Quo warranto—Legislation affecting judicial office.

Act 76 of 1879 purported to establish the police court of Grand Rapids and repealed the act under which the police justice was acting, but continued him in office to the end of his term under the title of "police judge." *Held* that it did not confer a judicial office by legislation, but only abstained from legislating the police justice out of office.

Whether the Supreme Court would require the Attorney General to file an information in the nature of *quo warranto* against his own judgment—*Q.*

Quo warranto proceedings ought generally to be instituted in the circuit court.

MOTION for an order directing the Attorney General to file an information in the nature of a *quo warranto*. Submitted October 28. Denied October 29.

Ballard & Maynard for the motion. It was the usage in England to file in the Court of King's Bench an application for a direction to the master of the Crown Office to file an information for the redress of public wrongs of which the applicant complained, High Ext. Leg. Rem., 434; *Goddard v. Smithett*, 3 Gray, 125; *Atty. Gen. v. Delaware & Bound Brook R. R.*, 38 N. J. L., 286.

Attorney General *Otto Kirchner* against.

PER CURIAM. The object of this application is to require the Attorney General to file an information in this court to inquire into the right of John M. Harris to hold the office and perform the duties of police judge of the city of Grand Rapids. It seems that Harris was chosen police justice of Grand Rapids for the term of four years from the sixth day of April, 1878; that in 1879 an act was passed to take effect on May 13, 1879, purporting "to establish and organize a municipal court in the city of Grand Rapids to be known and called 'The police court of Grand Rapids,'" one of the provisions of which purported to continue the police justice in office until the expiration of the time for which he was elected, but under the title of police judge. He was then made judge of the new court, and provision was made for the election of his successor. The new act repealed the one under which Harris was originally elected.

It is objected that the office Harris held was put an end to by the repeal of the old law, and that continuing him in office was equivalent to conferring a new office upon him by legislative act, and consequently invalid under the provision of the Constitution which requires judicial officers of cities and villages to be elected. Const., Art. xv., § 14. We do not agree in this view. The Legislature simply abstained from legislating the police justice out of office: they continued the office with some modification of title and duties, as it was very proper and suitable that they should do.

Holding to this view we have no occasion to consider the question whether we should under any circumstances require the Attorney General to file an information against his own judgment. We think it proper to say, however, that proceedings by information ought generally to be instituted in the circuit court unless the case is quite exceptional.

ANDREW C. MAXWELL v. THE BAY CITY BRIDGE COMPANY.

Taxation of costs—Map.

An affidavit stating generally that the items of disbursements given in a bill of costs were "necessary to the proper preparation of this case for hearing" is not specific enough to support the taxation of the expense of drawing and engraving a map that had been returned in the bill of exceptions and printed in the record.

APPEAL from taxation of costs. In taxing costs, the Clerk of the Supreme Court allowed the following items:

"To paid to engineer for preparing draft of map in bill of exceptions..... $12 00

"To paid for wood-cut in bill of exceptions.... 15 00

The engraving appears in the report of *Maxwell v. Bay City Bridge Co.*, 41 Mich., 458. The affidavit for the taxation of costs stated that the bill of costs was correct and that the items of disbursements were "necessary to the proper preparation of this case for hearing." The appeal was from the allowance of the items above set forth. Submitted Oct. 28. Decided Oct. 29.

Holmes, Collins & Stoddard and *Chaney* for the appeal. Costs are statutory and cannot be made to embrace unauthorized expenses: they are refused for such expenses as for printing briefs (*Bowditch Ins. Co. v. Winslow*, 3 Gray,

433), obtaining exemplifications or copies of judgments or other documents used on the trial (*Den v. Johnson*, 1 Green [N. J.], 156), or of papers necessary to establish plaintiff's title in ejectment (*Murphy v. Loyd*, 3 Whart., 356), surveyor's fees (*Anonymous*, Spencer, 112; *Low v. Vrooman*, 15 Johns., 238) compensation to artists or surveyors, (*Caldwell v. Miller*, 46 Penn. St., 235) printing testimony (*Spaulding v. Tucker*, 2 Sawyer, 50), or obtaining a transcript of the stenographer's minutes for the use of counsel in settling a bill of exceptions, *Hayes v. Livingston*, 35 Mich., 371. The costs provided for by rule are the clerk's fees (Sup. Ct. Rule 52), counsel fee (Rule 48) and necessary expenses for printing case and points, Rule 33.

A. C. Maxwell in person against.

THE COURT held that the affidavit for the taxation of costs was not sufficiently specific to support the items objected to, under Comp. L., § 7425, which provides that "when there shall be charges in a bill of costs for the attendance of any witness, or for copies or exemplifications of documents or papers, or for any other disbursements, except to officers for services rendered, * * such charges for copies shall not be taxed without an affidavit that such copies * * were necessarily obtained for use; nor shall such disbursements be allowed without an affidavit specifying the items thereof particularly, nor unless they appear to have been necessary and reasonable in amount."

Retaxation was accordingly ordered.

42 69
134 N.W. 490

Ex rel Jeremiah Sheahan, guardian ad litem v. Judge of Wayne Circuit.

Funds of infant litigants—General guardians.

A court is bound to guard the interests of infant litigants whether protected by their guardian or not.

General guardians do not represent their infant wards in foreclosure proceedings, and the solicitors of the guardians cannot bind the rights of the infants; nor can guardians *ad litem* bind the infants except in strict accordance with the rules for their protection.

The new security required by Chancery Rule 94 before money belonging to infant litigants can be turned over to general guardians, calls for a responsible showing, and cannot rest on loose verbal statements.

Money belonging to infant litigants in foreclosure cannot be ordered paid to the solicitors of their general guardian, as they are strangers to the infants and have no claim on, nor power to represent them.

A court should not give up control of a fund belonging to infant litigants without securing the rights of their guardian *ad litem* or his solicitor.

Mandamus. Submitted October 28. Granted October 29.

John H. Bissell for the writ.

A. F. Wilcox against.

Per Curiam. This application is for a mandamus to compel the respondent to recall certain money belonging to infants which was paid out of court into the hands of certain parties assuming a right to receive it as attorneys for the general guardians. The money was surplus funds remaining out of the proceeds of a foreclosure sale and belonging to certain infant heirs of whom relator was guardian *ad litem*. The circuit court, by an order which the judge returns was understood by him to have been acquiesced in by counsel, directed this money to be paid over to the general guardians or their solicit-

ors, and made no provision for the services of the guardian *ad litem* or his solicitor. He subsequently refused to recall the money. There was no showing what security had been given by the general guardians, except that the judge understood from statements of counsel that they had given bonds in the probate court. No security was required by the order referred to.

The court was, we think, bound officially to look to the interests of the infants, whether protected by their guardians or not. General guardians do not represent infants for any purpose in such a litigation as this, and whether proper parties at all or not, their solicitors are in no sense authorized to act so as to bind the rights of the infants. Guardians *ad litem* are appointed for this purpose, but they cannot bind the infants except in strict accordance with the rules framed for their protection. The court itself must be vigilant to preserve them from injury. By rule 94 no money can be turned over to the general guardian without taking new security unless the security he has already given is found adequate. This requires some responsible showing, and cannot be allowed to rest on loose verbal statements.

The court therefore could not properly order money to be paid to the general guardians without a showing concerning security which was not here made. It could not order or authorize the money to be paid to the solicitors, because they were strangers to the infants and had neither claim on them nor power to represent them. And the payment being wholly unlawful should have been recalled. It was also the duty of the court to make proper inquiry and protect any rights of the guardian *ad litem* or his solicitor before putting the fund out of its control.

The mandamus must be allowed.

In the matter of Daniel J. McCarthy.

Disbarring of attorney.

Conviction of such crimes as the law regards as infamous is sufficient ground for disbarring an attorney.

A bar association is not a recognized body, as such, in proceedings to disbar an attorney, and cannot control the prosecution; the proceeding is in the interest of public justice, and the Supreme Court will examine into and act on it as in other cases involving the position of its attorneys.

Proceedings to disbar an attorney, brought by a committee appointed by the Bar Association of Grand Rapids. The respondent was charged with having been convicted on an information for obtaining money under false pretenses, to which information he pleaded guilty. It satisfactorily appeared to the court by the record of conviction to be true, and he was accordingly disbarred. Submitted October 28. Decided October 29.

Upon the hearing, some members of the Bar Association of Grand Rapids appeared in support of the prosecution, and some controversy arose between the respondent and those gentlemen concerning their procedure and certain difficulties which had arisen in that city which he claimed were open to complaint on his part.

The Court, however, intimated that the proceeding was one which had nothing to do with that Association and was not under its management, and must be treated as purely in the interests of public justice, and declined to allow any controversy except as to the merits.

The charges being supported by record evidence of conviction of felony on a plea of guilty, the identity of the prisoner with respondent was established by the respondent himself, who averred that the plea was induced by undue urgency of the prosecuting attorney.

He also claimed it did not appear he was admitted

to the bar before the conviction. The contrary, however, appeared by the records of this Court.

After hearing respondent, the Court held that a conviction of a felony, which was infamous, made respondent unfit for membership of the bar; and disregarding some minor charges which had been included in the charges, —the main charge being made out,—the name of respondent was for this stricken from the roll.

42 72
116 436
116 440

Ex rel. Attorney General v. Supervisors of Sanilac County.

Affidavits to show cause—Tax valuation—Equalization—Supervisors.

It seems that affidavits in answer to an order to show cause cannot be assumed to be evasive, and if so in fact, the respondent will be bound by them according to the interpretation evidently intended.

Petitions for the reduction of the valuations of townships cannot be regarded by the supervisors in the assessment of taxes.

The equalization of valuations for taxation is a political duty, and the power to equalize is exclusive in the supervisors.

Mandamus. Submitted Oct. 28. Denied Oct. 29.

Attorney General *Otto Kirchner*, *Charles R. Brown* and *Charles A. Kent* for the writ.

Alfred Russell against.

Per Curiam. This is an application to compel the respondents to observe the law in equalizing the valuation of their respective townships for the purposes of a levy of State and county taxes for the year. The application makes a strong showing that in making their assessments a few of the supervisors had obeyed the law and assessed property at its cash value, while the

others had refused. In response to an order to show cause, the several supervisors who were accused of having made assessments at a fraction only of what they believed to be the real cash value, have come in with affidavits in which they say that they "estimated" the property at its cash value. It is objected to these affidavits that they are evasive, and that it is consistent with them that after having "estimated" the value, they proceeded to set down on their roll, according to a very reprehensible and law-defying custom prevailing in some quarters, only a fraction of the estimated value. A majority of the court are of opinion, however, that they cannot assume the affidavits to be evasive, and that if they are so in fact, the supervisors would be held to the truth of their affidavits according to the interpretation they evidently meant the court to put upon them. If the affidavits are false in that interpretation, the supervisors could not be heard to say that while meaning to have the affidavits understood in one sense, they swore to them in another.

We shall be compelled, therefore, to deny the application. It may be proper to add that the petitions to themselves from tax-payers for the reduction of valuations of townships, which the supervisors present with their return, have no business in the case. The subject is not one for petitions. The law points out a plain duty to be performed by the supervisors on their judgment, and they disobey the law if they permit their action to be influenced by petitions or solicitations.

In what we have said, it is not to be understood that we assume any authority to revise the action of the supervisors in equalizing. The duty in that regard is political, and the power is exclusive. The only question that these papers present is whether the supervisors have refused to perform their duty under the law; and when we find that the refusal is not established, we have no occasion to look further.

42 74
76 603

42 74
124 463

EDWARD W. MARKHAM v. JAMES GEHAN ET. AL.

Garnishment.

A demand due in part only to the principal defendant cannot be garnished.

Case made from Kent. Submitted October 10. Decided October 30.

ASSUMPSIT and TROVER appealed from before a justice. The action was brought by Markham against Thomas J. Fitzgerald, a building contractor; and James Gehan, William Farrell and Denis McCarthy, a building committee who had contracted with him, were brought in as garnishees. Their disclosure showed that the contract was made with Fitzgerald and J. W. Griswold jointly. The garnishees were discharged with a judgment for costs in their favor.

Frank G. Holmes for plaintiff. The relation between joint contractors may be shown in order to show that a particular claim may be enforced as against only one of them as garnishee, *Leighton v. Heaggerty*, 21 Minn., 42.

S. B. Horne and *A. T. McReynolds* for defendants.

COOLEY, J. It appears in the record beyond any controversy that the demand owing by defendants, and which the plaintiff seeks to recover from them as garnishees, was due not to the principal defendant alone, but to him and another person with whom he was joint contractor for building a church. There was therefore no ground for a recovery, and the judgment in favor of defendants must be affirmed with costs.

The other Justices concurred.

HOMER A. QUACKENBUSH, PETER FERGUSON AND CHARLES FERGUSON v. STEPHEN HENRY.

42 75
118 538

Levy of execution—Exemptions—Identification of articles.

A levy of execution is not valid unless made before the writ is returnable.

A levy of execution must be so made as to identify or give means of identifying the property levied on so as to make it chargeable to the officer; and property not levied on cannot be afterwards claimed. There must be manual seizure, or such assertion of control as may be made effectual, if necessary, in order to bring and keep the property within the dominion of the law for sale on execution only. An intention to allow it to be disposed of by the execution debtor is not the intention required.

Whether the proceedings required by Comp. L., ch. 192, for setting aside property exempt from execution do not call for some farther identification of the property than where seizure can be made of a mass of property not subject to such reduction—*Q.*

It is for the jury to determine from evidence and under instructions, whether the acts required to effect a valid levy have been carried out, even though the levy is indorsed on the execution, if the return is not explicit and the extent of the levy is uncertain.

Error to Lapeer. Submitted Oct. 4. Decided Oct. 30.

REPLEVIN. Defendants bring error.

W. B. Jackson for plaintiffs in error.

Geer & Williams for defendant in error. Actual possession is not necessary to a valid levy as against the execution debtor and other parties with notice; it is enough to give notice to the debtor and indorse the levy on the execution, *Roth v. Wells*, 29 N. Y., 472.

CAMPBELL, C. J. Defendant in error, Stephen Henry, recovered a judgment in replevin against plaintiff in error Quackenbush, and waived a return. He then obtained

a money judgment for the amount of certain executions which he claimed to have held against one Parmlee, and under which he set up that he had levied on the property in question. The suit, which is now removed by writ of error into this court, is on the replevin bond, and is defended on the ground that the sureties have a right,—which is not disputed by Henry's counsel,—to show the invalidity of the execution claims as against other rights asserted on the trial.

The controversy turned on several different points, the most important of which were the claim that no lawful levy was actually made except on the 19th of September, 1874, when Henry levied an attachment in favor of one John P. Hensien against Parmlee, which afterwards went to judgment and is owned by Peter Ferguson; and the further claim that Charles Ferguson owned an interest in the property under rights originating before there was any valid levy.

The property replevied consisted of various kinds, and as some questions arise concerning the levies upon which the description becomes material, it is proper to refer to them. It included (1), a stock of hardware in a store in Imlay City; (2), an iron safe; (3), a quantity of farm implements and machinery. These when replevied were in two different stores.

The court below, in charging the jury, after some general remarks, undertook to tell the jury in effect that the executions were actually levied, and that the plaintiff Henry "having made his levies, entered the same upon the executions, and then left the goods in possession of the defendant. This he had an undoubted right to do. A sheriff or constable can go and take possession of personal property by his levy, and take it away from the possession of the defendant, or he may take a receipt, or he may leave it in the possession and care of the defendant; but if he does so, he does it at his peril. If the defendant should proceed and sell that property while he was so in possession of it to a purchaser without notice, the purchaser would get a good title to the property, and the officer would be without redress against

the purchaser. After Henry made the levies by virtue of these executions, he left the property with the defendant in the executions, and he did not take it into his possession until September, when the writ of attachment was placed in his hands, and then he went and took possession of it. It is the duty of the officer to have the property in his possession, so any person would know what property is taken on the execution. Henry testifies that he took the property into his possession by virtue of the executions and the attachment. I shall charge you that these levies as between him and Parmlee were good, and that if Peter Ferguson or Quackenbush who was acting as clerk, knew of those levies,—knew that the officer was there and made those levies, by virtue of these executions they could not obtain any additional rights over Parmlee as against Henry, and his rights under those executions; but if they were innocent and had no knowledge of them, they had the same rights that you or I would, who knew nothing about these levies being made."

One of these executions was issued and levied September 18, 1874, which was sometime after the rights under which Charles Ferguson claims accrued, if they accrued at all. None of the other executions could have been lawfully levied or enforced unless by something done before they were returnable. The validity, therefore, of the alleged levies for any purpose depended on whether they were made during the life of the writs. It becomes therefore a vital question whether these levies were made as assumed, and whether, if there was evidence on the subject, the court could properly take that fact for granted. There was—as the court says—conflicting evidence as to who was in possession of the goods in August and up to the levy of the attachment. One of these executions was issued and levied during this interval, and was made a ground of recovery in this action. Henry, in his testimony, shows that Quackenbush was in the store before he levied the Hensien attachment, and that witness informed him about having levied under the executions, and that the matter must be settled up or he would take possession under the levies. This Quackenbush denies, and Henry does not

in his testimony indicate that any action was had under the latest execution, which would have amounted to a levy if the property had not been already under levy. The early levies were evidently the ground of all his right.

Upon those he was asked to give a full statement of what he did, and it also appears to some extent affirmatively what he omitted. The statement of the levies in the bill of exceptions refers only to the stock of hardware, although Henry says he informed Quackenbush in August that he also claimed what was in the warehouse. The safe is not included in any of the descriptions, and there is nothing to show on the record that any of the farm machinery or implements were levied on.

The only acts that Henry testifies to in making the execution levies are thus mentioned: "I made the levy and indorsed the levy on the execution at the time, and notified Parmlee." And in speaking of the attachment levy, which was regular, and under which he took actual possession, he says: "I had the property appraised. I had never had it appraised before that. I did not set apart any part of that property as exempt property. I cannot tell why I did not."

It appears that no change was made and no interruption was had in the business during Parmlee's possession, which continued from February to August, and that Henry was willing to let Quackenbush continue then if matters were settled up. And when he made his first levy, Parmlee, as he testifies, said: "I can pay these matters up if you will give me time."

It may be open to inference, at least, that Henry did not give Parmlee any notice which was designed to stop the ordinary business and sales.

Whatever may have been the real facts of the case, the judge could not rightly decide as a matter of fact that there was a levy of any kind, unless an endorsement on the writ, and notice of the claim of levy would by themselves and in spite of other facts make it complete. And even if this were so, inasmuch as the entire prop-

erty replevied by Quackenbush and taken under the attachment was not covered by the former levies, the instruction, which made no reference to the extent of the property, was misleading. There is nothing to show whether the safe and the farm implements and machinery would not have made a reduction which would have changed the verdict.

But the rule laid down concerning levies was too loose. The English rule is rather more strict than the general American rule, and requires a continued and actual possession, the voluntary relinquishment of which is an abandonment of the levy. The Supreme Court of New York in *Beekman v. Lansing*, 3 Wend., 446, lays down this rule, which has not, we think, been departed from since, although there are *dicta* in some later cases, which standing alone, might favor a more careless practice. After mentioning the English doctrine, MARCY, J. proceeds: "We are not disposed to go this length, but are of opinion that the officer should enter upon the premises where the goods of the defendant are, and take actual possession of them, (if they are such of which possession may be taken.) The goods should be brought within his view, and subjected to his control, (*Haggerty v. Wilber*, 16 Johns. R., 288;) and it is proper also, if not necessary, that an inventory should be taken of them; the officer should assert his title to the goods by virtue of the execution; and we are inclined to think that his acts, as to the asserting of his rights and the divesting of the possession of the defendant, should be of such a character as would subject him to an action as a trespasser but for the protection of the execution; they should be public, open and unequivocal, and nothing should be done by him to cast concealment over the transaction. But it is not necessary that an assistant of the officer should be left in possession of the goods, or that the goods should be removed; they may be left in the custody of the defendant, at the risk of the plaintiff or of the sheriff, or on obtaining, as is customary,

a receiptor for their delivery on demand." Pages 450, 451. In *Camp v. Chamberlain*, 5 Denio, 198, which is cited as a correct exposition in *Barker v. Binninger*, 14 N. Y., 270, it is said: "In order to constitute a valid levy, as to third persons, the goods must not only be within the view of the officer, but must be subjected to his control. He 'must take actual possession,' which, although the goods are present, can only be done by manual acts, or by an oral assertion that a levy is intended and which is acquiesced in by those who are present and interested in the question."

According to the most liberal rule we have been able to discover, the levy must be so made that it identifies or gives means of identifying what is levied on, so that any property levied on may be made chargeable to the officer, and property not levied on cannot be subsequently claimed. It must be seized manually or by assertion of control that may be made effectual, if necessary, and this to bring and keep it within the dominion of the law, for sale on execution, if needed, and for no other purpose. An intention to allow it to be disposed of by the execution debtor as his own, is not the intention required. It is also a matter worthy of consideration whether the proceedings required by our statutes to set aside exempt property do not require something more to identify the property covered by the levy than where a seizure can be made of a mass of property not subject to reduction in that way.

While we cannot determine—as we think the court below could not—whether there was here a valid levy at all, we think the record left that question as one very seriously open to dispute; and the extent of property levied on was still further in doubt. As to any property not under levy, the rights of the parties to deal with it are very different from what they might be otherwise. We therefore abstain from discussing the rules of fraud and capacity to deal with the property in dispute, which in some respects and in some aspects of

the case may be open to criticism. Until the validity and extent of the levies are disposed of, the remaining questions are variable.

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

The other Justices concurred.

WILLIAM MCLAUGHLIN v. EMIL LANGE ET AL.

Sale between members of the same family—Change of possession.

The evidence necessary to show a change in the possession of property transferred by an uncle to his nephews living together on the same premises would be different from that otherwise needed; and where there is uncertainty, it is for the jury to determine from the evidence whether the change was effected.

Error to Muskegon. Submitted Oct. 15. Decided Oct. 30.

REPLEVIN by Emil and Robert Lange, composing the firm of Lange Brothers, against McLaughlin for certain horses, trucks, harness, etc., which defendant, who was deputy sheriff, held under an execution against their uncle, from whom plaintiffs claimed to have bought the property. Plaintiffs recovered and defendant brings error.

Smith, Nims, Hoyt & Erwin for plaintiff in error.

Stephenson & McLaughlin for defendants in error.

CAMPBELL, C. J. The controversy in this case arose concerning the validity against creditors of a sale of certain horses and teams by an uncle to his nephews. They lived together on the same premises, and the change of possession which is necessary under the statute to avoid a disputable presumption of fraud would be shown

by different evidence than under other circumstances. The testimony was very positive in favor of such a change, but there were suspicious facts bearing on it. From the condensed form in which it is very properly set forth in the bill of exceptions, it is not clear there was not further testimony, while on the other hand there were several circumstances which might possibly be urged to the jury as bearing on the general probability of the story of the witnesses. Under these circumstances we think the court had no right to take the question from the jury. The case is within *Molitor v. Robinson*, 40 Mich., 200.

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

The other Justices concurred.

JOSIAH B. TAYLOR AND RALPH B. HALL v. CHRISTOPHER DANSBY.

Consideration for a note—Discontinuance for infancy as against a joint defendant does not release surety on appeal bond.

A written agreement to pay all damages arising from a complaint for bastardy and in case of farther trouble from it, and that no farther damage should accrue against the respondent, was *held* a sufficient consideration for a promissory note.

In an action on a note given in consideration of an agreement to secure the respondent in bastardy proceedings from damages arising from the complaint, proof that the injured woman agreed to be satisfied with the arrangement made was no more than proof of its execution, and was *held* admissible.

Where a written agreement is shown as consideration for a note, but not referring to it or indicating what the entire dealings were, evidence of additional consideration is admissible.

Where an action on a note is appealed to the circuit court, and the surety on the appeal bond is impleaded as defendant, and the

defendants show that one of the original promisors is an infant, the plaintiff can accept the infancy as a fact and discontinue as against him.

One who signs a note with an infant may be held as sole maker after discontinuance as against the infant.

Discontinuance may be had in the circuit court in an action brought up on appeal, as well as if begun there; and as it is contemplated by the appeal bond, does not release the surety on that bond.

Error to Ingham. Submitted Oct. 16. Decided Oct. 30.

ASSUMPSIT. Defendants bring error.

Henry F. Higgins for plaintiffs in error. Discontinuance as to any one defendant in an appealed case, discontinues the case, *Anderson v. Robinson*, 38 Mich., 407; any radical change in a case, made without the consent of the surety on the appeal bond, discharges him, *Evers v. Sager*, 28 Mich., 47; *Andre v. Fitzhugh*, 18 Mich., 95; a mere moral consideration cannot support an express promise, 1 Greenl. Ev. [5th ed.], 432; *Kaye v. Dutton*, 7 M. & G., 807; *Mills v. Wyman*, 3 Pick., 207; *White v. Bluett*, 24 Eng. L. & Eq., 434.

A. D. Cruickshank and *E. D. Lewis* for defendant in error. Where the defense of infancy is made on behalf of a joint maker of a promissory note, the plaintiff may admit the fact, discontinue as to the infant, and proceed only against the others, *Hartness v. Thompson*, 5 Johns., 160; *Slocum v. Hooker*, 13 Barb., 536; *Barlow v. Wiley*, 3 A. K. Marsh., 1263; *Robertson v. Smith*, 18 Johns., 459; *Cole v. Pennell*, 2 Rand., 174; *Exp. Nelson*, 1 Cow., 417; *Woodward v. Newhall*, 1 Pick., 500; *Cutts v. Gordon*, 13 Me., 474; *Tuttle v. Cooper*, 10 Pick., 281; *Noke v. Ingham*, 1 Wils., 90; *Judson v. Gibbons*, 5 Wend., 229; *Cruikshank v. Gardner*, 2 Hill, 333; where the plaintiff has a right to discontinue as against one defendant, a discontinuance does not release the surety on the appeal bond (*Minor v. Mech. Bank*, 1 Pet., 46) whose liability is

not increased by his doing so, Fell's Guaranty and Suretyship, 527; where only part of the consideration for a note is in writing, the whole may be proved, 1 Greenl. Ev. [12th ed.], §§ 285, 304; the settlement of a prosecution for bastardy is a valid consideration for a promissory note, *Haven v. Hobbs*, 1 Vt., 238; *Knight v. Priest*, 2 Vt. 507; 1 Pars. N. & B., 200; and in a suit on the note, evidence of what the injured woman said when notified of the terms of the settlement, is admissible, 1 Pars. Cont., § 44; 2 Greenl. Ev., § 66.

CAMPBELL, C. J. Dansby sued Taylor and one Frank Smith on a promissory note, given in settlement of a bastardy case in which Smith was the implicated party. Hall is surety on the appeal bond given to remove the judgment rendered before a justice against Taylor and Smith into the circuit court of Ingham county on appeal.

On the trial of the appeal evidence was put in on behalf of Taylor and Smith, showing Smith to be a minor. Thereupon plaintiff below was granted leave to discontinue as against the infant, and obtained judgment against Taylor, and then, under the statute, against the surety on the appeal bond. It is now claimed there was no authority for such a discontinuance in the appellate court, and that Hall was thereby discharged.

Inasmuch as the infancy of Smith was shown by the defendants themselves, plaintiff had a right to accept it as a fact and act accordingly. The note was valid against Taylor, who might be treated in such a case as sole maker,—the infant's liability being out of the way. *Cruikshank v. Gardner*, 2 Hill, 333; *Reading v. Beardsley*, 41 Mich., 123. The fact that the case was before the circuit court by appeal and not as an original action makes no difference under our practice. This was decided in *Chandler v. Lawrence*, 3 Mich., 261. And being within the ordinary powers of the circuit court on appeal, the resort to it is one of the incidents of the controversy covered by the appeal bond.

An agreement in writing appeared which was signed by Dansby and one Hill, whereby they agreed to settle and pay all damages arising from the complaint against Smith in regard to the young woman referred to, and that no further damage should accrue against Smith, and that in case of further trouble they would pay all damages.

On the trial Dansby was allowed under objection to show a further consideration for the note. The objection was that the whole agreement must be regarded as contained in the writing. But there is nothing in the writing to indicate this. It is an independent agreement, in no way indicating what the whole dealings were. It does not refer to the note at all, and does not raise any presumption that it covers any entire transaction. The testimony was clearly admissible.

We can see no objection to the proof offered that the injured woman agreed to be satisfied with the arrangement made by Dansby. It was no more than proof of the execution of the written agreement whereby Smith was to be protected against further liability.

As the agreement of Dansby covered all liability of Smith, and indemnified him against it, there is no ground for the objection that it was not a sufficient consideration.

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

The other Justices concurred.

42 86
79 650

THE IRON CLIFFS COMPANY v. CHRISTIAN H. BUHL ET AL.

42 86
143 2522

Sale—Acts of control by purchaser—Delivery—Evidence of usage.

A mining company agreed to sell 2000 tons of ore to an iron company and deliver it at a certain point whence it was to be taken by rail to the consignees. The contract quantity was delivered and with more ore of the same kind was deposited in a pile at the point of delivery, but the consignees directed the railroad company to cease forwarding it for a time as they had no room for it. They paid in full for the contract quantity, however, but as they did not finally receive the full amount they sued the railroad company for the amount which it had failed to deliver. *Held* (1) that by these acts the iron company asserted their understanding that when the ore was delivered in the pile it was under their control, and (2) that they could not sue the mining company for the deficiency.

Where ore is piled at the point of delivery in a mass larger than was contracted for, and nothing remains but to take the contract quantity from the pile, *it seems* that it is a sufficient delivery.

Law books cannot be read to the jury to establish local usages of trade that are subject to change.

Error to Marquette. Submitted Oct. 16. Decided Oct. 30.

ASSUMPSIT. Defendant brings error.

W. P. Healy for plaintiff in error. A usage by which different purchasers of ore are entitled, on demand, to take the quantity bought by each, from a common pile where it has been deposited on delivery, is valid, *Hutchinson v. Com.*, 82 Penn. St., 472; *Wilkinson v. Stewart*, 85 Penn. St., 255; *Kimberly v. Patchin*, 19 N. Y., 330; *Damon v. Osborn*, 1 Pick., 477; delivery of ore to a carrier to be forwarded to its destination, is delivery to the purchaser if made according to known usages, *Watkins v. Paine*, 57 Ga., 50; *Turner v. Mellier*, 59 Mo., 526; the mode of delivery that is valid in Pennsylvania should be held valid wherever it comes in question, *Bissell v. Lewis*, 4 Mich., 450; *Penobscot R. R. v. Bartlett*, 12 Gray, 244;

Cragin v. Lamkin, 7 Allen, 395; *Snow v. Perkins*, 2 Mich., 238; *Holdridge v. F. & M. Bank*, 16 Mich., 66; the law of foreign States may be shown from their reports, Comp. L., § 5936; *Ames v. McCamber*, 124 Mass., 85.

Dan. H. Ball for defendant in error. The title to a quantity of merchandise taken from the mass does not pass unless there has been a sale of a definite quantity out of an ascertained mass of uniform quality and value, Benj. Sales, § 352, *n*.

GRAVES, J. In 1871 defendants in error, with one James Westerman, were pursuing the furnace business at Sharon, in the State of Pennsylvania, as copartners under the name of the Westerman Iron Company, and the plaintiffs in error were a mining corporation under the laws of Michigan, and engaged in mining iron ore at Negaunee, in our northern peninsula. The corporation were from time to time shipping their ore to Erie, Pennsylvania, and the Westerman company were in the way of receiving ore from that point by rail for their business.

At this time Rhodes & Co., of Cleveland, Ohio, were agents for the corporation in contracting sales of their ore, and on the first day of August of that year they contracted on behalf of the Cliff company with the Westerman company for the sale of a quantity of ore.

The agreement was written and in these terms:

"Agreement between the Iron Cliffs Iron Company, of Negaunee, Lake Superior, by its agents, Rhodes & Co., of Cleveland, Ohio, and Westerman Iron Co., of Sharon, Pa., made at Cleveland, Ohio, August 1, 1871:

"WITNESSETH, That the said Iron Cliffs Company, iron company, for the considerations hereinafter named, hereby agree to sell to the said Westerman Iron Co. two thousand gross tons of Barnum iron ore, of its standard quality, deliverable at Erie, Pa., during the season of 1871, afloat at the docks of the Erie & Pitts. R. R. Co., and as near 500 tons per month as practicable, but with the agreement that if ore is lost by disasters of navigation, too late to be replaced, said Iron Cliffs Iron Company shall

not be held accountable for non-delivery thereby occasioned. Said ore is to be paid for by the said Westerman Iron Co. at the rate of 8.20 dollars per ton, in equal payments of $—— each, payable on the first days of August, September, October and November next, respectively, each of which payments is to consist of the note of said Westerman Iron Company for 5.90 per ton dollars at four months, payable at Cleveland, O., and 2.30 dollars in cash, all in funds par at Cleveland.

Said Westerman Iron Co., for the above named considerations, hereby agree to buy, *receive* and pay for said ore as above mentioned."

The Westerman company paid in full for the amount of ore contracted for; but some three hundred tons out of the two thousand agreed for failed to reach the works of the Westerman Company at Sharon, and Westerman having retired and assigned his interest to defendants in error, they proceeded, after a lapse of nearly six years, to bring this action on account of the mining ore.

They were allowed to recover, and the corporation has brought error. The points agitated are numerous, but the case depends on one or two main considerations.

The plaintiffs in error actually shipped to the railroad dock at Erie a considerably larger quantity than was bargained to the Westerman Company, and they intended two thousand tons of it for them.

As no one appeared to accept it afloat, it was landed on the dock in charge of the railroad company for the benefit of the buyers. This was the only course fairly practicable, and it was the course the Westerman Company expected would be taken and the course which received their subsequent sanction. The position of defendants in error that the ore was to become the property of the Westerman Company only as it was delivered to them at Sharon and that during its deposit on the dock in a larger pile it remained the property of plaintiffs in error, cannot be sustained. Both parties understood that it should be left and was left for the railroad company to hold and carry for the buyers.

The circumstance that the pile contained more than

was bargained to the Westerman Company is of no importance under the facts in this record. It was all of the same kind and quality, and there was nothing to do except to take away from the common mass the required quantity, and the case is certain that it was fully contemplated that the railroad company should attend to that business. Rhodes & Co. notified the agent of the railroad company that two thousand tons of the ore belonged to the Westerman Company, and he forwarded over sixteen hundred tons which they received; and in the course of the fall and whilst he was sending the ore forward, they interposed and required him to cease for awhile. The explanation given is that they lacked room and that the railroad company would charge them for the use of the cars if left unloaded at Sharon.

Here was a clear exercise of dominion over the ore, and an act inconsistent with the notion that it was not subject to their control, and that delivery was to be made by plaintiffs in error at Sharon.

According to the evidence the failure of the Westerman Company to receive the missing ore at Sharon was owing to a miscarriage by the railroad company, and it appears that soon after discovery of the loss they sued the railroad company to recover for the ore as their property. This was an unequivocal assertion of their understanding that the ore was under their control as their property when piled upon the dock and ready for removal to Sharon by the railroad company and by them known to be subject thereto.

The circuit judge allowed the jury to find, however, that of the ore in that situation the portion which was taken by the railroad company and by them miscarried was not at the risk of the Westerman Company, or their property, but was still the property of the Cliff corporation in the hands of the railroad company as the agents of the Cliff corporation. We think this was contrary to unquestionable facts.

The refusal to permit certain adjudged cases in Penn-

sylvania to be read to the jury from the books of reports was not error. The law of Pennsylvania was not in dispute. The claim was that there existed at Erie a particular custom or usage in regard to the mode of handling and delivering ore, and this if true was a local fact not necessarily stable but subject to be changed as experience and altered circumstances might dictate, and it was not a matter to be proved by law books. Much, however, of the way in which things were done there, and all of importance, was matter of necessity and of understanding rather than of custom. Further discussion does not appear necessary.

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

The other Justices concurred.

42 90
71 58

42 90
108 647

42 90
j153 7151

HOYT POST ET AL., ADM'RS v. DANIEL J. CAMPAU.

Limitation of actions for breach of covenant—Incumbrances—Action for money paid.

It seems that the right of action for breach of warranty accrues when substantial damage is suffered; and successive acts or occurrences causing damage amount to successive breaches.—COOLEY, J.

An incumbrance is anything which burdens a title; as a right of way; a right to take off timber; a right of dower; a condition that may work forfeiture, or any interest that diminishes the value of the land while it is consistent with the conveyance of the fee.

The elements of a cause of action are (1) a breach of duty to another, and (2) a damage to the latter resulting from it.

A covenant runs with the land when its purpose is to give future protection to the title which the deed containing the covenant undertakes to convey, but not when it simply gives protection against something which immediately affects the title and causes present damage.

There is no laches in delaying suit until the party bringing it has been damnified.

A deed contained the following covenant of warranty: "The said parties of the first part for themselves, heirs, executors and administrators, do covenant, grant, bargain and agree to and with the said party of the second part, his heirs and assigns, that they, the said parties of the first part, have not heretofore done, committed, or wittingly or willingly suffered to be done or committed any act, matter or thing whatsoever, whereby the premises hereby granted, or any part thereof, is, are or shall or may be charged, encumbered in title or estate or otherwise." *Held* a special covenant looking to the future and promising indemnity for damages that might at any future time result from the breach of it.

Ejectment was brought against the grantee of land that had been deeded with a covenant of warranty, and at the grantor's request, the grantee defended the suit. The plaintiff in ejectment prevailed and the grantee afterwards bought in his title. *Held* that he could recover against the grantor's estate as for money paid to the grantor's use.

Error to Wayne. Submitted Oct. 17. Decided Oct. 30.

APPEAL from the report of commissioners on the estate of Theodore J. Campau, disallowing a claim brought by Daniel J. Campau. Claimant recovered judgment, and the administrators bring error.

Wilkinson, Post & Wilkinson for plaintiffs in error. Covenants of seizin and of a right to convey and against incumbrances, are personal covenants, not running with the land or passing to the assignee, for if not true, they are broken as soon as executed, and become *choses in action* which are not technically assignable, 4 Kent's Com., 471; *Mitchell v. Warner*, 5 Conn., 497; *Davis v. Lyman*, 6 Conn., 249; *Clark v. Swift*, 3 Met., 390; *Tufts v. Adams*, 8 Pick., 547; *Potter v. Taylor*, 6 Vt., 676; *Lawrence v. Montgomery*, 37 Cal., 188; *Salmon v. Vallejo*, 41 Cal., 484; *Allen v. Little*, 36 Me., 170; *Morrison v. Underwood*, 20 N. H., 369; *Garrison v. Sandford*, 7 Halst., 261; *Smith v. Lloyd*, 29 Mich., 382; *Matteson v. Vaughn*, 38 Mich., 373; see, however, *Foote v. Burnet*, 10 Ohio 332; *Dickson v. Desire*, 23 Mo., 163; *Mar-*

tin v. Baker, 5 Blackf., 232; *Kingdon v. Nottle*, 1 M. & S., 355: 4 id., 53; the statute of limitations runs at once upon the usual covenant against incumbrances, Rawle on Covenants, 360, 556; *Bird v. Smith*, 3 Eng. (Ark.), 368; *Pierce v. Johnson*, 4 Vt., 247.

Moore & Moore and *Ashley Pond* for defendant in error. A covenant against incumbrances is broken only when the covenantee has paid the incumbrance, or been evicted, if the incumbrance is a mortgage, *Griggs v. D. & M. R. R.*, 10 Mich., 124; *D. & M. R. R. v. Griggs*, 12 Mich., 50; *Cheney v. City Nat. Bank*, 77 Ill., 562; covenants of seizin and against incumbrances run with the land and are broken when substantial damages accrue, 3 Washb. R. P. [3d ed.], 346; *Backus v. McCoy*, 3 Ohio, 211; *Devore v. Sunderland*, 17 Ohio, 55; *M'Crady v. Brisbane*, 1 N. & McC., 104; *Sprague v. Baker*, 17 Mass., 586; *McConnel v. Kibbe*, 33 Ill., 180; but see *Eaton v. Lyman*, 30 Wis., 41.

Cooley, J. The claim upon which the defendant in error recovered judgment against the estate of Theodore J. Campau, in the circuit court, was for damages for the breach of a covenant against encumbrances. The deed containing the covenant bears date December 19, 1866, and was made to defendant in error by Theodore J. Campau and a number of others, who severally owned undivided interests in the land. The only covenant in the deed was the following: "And the said parties of the first part for themselves, heirs, executors and administrators, do covenant, grant, bargain and agree to and with the said party of the second part, his heirs and assigns, that they, the said parties of the first part, have not heretofore done, committed, or wittingly or willingly suffered to be done or committed any act matter or thing whatsoever whereby the premises hereby granted or any part thereof is, are or shall or may be charged encumbered in title or estate or otherwise."

It appears that on the twenty-sixth day of March, 1866, the interest of Theodore J. Campau in the lands described in the deed, which was an undivided one-ninth,

had been sold on execution and bid in by Godfrey, Dean & Brow, plaintiffs in a judgment against him, and that Theodore failed to redeem from this sale, though he made an ineffectual attempt to do so. The title under the execution sale passed by transfer to Milton H. Butler, who in 1872 brought suit in ejectment to recover possession, and after some five years of closely contested litigation, which was defended by Daniel at the request of Theodore, the plaintiff recovered judgment. When the litigation was concluded, Daniel bought up the title of Butler, paying therefor over $7000, which was about one-ninth the value of the whole land at the time the deed to Daniel was given.

Theodore J. Campau died intestate in 1875, and letters of administration were issued on his estate on the thirtieth day of April of that year. Commissioners were appointed to hear and report upon claims against the estate, and they made their report before the Butler litigation was closed. The claimant, after purchasing from Butler, petitioned the probate court that the commission be revived for the hearing of this claim, and August 18, 1878, the prayer of his petition was granted. The claim was then presented to and heard by the commissioners, who disallowed it, and the claimant then appealed to the circuit court. In that court he had judgment in his favor.

From the foregoing statement of facts it appears that the interest of Theodore J. Campau in the lands conveyed to the claimant was, at the time of conveyance, encumbered by the execution sale, the right to redeem from which had not then expired. It is not disputed that this created a liability against Theodore on his covenant. It is contended, however, that his covenant was broken as soon as made, and that the remedy to recover damages for the breach was lost by the failure to institute suit, or to present the claim within the time limited by statute.

Under the statute a suit upon covenant must be brought within ten years after the right accrues. Comp. L., § 7154. A special provision is made for the case of a party dying before the time has expired (Comp. L., § 7157), but it would not affect the present suit. The ten years from the delivery of the deed was fully complete and ended before the petition was presented for the revival of the commission to hear this claim, and no exception to the statutory bar can relieve this case if the right of action is to be deemed to have accrued at the giving of the deed.

If this were a case of first impression, there would seem to be no difficulty in disposing of it in a way that would do justice between the parties. As the terms of the covenant sued upon were falsified by facts existing at the time, a technical breach may be said to have then taken place; but as no damage followed from this breach, until the claimant purchased from Butler more than ten years afterwards, the rule that the claimant's right of action shall be deemed to have arisen at the delivery of the deed involves this manifest absurdity; that the claimant's remedy was barred before he was damnified; a result that can scarcely be consistent with any just or proper rule of law.

It is commonly said that a covenant against encumbrances is broken when made, if ever, (*Smith v. Lloyd*, 29 Mich., 382); and this is true in the sense that the promise always relates to an existing condition of things, and is falsified then if it ever is. But if the damage do not then result, it is misleading and mischievous to treat this mere technical breach as constituting the plaintiff's cause of action.

If all encumbrances were the same in nature, and might be got rid of at the pleasure of the owner of the property encumbered, there would be no difficulty and no wrong in applying to all the same rule. But anything is an encumbrance which constitutes a burden upon the title; a right of way, *Clark v. Swift*, 3 Met.,

392; a condition which may work a forfeiture of the estate, *Jenks v. Ward*, 4 Met., 412; a right to take off timber, *Cathcart v. Bowman*, 5 Penn. St., 317; a right of dower, whether assigned or unassigned, *Runnells v. Webber*, 59 Me., 488. In short, "every right to, or interest in the land, to the diminution of the value of the land, but consistent with the passage of the fee by the conveyance." *Prescott v. Trueman*, 4 Mass., 627, 630. Some of these are permanent in their nature, and incapable of being removed at the option of the covenantee; they permanently reduce the value of the title conveyed; and this as much at the time of the conveyance as at any future time; and it is therefore reasonable to hold that the covenant against them is broken at once and finally. The covenantee may at once proceed to recover full damages. But when the covenant consists of a money charge, capable of being removed at some time, but which has as yet caused no loss to the covenantee, the doctrine that because the promise of the covenant is technically broken by the existence of the encumbrance, must often in its application prove a denial of justice.

All proper and lawful contracts of parties are made for a substantial purpose, and must be interpreted and construed so as to accomplish that purpose. To this end it is necessary that the law should afford appropriate and effectual remedies. When it is held that a covenant against encumbrances is broken at once, and that, to use the language of one court "a second supposed breach is as futile as the imaginary unbroken existence of a thing dashed in pieces" (*Mitchell v. Warner*, 5 Conn., 497) the logical result is that, in the case of a money charge not paid off, the covenantee has a right of action but can recover nominal damages only. But nominal damages are given in such case on the express ground that on a technical breach of the contract no damages are suffered, *Wyman v. Ballard*, 12 Mass., 304; *Tufts v. Adams*, 8 Pick., 547; *Delavergne v. Norris*, 7 Johns., 358; and thus the action is allowed to

proceed for the nominal redress of a wrong when the injury, if any, is confessedly not yet suffered, and may never be. It is somewhat difficult to reconcile this with the general rules of legal redress, and much more difficult to understand how it conforms to substantial justice.

The elements of a cause of action are, *first*, a breach of duty owing by one person to another; and *second*, a damage resulting to the other from the breach. Damage, where no duty is violated, is *damnum absque injuria;* a neglect of duty, where no loss occurs, is equally incapable of giving a right of action. *Waterer v. Freeman*, Hob., 266. Every man owes to his surety the obligation to pay the debt when due, but the failure supports no action till the surety is damnified. There are some cases in which the award of merely nominal damages is perfectly consistent with this rule, either because the party has other substantial redress, or because the nominal damages cover all that are suffered, and answer as a preventive by way of warning against further injury. An example of the first class is where a plaintiff in replevin, after obtaining his property, and establishing his title, obtains only nominal damages. Examples of the second class are had in cases of technical trespass for distinct invasions of right, and where the award of costs has its effect by way of warning, and the judgment itself may establish a right before in dispute. But to give an action for nominal damages upon a covenant which was intended to accomplish a substantial protection, is to confuse all sound ideas of legal remedy. It gives no substantial redress; it establishes no right for future protection; it cannot operate by way of warning; and it taxes the public, and taxes the time and attention of courts in enforcing an injury which as yet exists only in imagination, and may never ripen into substantial wrong. It is idle to call that a remedy which redresses nothing, but leaves the real injury in existence as before, threatening to inflict the same damage and in the same way. The reason for maintaining such an action is

well expressed in one case. "Technical rules," it is said, "and rules as to the forms of proceedings, must be observed, without regard to the consequences which may follow in particular cases; otherwise, the stability of judicial decisions, and the certainty of the law, cannot be preserved." *Clark v. Swift*, 3 Met., 390, 395. But when technical rules only result in injustice, it is well to consider whether others, equally consistent with certainty in the law, and more consonant to equity, may not be recognized.

It is not, however, in the award of merely nominal damages that the anomaly of the doctrine of present breach of this covenant appears; for this is perfectly consistent with justice if it be also held that whenever substantial damages are suffered there is a new breach for which substantial redress may be had. The money charge, for example, may be one payable many years hence; if now when it falls due and the covenantee pays it off, he may recover as for a new breach, what he is thus compelled to pay for his own protection, the contract is enforced according to its manifest intent. If the incumbrance is payable in installments, there would under such a rule be as many successive breaches of the covenant as there would be of the promise to pay the debt constituting the encumbrance. But this, it is said, would make the covenant against encumbrances run with the land; and as the covenant is broken at once, so as to become a right of action, it would be inconsistent with the common-law rule that *choses in action* are not assignable.

A covenant may be said to run with the land when its purpose is to give future protection to the title which the deed containing the covenant undertook to convey, and it does not run with the land when its whole force is spent in giving assurance against something which immediately affects the title and causes present damage. Tested by this rule a covenant against an encumbrance which consists in a right of way would not run with the

land; but a covenant against a money charge must attach itself to the title conveyed and accompany it, not only for the protection of the covenantee, but for the protection of any of his assigns whom the encumbrance may eventually damnify. *Foote v. Burnet*, 10 Ohio, 332; *Knadler v. Sharp*, 36 Iowa, 232; *Richard v. Bent*, 59 Ill., 38. It is only by thus distinguishing between encumbrances that the covenant can have reasonable effect in all cases, and when the courts thus discriminate there is no difficulty in giving substantial redress under definite and inflexible rules of law. When the law can be just and also certain there is no reason why an unjust certainty should be perpetuated.

There has been in this case no transfer of the title by the covenantee, and the question whether a remote grantee may sue on the covenant may be said for that reason not to be involved. But the substantial controversy in the case relates to the question whether the breach is to be considered as occurring when the promise is first broken, or as in case of a promise of indemnity, which the covenant closely resembles, it is to be referred to the time when the damage is suffered. If the latter is the case, the covenant must be deemed to attach to the title. It was never doubted that the covenantee might sue as for his substantial grievance for the recovery of what he may have paid to relieve the title of the encumbrance; but this it was said he must do within the period allowed by the statute of limitations; the payment not giving a new right of action, but only showing damage from the breach previously existing. But the purpose of the statute of limitations is, to compel parties to bring their actions within a reasonable time; and it can never be held that a party is guilty of *laches* in delaying suit until he is damnified. The doctrine that the statute shall run from the technical breach makes the covenant in many cases a mockery. If the encumbrance consists of a mortgage having many years to run, the covenantee has no legal right to pay it off

until it falls due, and the fiction of a right of present action would defeat substantial redress. I am of opinion that the better and only just rule is, that a right of action accrues when substantial damage is suffered, and that there may be successive breaches when, by successive acts or occurrences damage is from time to time suffered as a consequence of the encumbrance.

I am aware that this view is opposed to a decided current of American authority, and in most cases this fact should be conclusive against its adoption. But it not only appears to me sound in principle, but it is supported by adjudications in several neighboring States. The decisions in Ohio, Illinois and Iowa, above cited, are very clear and decided, and they find support in others in Missouri and Indiana, to which counsel have referred.

So far I have expressed my own views, and have not spoken for any one else. My brethren think that the broad question I have discussed is not involved. They are of opinion that the covenant is special, and that it looks to the future, and promises indemnity for damages that may at any time in the future result from the breach. In this view it is immaterial whether the ordinary covenant against encumbrances would or would not be broken finally, if at all, at the delivery of the deed containing it. My brethren also think that under the evidence, which shows that the Butler suit was defended at the request of Theodore, the claimant was entitled to recover what was paid as money paid to Theodore's use.

The judgment must be affirmed with costs.

The other Justices concurred.

42 100
79 616
42 100
108 681
42 100
121 452
42 100
127 552
42 100
s3NW 278
s36AR433n
131 1436

ALFRED FILDEW ET AL. v. WILLIAM BESLEY.

Non-apportionable building contract—Acceptance of performance.

One cannot recover for work done and materials furnished under a non-apportionable contract to put up an addition to a building for a fixed sum, where the house and the addition were burned without the fault of either party before the contract was fully performed, and before any part of the work had been accepted or in any way appropriated by the owner of the main building.

Acceptance of work done under a non-apportionable contract to erect an addition to a building, must be unequivocal, and cannot be presumed from ordinary acts done as owner of the realty.

Error to Clinton. Submitted Oct. 22. Decided Oct. 30.

ASSUMPSIT. Defendants bring error.

H. & H. E. Walbridge for plaintiffs in error. Where a contractor agrees to build an addition to a house, and he furnishes the labor and materials, and the house is destroyed by accident before the addition is completed, he is entitled to recover ratably for labor and materials furnished, 2 Chitty Cont. [11th ed.], 832, n; Story on Bailments, § 426; 2 Kent's Com., 590; *Menetone v. Athawes*, 3 Burr., 1592; *Appleby v. Myers*, L. R. 2 C. P., 658: 6 Amer. L. Reg., 112; *Rawson v. Clark*, 70 Ill., 656; *Walker v. Tucker*, id., 527.

A. Stout and *Randolph Strickland* for defendant in error.

MARSTON, J. The controversy in this case arises out of certain materials furnished and work and labor performed by plaintiffs in error under an oral agreement to furnish materials and erect an addition to the building in which the defendant resided. This "addition lapped by the old building about eight feet, which was to give room for a door swinging back so it connected with the old building. The sills were mortised into the old building and pinned, and the sill of the old part

formed part of the sill of the new part. Between the old and the new part there was a door cut through, and the door and the lock hung. The old wall formed part of the new." The agreement specified fully how the building should be completed, and the price agreed upon was $250. There was evidence tending to show that the work, labor and materials should not exceed this sum, and that such work and labor were being done by the day. After the work was partly done, the house and this addition were destroyed by fire without the fault of either party, and evidence was given tending to show that the work and labor done, and materials furnished up to the time of the fire, amounted to nearly two hundred dollars.

The court charged the jury that if the agreement made was to furnish the materials and do the work, and no particular sum was agreed upon therefor, plaintiffs could recover. If, however, they should find that the materials furnished and labor done were at a certain fixed price for the job, to be paid for when completed, and that it was not completed at the time of the fire, then for the materials furnished and labor performed up to the time of the fire, they could not recover. The correctness of this portion of the charge is what our attention has been called to as the matter complained of.

Under the strict common-law rule, where a party had failed to comply substantially with an unapportionable agreement, he could not recover for what had been done. This rule has been so far modified that where anything has been done from which the other party has received a substantial benefit, and which he has appropriated, a recovery may be had based upon such benefit. The basis of this recovery is not the original contract, but a new implied agreement deducible from the delivery and acceptance of some valuable service or thing. *Allen v. McKibbin*, 5 Mich., 454.

Applying this rule to the case before us, and there

can be no recovery for the work and labor done and materials furnished. The contract was not apportionable, if to complete the building for a fixed sum, and there was no acceptance of what was done, or any benefit derived therefrom or on account thereof at the time of the fire.

If Besley had conveyed the premises before the fire, or in any way accepted or appropriated to his own use what had been done, the law would have implied a promise that he pay therefor. It was argued that this addition having been attached to the main building thereby forming a part thereof, it from day to day became the property of Besley as the work progressed, and therefore that he should pay for so much as had been done. But had it been separated from the main building it would equally have been a part of the realty, therefore Besley's property, and for that reason should have been paid for although a separate building—a doctrine not contended for. Where the agreement is to erect and complete a building, the person on whose land it is being erected cannot be compelled to pay for one erected in part, or one differing from what was contracted for unless he has in some way accepted it and derived some benefit therefrom. *Martus v. Houck*, 39 Mich., 431. If before acceptance or an appropriation thereof to the use of the owner of the land it should be destroyed without fault on his part, he would not be liable for what had been done.

It was also argued that as this addition under the agreement was attached to and formed a part of the main building, there was an implied agreement that the defendant would furnish the house to which the addition was to be attached, and failing in this because of the fire the parties would be entitled to recover. Admitting such an implied agreement, and that any act of the owner of such building, which would remove it, or deprive the contractors from attaching this addition thereto, would give them a cause of action, yet we do not see the force or

bearing thereof in this case. Here the main building was not removed by the act, or through any fault of the owner thereof, and why he should be held chargeable therefor does not appear. It was one of those casualties not provided for or contemplated, and for which neither should be held liable to the other. It certainly does not clearly appear but that the contractors might yet go on and substantially perform the agreement on their part. This addition formed a complete building of and by itself. True it was to be attached in part to the old, but not in so essential a manner as to prevent the erection thereof without the support which it would otherwise have derived therefrom. This work could have been carried on and fully performed without any reference to the main building in any important particular. A removal of the main building by the owner thereof would have excused the contractors from connecting this addition therewith, but would not have prevented their recovering the full contract price had they in all other respects complied with their agreement.

In this case there was no acceptance by Besley previous to the fire, and the addition was in no shape to call for an acceptance thereof. What is necessary to constitute a proper acceptance in a case like the present, or in a case where a building has been erected on the land of another, we need not in this case determine. It is not every act of the owner of the real estate or of the main building that could thus be construed. The act of acceptance should be unequivocal, else ordinary acts as owner of the real estate, which he does not yield up in such a case, might be so considered contrary to the real intention. *Taymouth v. Koehler*, 35 Mich., 26.

The judgment must be affirmed with costs.

The other Justices concurred.

SAMUEL T. HENDRICKS v. FREDERICK RASSON.

Ejectment—Joinder.

Where ejectment was brought for premises on which was a house, a distinct part of which was occupied by defendant's father, it was *held* proper to join the latter as a defendant, but the action would not fail for non-joinder.

The non-joinder, as a defendant in ejectment, of one who occupies a distinct portion of the premises, only limits the recovery by excluding that portion. Comp. L., § 6206.

It is for the jury to find whether any other person than the nominal defendant is in occupation of part of the premises where such occupancy is alleged in defense to the action.

Error to Wayne. Submitted Oct. 22. Decided Oct. 30.

EJECTMENT brought by Hendricks against Frederick Rasson, for premises upon which, as appeared from the evidence, Rasson's father lived with him in the same house. Defendant had judgment and plaintiff brings error.

George W. Coomer and *Atkinson & Atkinson* for plaintiff in error. Servants or members of the family of the occupant of premises against whom ejectment is brought, need not be made parties to the suit, 9 Vin. Ab., 340; 3 Wait's Actions, 81; *Jones v. Webber*, 1 Chip. (Vt.), 215; *Chiniquy v. Catholic Bishop*, 41 Ill., 157; *Shaver v. M'Graw*, 12 Wend., 558; *James v. Stanton*, 2 B. & Ald., 371; but the possession of a servant or tenant is the possession of his master or landlord, 2 Waterman on Trespass, 358; *Lamb v. Swain*, 3 Jones' Law (N. C.), 370.

Henry M. Cheever for defendant in error.

COOLEY, J. The circuit judge was under misapprehension when he instructed the jury that the plaintiff could not recover if they found that another person than the defendant was with him in occupation of the prem-

ises. The evidence to show possession in another tended to establish the fact that defendant's father occupied a distinct part of the house. If such was the fact, it would have been proper to join him as defendant (Comp. L., § 6207), but the suit would not fail for the non-joinder. The only effect upon the verdict would be to limit the recovery by excluding that which the father occupied. Comp. L., § 6206. The case bears no resemblance to *Hodson v. Van Fossen*, 26 Mich., 68, where the possession in question was that of husband and wife, and incapable of severance on judicial process.

The case does not show that the father claimed a right to occupy and enjoy the whole land jointly with the defendant; but if it had, the plaintiff would have been entitled to go to the jury on that question. The charge was broad enough to put the plaintiff out of court on the fact—which seems not to have been disputed—that the father occupied a part of the house.

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

The other Justices concurred.

CATHARINE WILLCHECK v. JOHN EDWARDS, DRAIN COMMISSIONER, ET AL.

Notice of proceedings to open drain.

In proceedings to open a drain under Act 140 of 1875, notice of the application to the Probate Court for the appointment of commissioners is necessary to the jurisdiction. And the drain should be identified or described in the order of the Probate Court, or in the commissioner's finding of the necessity for opening it.

CERTIORARI to drain commissioner. Submitted October 22. Decided October 30.

George C. Green and *Atkinson & Atkinson* for plaintiff in certiorari.

Engle, Drury & Engle for defendants in certiorari.

CAMPBELL, C. J. The certiorari in this case was issued to review proceedings for opening a drain over lands of plaintiff under the township drain law of 1875.

It appears from the return that no notice was given of the application to the probate court for the appointment of commissioners; and this was necessary to their jurisdiction. *Strachan v. Brown*, 39 Mich., 168; *Taylor v. Burnap*, id., 739.

Neither the order of the probate court nor the finding of the commissioners of the necessity of the drain identifies or describes it. There are also several other defects not necessary to refer to.

The proceedings must be quashed.

MARSTON and GRAVES, JJ., concurred.

COOLEY, J. I am of opinion that the writ of certiorari in this case should be dismissed. The proceedings which are brought up by it were finally closed in August, 1878, and we do not know what may have taken place since. It is reasonable to conclude that contracts have been let, and that rights have accrued in reliance upon the proceedings, and it is not at all improbable that the plaintiff in certiorari is herself reaping permanent benefit from what has been done under the proceedings she now seeks to set aside. In my opinion we ought never to interfere in these cases after any considerable delay unless it is very satisfactorily explained.

42	107
78	634

CATHERINE GIES v. WILLIAM S. GREEN ET AL.

42	107
118	262

Execution for deficiency on foreclosure—Bill of review.

42	107
124	69
124	70

An execution for deficiency on foreclosure should not be issued without special application to the court, and notice to the defendant.

The purchaser at an execution sale under a personal decree for a deficiency on foreclosure, is not properly a party to a bill of review.

A bill of review concerns the original controversy only and does not cover subsequent proceedings.

Appeal from Wayne. Submitted Oct. 22. Decided Oct. 30.

BILL for rehearing, and for vacating a personal decree for a deficiency on foreclosure, and execution and levy thereon. Defendants appeal.

F. A. Baker for complainant. A personal decree on foreclosure is erroneous in awarding execution before the report of sale is made, and without a special application showing a right to it, *Howe v. Lemon*, 37 Mich., 164; parties not affected by a decree need not be made parties to a bill of review, *Bank of U. S. v. White*, 8 Pet., 262.

Henry M. Cheever for defendants and appellants. All whose interests are to be affected or concluded by a decree should be parties to a bill of review, *Pierce v. Faunce*, 47 Me., 507; *Lovejoy v. Irelan*, 17 Md., 525; *Chamberlain v. Lyell*, 3 Mich., 448; *F. & M. Bank v. Bronson*, 14 Mich., 361; *Horton v. Ingersoll*, 13 Mich., 409; all should be made parties to a bill of review who are necessary to make the determination complete, Story's Eq. Pl., § 16 *a*; Mitford's Eq. Pl., 164; *Palk v. Clinton*, 12 Ves., 58; *Hawkins v. Hawkins*, 1 Hare, 543; 2 Barb. Ch. Pr., 173; *Poore v. Clark*, 2 Atk., 515; *Cockburn v. Thompson*, 16 Ves., 325; *Hammontree v. Lott*, 40 Mich., 190; *Miller v. Thompson*, 34 Mich., 12; *Payne v. Avery*, 21 Mich., 524.

COOLEY, J. My brethren think the decree in this case should be affirmed. They are of opinion that, if the facts are as complainant states, she had no reason to expect that a personal decree would be taken against her on a demand on which she was not personally liable, and we all agree that the execution which was taken out for the deficiency, after the foreclosure sale, without special application to the court and notice to complainant, was issued without authority of law.

It is objected that the purchaser at the execution sale is not made a party. But as he was no party to the original controversy and is in no way connected with the merits, he would be an improper party to a bill which proposes merely to re-examine them. Nor in this suit can the title of Mrs. Gies to the lands sold be litigated: the questions in this suit will concern the original controversy, only, and cannot take notice of the subsequent proceedings.

The decree must be affirmed with costs.

The other Justices concurred.

JOHN RITTER v. ELIZA RITTER.

Release of title fraudulently obtained.

A man made a deed, but did not record it or authorize it to be recorded. It was fraudulently put on record, however, and he filed a bill to have it declared void and the interest conveyed by it released. The court below refused a release, but held that he had reserved a life interest to himself which it enjoined defendant from disturbing. *Held* that he was entitled to a release. If he had delivered the deed, the grantee was the owner in fee simple; if not, she had no interest.

Appeal from Wayne. Submitted October 22. Decided October 30.

BILL to set aside a deed. Complainant appeals.

Henry M. Cheever for complainant.

Atkinson & Atkinson for defendant cited 4 Kent's Com., 445; *Belden v. Carter*, 4 Day, 77; *Thatcher v. St. Andrew's* Church, 37 Mich., 269; *Ellis v. Secor*, 31 Mich., 187; a grantor is not entitled to have his deed cancelled merely because he meant it to be operative only at his death, *Wallace v. Harris*, 32 Mich., 380; *Alsop v. Eckles*, 81 Ill., 425; *Foster v. Mansfield*, 3 Met., 415; delivery of a deed is valid if made by the grantor's wife who signs with him, 3 Washb. R. P., 584.

MARSTON, J. The bill of complaint in this case was filed to have a certain deed executed by complainant to defendant, but not delivered, and fraudulently recorded, declared void, and defendant required to release to complainant all interest in the premises. The prayer of complainant for a release was denied, and the court being of opinion that in making the deed to defendant complainant reserved to himself the use of the premises until his death, decreed that he have a life estate therein and enjoined defendant from any interference therewith.

Under the pleadings in this case, and the deed of conveyance which was in the usual form, we do not quite see how a life estate only could be given to the complainant. If there was a delivery of the deed the defendant was the absolute owner in fee simple of the property, while if the deed was not delivered she had no interest whatever therein. A careful examination of the evidence satisfies us that the complainant never delivered or authorized the delivery or recording of this deed. Of this we have no reasonable doubt. It follows therefore that complainant is entitled to the relief sought, and a decree will be entered accordingly, with costs.

The other Justices concurred.

42 110
113 490

ISRAEL D. CARLETON v. ISAAC N. JENNESS ET AL.

Surviving partner not liable on an unauthorized indorsement in the firm name without ratifying it.

A member of a firm that has been dissolved by the death of a partner cannot bind the survivors by indorsing a note in the firm name, unless they ratify his act, even though the note may have been given for a debt of the firm.

The fact that a man has recognized a debt as one for which he is responsible, does not establish a right of action against him on a note purporting to bind him but given for the debt without his consent or acquiescence, though it might strengthen proof of his ratification of the note if there were any evidence to show it.

Error to St. Clair. Submitted October 22 and 23. Decided October 30.

ASSUMPSIT. Plaintiff brings error.

Whipple & Voorheis for plaintiff in error. Where an indorser who knew he had been released by neglect to notify him of non-payment, said he was responsible for the note, it was held in effect a promise to pay it, *Curtis v. Sprague*, 51 Cal., 239.

Geer & Williams for defendant in error Jenness. Ratification of an agent's acts is not made out unless the principal was informed of all material facts, and of the effect of his act on his rights, 1 Pars. Cont., 52; *Elliott v. Dudley*, 19 Barb., 326; *Lusk v. Smith*, 8 Barb., 570; *Mathews v. Hamilton*, 23 Ill., 470; *Fletcher v. Dysart*, 9 B. Mon., 413; evidence of ratification should be as clear as is necessary to show original authority, *Wisconsin Bank v. Morley*, 19 Wis., 62.

COOLEY, J. This case was before the court at the January term and is reported in 40 Mich., 343. It has again been tried, and under instructions from the court

the jury have returned a verdict for the defendant Jenness.

The action is brought upon a promissory note dated June 30, 1877, made by the copartnership of A. & H. Fish, and purporting to be indorsed by the firm of I. N. Jenness & Co. There had been a copartnership doing business under the name of I. N. Jenness & Co., which was composed of Jenness and Allen and Henry Fish, but it had been dissolved by the death of Henry Fish in May, 1876. The note in suit was made more than a year later, and was indorsed with the name of I. N. Jenness & Co. by Allen Fish without the knowledge or consent of Jenness. The question in contest in this suit was whether Jenness had subsequently ratified or sanctioned the indorsement. Of this we find no evidence. He refused to recognize it and denied liability upon it when it was first brought to his attention and continuously.

Much testimony was taken to show that Jenness had recognized the indebtedness for which the note was given as indebtedness of the firm of I. N. Jenness & Co., or at least as indebtedness for which he was either morally or legally responsible. This evidence might have strengthened any proofs of his consent to or acquiescence in the giving of the note, if there had been such proofs; but in the absence of any, it is immaterial for what the note was given. Admitting the debt to have been a partnership debt of I. N. Jenness & Co., Fish nevertheless had no power to give the note, and the note being the sole cause of action, the plaintiff could not recover without establishing a right of action upon it. We agree with the circuit judge that no evidence was given tending to establish the liability of Jenness upon the note, and consequently nothing to submit to the jury.

The judgment must be affirmed with costs.

The other Justices concurred.

42 112
68 127
42 112
79 658
42 112
92 430
42 112
100 229
42 112
124 55
42 112
134 2194

Amanda E. Wilson v. Orville W. Coolidge.

Equity jurisdiction—Bill to set aside execution—Estoppel.

A court of equity cannot examine errors in proceedings at law on objections that do not go to the jurisdiction.

A married woman was sued upon a promissory note which she had signed with her husband, and though personal service was made on her, she did not appear, but suffered judgment by default on which execution was levied. *Held* that as she neglected to make her defense at law and allowed the judgment to stand, she could not maintain a bill in equity to set aside the execution on the ground that she had signed as surety for her husband and the judgment was void as against her.

Appeal from Berrien. Submitted October 23. Decided October 30.

Bill to set aside an execution. Complainant appeals.

Edward Bacon for complainant. A bill in chancery lies to remove a cloud on title caused by a levy of execution, *Patterson v. Fish*, 35 Mich., 209; *Hill v. Bowman*, id., 191; *Brown v. Kemper*, 27 Md., 673; and when once the court of equity has acquired jurisdiction it will grant all proper relief, *Miller v. Stepper*, 32 Mich., 194; *Hawkins v. Clermont*, 15 Mich., 512.

O. W. Coolidge in person for defendant. Where a defendant has had opportunity to make a defense at law and has neglected to do so, a court of equity will not interfere to set aside the judgment (*Creath v. Sims*, 5 How., 192; *Lansing v. Eddy*, 1 Johns. Ch., 51; Freeman on Judgments, 485, 496) even though the defense would have been good at law, *New York Dry Dock Co. v. Amer. Ins. Co.*, 11 Paige, 384; *Mitchell v. Oakley*, 7 Paige, 68; the justice of the verdict will not be impeached unless on grounds of which he could not have availed himself on the trial, *Marine Ins. Co. v. Hodgson*, 7 Cr., 332; a married woman is estopped from denying or col-

laterally attacking a judgment which she has allowed to be taken against her, but which she could have avoided by pleading coverture, *Burk v. Hill*, 55 Ind., 419; *Rorabach v. Stebbins*, 3 Keyes, 62; *Genet v. Dusenbury*, 2 Duer, 679; *Quarles v. Waldron*, 20 Ala., 217; *Thomas v. Lowy*, 60 Ill., 512; *Van Metre v. Wolf*, 27 Ia., 344; *Spaulding v. Wathen*, 7 Bush, 659; *Gambette v. Brock*, 41 Cal., 83; Freeman on Judgments, 150.

GRAVES, J. The object of this bill is to avoid a judgment entered upon a transcript from a justice of the peace, and to set aside the execution thereon, and a levy of the same on complainant's land.

The cause of action before the justice was a promissory note signed by complainant and Nathaniel Wilson and William Parton as co-makers, and the judgment was recovered in 1875, after personal service against all. The complainant did not appear. In November, 1877, judgment was entered in the circuit court on a transcript from the justice, and the defendant Coolidge procured an execution which the sheriff levied on complainant's premises. In February, 1878, the sheriff advertised a sale on the execution, and complainant filed this bill. The court below dismissed it and she appealed. Her counsel urges several objections to the law proceedings, but none of them go to the jurisdiction, and the court of chancery has no authority to sit as a court of error to examine the regularity of the proceedings in a court of law.

If the justice had jurisdiction, but made mistakes of law, however serious, we cannot inquire into them here. They should have been investigated in a proceeding instituted for the purpose. At the time the note put in judgment was made, the complainant was the wife of Nathaniel Wilson, one of the co-makers, and the relation has continued and still exists. It is not claimed that this appeared on the face of the note, or was objected in the action before the justice. But her coverture

is now admitted, and it is admitted further that she signed exclusively as surety for her husband.

The only question is whether, in consequence of her coverture and of the fact that she signed as surety, as now admitted, the judgment and other proceedings are caused to be void as against her; because if they are not void on that ground there is no foundation in the case on which the court can interfere; and we think they are not.

By our law a married woman is allowed in many cases to contract and to sue and to be sued as though she were unmarried, and her competency to assert and maintain her rights either as plaintiff or defendant is fully acknowledged. In case she is sued upon a contract she has not capacity to make, or against which she has some other valid objection, the door of justice is open to her, and the law invites her to explain her case and expose her objection seasonably and in the due course of proceeding.

The act or matter may be not enforcible against her in case of objection; yet if she refrains and suffers the case to go on to judgment against her, and still more, suffers the judgment to stand, the circumstance that she was not originally bound will not suffice to render the judgment void. In case it has not been impeached on error or appeal, it cannot be repudiated; and when recourse is had to legal process to enforce it, its conclusiveness cannot be brought into question on account of the invalidity of the cause of action or the right which she held to successfully resist it.

We are aware that a different doctrine prevails in some courts of high authority, and it is possible that reasons exist in their systems for peculiar rules. The weight of authority is otherwise, and we are satisfied that our regulations require us to concur with it.

The decree must be affirmed with costs.

The other Justices concurred.

ELIAS FERGUSON ET AL. v. HENRY POPP.

42 115
126 585

42 115
146 2 99

Loss of lien by evading tender—Neglect to keep tender good.

A mortgagee loses his lien by evading tender of payment.

Where a mortgager had made a tender of payment which was not accepted and which he had not kept good, and the mortgagee afterwards tendered a conveyance and demanded payment, it was decreed on foreclosure that the mortgager pay the principal of his debt with simple interest to the time of payment, less the period that intervened between the dates of the tender and of the mortgagee's subsequent offer to reconvey; and that the mortgager's costs of both courts be deducted.

Appeal from Van Buren. Submitted October 23. Decided October 30.

FORECLOSURE. Defendant appeals.

Richards & Mills for complainants.

Clapp & Fyfe for defendant. A tender of the amount due on a mortgage discharges the lien, *Potts v. Plaisted*, 30 Mich., 149; *Flanders v. Chamberlain*, 24 Mich., 305; *Cowles v. Marble*, 37 Mich., 161, and it is not necessary to keep the tender good, *Van Husan v. Kanouse*, 13 Mich., 306; *Eslow v. Mitchell*, 26 Mich., 503; *Caruthers v. Humphrey*, 12 Mich., 277; when the lien is once discharged it cannot be revived, *Moynahan v. Moore*, 9 Mich., 9.

COOLEY, J. This is a foreclosure suit. The mortgage consists of two papers; a deed absolute in form from defendant to complainants, and a contract on their part to reconvey to defendant on the payment by him of one hundred and fifty dollars with ten per centum interest on or before the twentieth day of June, 1870. The contract bore date September 20, 1869. Payment was not made when it fell due, but defendant claims to have made tender of full payment May 23, 1873, and to have deposited the amount in bank when complainants refused to

receive it. According to his evidence the whole amount remained in bank until the following September. Complainants denied the tender, and showed that on March 9, 1874, they tendered to the defendant a conveyance and demanded payment.

The evidence satisfies us that defendant made the tender as he claims, and that complainants, while they did not in terms refuse to receive it, were nevertheless unwilling to do so, preferring to keep their security. They therefore avoided taking the money, and must be held to have lost their lien. *Van Husan v. Kanouse*, 13 Mich., 303.

Defendant, however, has not kept his tender good, and is liable at law upon his promise to pay, which is contained in the contract of sale, and submits to have such decree made in this case as shall be just. A just decree will be that he pay the principal sum due with simple interest at the rate agreed upon to the time of payment, deducting from the time the period that intervened between the date of the tender and the date of their offer to convey. From the gross sum must be deducted defendant's costs of both courts to be taxed, with interest at the same rate from this day. Defendant must pay the balance in three months, and in default of payment sale of the land may be made after the usual course of foreclosure proceedings. If defendant makes payment, complainants shall simultaneously convey the lands to him with covenant against their own acts.

The other Justices concurred.

FRED MCOMBER v. DANIEL CHAPMAN.

Statute of limitations—Reversal on certiorari.

Comp. L., § 7158, provides that if a judgment for the plaintiff is reversed on writ of error after the statute of limitations has run, a new action will lie at any time within a year. *Held* to apply also to reversals on writ of certiorari.

Error to Berrien. Submitted Oct. 23. Decided Oct. 30.

ASSUMPSIT. Defendant brings error.

Clapp & Fyfe for plaintiff in error.

N. A. Hamilton for defendant in error. Reversal in any judicial proceeding is enough to bring a case within Comp. L., § 7158, so as to save a right of action where judgment was reversed after the period of limitation had expired. *Coffin v. Cottle*, 16 Pick., 383; *Partridge v. Lott*, 15 Mich., 251. See as to construction of statute, *Whipple v. Judge, etc.*, 26 Mich., 342.

GRAVES, J. An action was duly commenced before a justice of the peace on a promissory note which had only two days to run before being outlawed. The service was not a legal service, but the justice ruled that it was valid and gave judgment for the plaintiff. The circuit court reversed the judgment and the plaintiff brought a new suit within one year after the reversal on certiorari. The only question is whether the first proceedings and the reversal suspended the bar of the statute as against the last suit under Comp. L., § 7158.*

* (7158.) SEC. 11. If, in any action duly commenced within the time limited in this chapter and allowed therefor, the writ or declaration shall fail of a sufficient service or return, by any unavoidable accident, or by any default or neglect of the officer to whom it is committed, or if the writ be abated, or the action otherwise avoided or defeated by the death of any party thereto, or for any matter of form, or if, after a verdict for the plaintiff, the judgment shall be arrested, or if a judgment for the plaintiff shall be reversed on a writ of error, the plaintiff may commence a new action for the same cause at any time within one year after the abatement or other determination of the original suit, or after the reversal of the judgment therein; and if the cause of action does by law survive, his executor or administrator may, in case of his death, commence such new action within the said one year.

The court below held that they did so, and error is charged on the ruling. The only objection having any color of force is that the provision cited speaks of reversals on "writ of error," but is silent as to reversals on certiorari.

It would be a very narrow and unreasonable construction to confine this provision to the common-law writ of error. The effect would be to exclude from the operation of this meritorious qualification of the statute of limitations the numerous cases where the law excludes the common writ of error and requires a review on certiorari for the purpose of reversal; and nothing can be more evident than the fact that the reason of the provision weighs much stronger in respect to these cases and their jurisdictions than it does where the ancient writ of error will lie. And when we bear in mind the enlarged authority of these courts in regard to the amount, the attempted discrimination is more obviously unjust. Certainly it could not have been designed by the Legislature to place them on a different footing for the purpose of this statute than other courts. If any exception were to be allowed it should be in regard to those courts which are the least liable to miscarry.

The writ of certiorari authorized by the statute is in substance a writ of error. For the purpose of reviewing in the circuit court the judgment of a justice of the peace it performs much of the function of such a writ, and it is not going beyond good sense to regard it, for the purpose of this provision, as such a proceeding.

It follows that the judgment must be affirmed with costs.

The other Justices concurred.

WILLIAM BRONG v. JAMES H. BROWN.

Conversion by mortgagee—Error not to be presumed.

It is a conversion for a mortgagee of chattels, after taking possession of a portion of the mortgaged property on breach of condition, to retain possession of it and assign the mortgage to a third person; if he so converts the property, its value may be applied on the debt.

Facts cannot be presumed in order to find error.

Case made from Kent. Submitted October 24. Decided October 30.

TROVER. Plaintiff had judgment below.

D. E. Corbitt for plaintiff.

J. W. & O. C. Ransom for defendant.

MARSTON, J. James Farley, to secure the payment of four hundred dollars to William Brong, gave him a chattel mortgage upon a span of horses, a wagon, a set of harness and certain furniture. This mortgage was dated November 9, 1877, and was made payable nine months from the date thereof. On the 19th of the same month defendant Brown, with full knowledge of this mortgage purchased the horses, wagon and harness from Farley, the mortgagor. Afterwards, but at what particular time does not appear, Brown, the mortgagee, assigned the mortgage to A. A. Lord, and while Lord was the owner thereof he took possession of the horses mentioned therein, and afterwards reassigned the mortgage to the plaintiff. The plaintiff demanded possession of the wagon and harness, which was refused, when this action of trover was brought to recover the value thereof.

The court charged the jury that in case they found the horses had been taken by Lord while he owned the mortgage, the value thereof ought to be applied as pay-

ment on the mortgage as of the date when they were actually received by him. This was excepted to, and is the only question raised in the case.

In *Davis v. Rider*, 5 Mich., 423, it was held that where one holding property in mortgage converts it to his own use, the mortgage debt is thereby satisfied to the extent of the value of the property taken. In this case the assignee of the mortgage took the property, and afterwards re-assigned the mortgage to the mortgagee, but he retained possession of the horses. By virtue of what right or authority he retained the horses after re-assigning the mortgage, does not appear. Where a mortgagee of chattels after condition broken takes possession of a part of the mortgaged property, and retaining the same assigns the mortgage to a third party, we think he may well be held to have converted the same to his own use, and that the value thereof should be applied in payment on the mortgage. A mere taking possession of the property alone would not have this effect, as he would have a right to take and retain possession for the purpose of making sale thereof in accordance with the terms of the mortgage. In this case Lord went farther. After taking possession he disposed of all farther interest in the mortgage. It does not appear that he either intended to or in terms gave his assignee any right to take or claim these horses, or that his assignee had a right to collect the entire mortgage indebtedness, even if under the circumstances this latter right could have been given him. Nor does it appear that Lord at any time took any steps looking to a sale of these horses under the power contained in the mortgage, even if he could have sold after making the assignment. Counsel in their argument and brief say that Lord had the right to take possession before default, and retain it until the indebtedness should become due, and that in this case over eight months elapsed between the taking of the horses and the time when the mortgage became due so that Lord could sell them, and that considerable

expense would be incurred for keeping the horses during this time, which should be deducted.

Whether such expense could be deducted or not we need not determine, as the record shows no such state of facts as counsel assumes. At what time Lord took possession does not appear, nor the length of time he retained possession, nor when he re-assigned. We cannot presume facts for the purpose of finding error. On the contrary, we must assume that the evidence fully warranted the charge of the court and verdict of the jury. If not, the party complaining should have shown clearly wherein it failed.

The judgment must be affirmed with costs.

The other Justices concurred.

MARGARET BURROWES v. JOHN T. GIBSON, MARY E. GIBSON, ELIZABETH D. KNIGHT AND WILLIAM H. GIBSON.

Levy of execution on land—Description of premises.

A certificate of levy on "lot 7 of the subdivision of lots 12, 13 and 14 of the Labrosse and Baker farms in Detroit," is not sufficient to charge a purchaser with notice that it is intended to cover "lot 7 of John Gibson's subdivision of lots 12, 13, 14 and 18 of the Labrosse and Baker farms, situated on the south side of Pine street, between Sixth and Seventh streets, according to the recorded plat of the same in the Register's office of Wayne county."

A levy of execution on real estate may describe the property by proper abuttals, but it is better to describe it by reference to the recorded plat, if any, and by the number of the lot and block as given thereon, together with such other descriptive facts as may be necessary to identify it.

Appeal from Superior Court of Detroit. Submitted October 24. Decided October 30.

BILL TO SET ASIDE A DEED. Complainant appeals.

Stewart & Galloway for complainant. The description in a levy is sufficient if it so describes the property to be taken that it can be identified, *Wing v. Burgis*, 13 Me., 111; *Hart v. Rector*, 7 Mo., 531; *Marshall v. Greenfield*, 8 Gill & J. (Md.), 349; *Bates v. Bank of Mo.*, 15 Mo., 309; *Dygert v. Pletts*, 25 Wend., 402; *Huggins v. Ketchum*, 4 Dev. & B. (N. C.) L., 414; *Parker v. Swan*, 1 Humph. (Tenn.), 80; *Rollins v. Mooers*, 25 Me., 192; *Allen v. Taft*, 6 Gray, 552; *Jones v. Austin*, 10 Ired. (N. C.) L., 20; *Vance v. M'Nairy*, 3 Yerg., 171; *Jackson v. Walker*, 4 Wend., 462; *Boylston v. Carver*, 11 Mass., 515; *Hedge v. Drew*, 12 Pick., 141; *Biggs v. Blue*, 5 McLean, 148; *Webb v. Bumpass*, 9 Port., 201; *Randolph v. Carlton*, 8 Ala., 606; *Balch v. Zentmeyer*, 11 Gill. & J., 267; *Lisa v. Lindell*, 21 Mo., 127; *Douglass v. McCoy*, 5 O., 525; *Swartz v. Moore*, 5 S. & R., 257; *Inman v. Kutz*, 10 Watts, 90; *Swan v. Parker*, 7 Yerg., 490; *Trotter v. Nelson*, 1 Swan, 7; *Smith v. Low*, 2 Ired., 457; *Swigget v. Kolloch*, 3 Hous. (Del.), 326; *Solomon v. Breazeal*, 27 Ga., 200; *Wright v. Watson*, 11 Humph., 529; *Ives v. Kimball*, 1 Mich., 308; *Perkins v. Spaulding*, 2 Mich., 157; *Anderson v. Baughman*, 7 Mich., 69; *Wright v. Dunham*, 13 Mich., 414; *Bird v. Perkins*, 33 Mich., 28; *Smith v. Brown*, 34 Mich., 455; *Slater v. Breese*, 36 Mich., 77; *Wilt v. Cutler*, 38 Mich., 189; Freeman on Executions, § 281; it is not necessary that the terms used be such as to be understood by those not familiar with the property or the neighborhood in which it is situated, *Roberts v. Parry*, 2 D. & L., 430; it is sufficient for the purposes of a notice if it puts a purchaser on his guard, *Godfrey v. Beardsley*, 2 McL., 412; *Bander v. Covill*, 4 Cow., 60; *Bartolett v. Achey*, 38 Penn. St., 273; *Black v. Chicago etc. R. R. Co.*, 18 Wis., 208; *Booth v. Barnum*, 9 Conn., 286; *Farwell v. Smith*, 12 Pick., 87; *Stafford v. Ballou*, 17 Vt., 329; *Cooper v. Bigly*, 13 Mich., 463.

Alex. D. Fowler for defendant William H. Gibson.

GRAVES, J. This is an appeal in chancery by com-

plainant from a determination by the Superior Court of Detroit. The main facts alleged in the bill, so far as now material, are substantially as follows:

On the 9th of January, 1878, complainant recovered judgment in the Superior court against the defendant John T. Gibson for $262.75 and $12 costs; that just after the report in complainant's favor had been filed by referees to whom the case had been referred, and on January 3d, the debtor John T. Gibson deeded to his wife, the defendant Mary, lot 7 of the subdivision of lots 12, 13 and 14 of the Labrosse and Baker farms in the city of Detroit, then owned and occupied by him, without consideration and with intent to defraud complainant; that on the twenty-eighth of May, 1878, complainant caused an execution on said judgment to be levied on said lot 7 and also on several other parcels, and on the same day procured the levy to be filed in the office of the register of deeds for Wayne county; that the parcels levied on apart from lot 7 are of small value, and for reasons stated not available for any thing beyond a trifling amount; that on the 31st of May, and three days after filing of the levy, the defendant Mary E. Gibson, at the instance and in the interest of her husband, the defendant John T., deeded said lot 7 to the defendant Elizabeth D. Knight, a resident of Cape Vincent in Jefferson county in the State of New York, for $2500, and for $950 thereof took back a mortgage on the lot; and that on the third day of June Mrs. Gibson transferred the mortgage to the defendant William H. Gibson, a brother of John T., and that the mortgage stands of record in the name of said William H. Gibson; that William H. Gibson was cognizant of the levy on lot 7 and of the fraudulent purpose of said John T. and his wife to prevent complainant from gaining any thing by the levy.

The bill charges the defendants with fraudulent intent, and avers that they respectively had notice of complainant's equities, and the court is asked to set aside the

deed from John T. to his wife, and that lot 7 may be held subject to the levy and sold under it, and that Elizabeth Knight and defendant William H. Gibson may be enjoined from transferring, encumbering or otherwise disposing of said lot or of the mortgage until the further order of the court.

The defendant William H. Gibson pleaded that he was a *bona fide* purchaser of the mortgage and added a demurrer, and also made answer to such matters as it was thought might be claimed to operate against the truth of the plea if left unanswered.

The plea having been allowed, a replication to it was filed and the parties went into proofs upon the issue so raised, and the court after a hearing on these proofs decreed upon the plea and dismissed the bill as to William H. Gibson, and the appeal is from that decree. In these circumstances, and whilst the question as to whether Elizabeth Knight purchased *bona fide* is left in abeyance, the right of complainant to insist here on a decree against William H. Gibson on his plea is not evident. But as counsel have not noticed this condition of the case, and our opinion is against complainant on his own ground, we shall not base our conclusion upon any supposed infirmity in the present shape of the litigation.

The substantial controversy here is whether the description in the levy of the lot 7 in question was sufficiently full and correct to charge the public with notice through the certificate placed on file.

The proposition is stated in this way because the question is not what sort of description might suffice as against parties having actual knowledge, or what might be deemed a sufficient description in itself considered, to constitute a valid levy; but it is what is sufficient to make the filed certificate afford constructive notice. And we are satisfied that this levy lacks the requisite certainty.

The lot 7 deeded to Elizabeth Knight, and on which the mortgage rests and to which the complainant seeks to apply the levy, is lot 7 of John Gibson's subdivision of lots 12, 13, 14 and 18 of the Labrosse and Baker farms, situated on the south side of Pine street between Sixth and Seventh streets, according to the recorded plat of the same in the register's office of Wayne county, and the levy is described as on lot numbered 7 of the subdivision of lots numbered 12, 13 and 14 of the Labrosse and Baker farms, so called, in the city of Detroit.

The discrepancy is very glaring. The lot we are in quest of is not a portion of the surface which is defined by natural marks or distinguished by some name or other feature which is notorious, but it is a specific area which might perhaps be indicated by proper abuttals, although the better description, if not the necessary one, is by reference to the plat and by the number of the lot and block as given on the plat, together with such other descriptive facts as may be practicable and essential for the purpose of identification.

Now the levy gives no abuttals and points out no plat. The lot 7 it specifies is said to belong to the subdivision of lots 12, 13 and 14, and not to John Gibson's subdivision of lots 12, 13, 14 and 18 according to the recorded plat. Again it does not assign the subdivision to any block or mention any block. The John Gibson subdivision is on block 13. We have then in the one case a John Gibson subdivision of four specified lots on a specified block according to a recorded plat, and in the other a subdivision of three specified lots made by some one not named, and not located on any block and not referred to any plat.

It is, we think, not possible to hold that the lot 7 in the levy was so described there as to affect the public with notice, through the certificate, that the lot 7 of the John Gibson subdivision was meant.

The difficulty is not merely that the description in the levy has fewer badges of identification than were

practicable, and should have been given. It goes further. Instead of being only a blind guide to the lot claimed, the description is a misleading one which points somewhere else. Upon the whole, we agree with the court below and affirm the decree with costs.

The other Justices concurred.

Sarah E. Senecal v. Peter Labadie.

Trespass on lands—Plea of license.

A license cannot be proved under the plea of the general issue to an action of trespass on lands, if it is not specially pleaded.

Error to Wayne. Submitted Oct. 24. Decided Oct. 30.

Trespass for cutting timber. Plaintiff brings error.

Simon W. Rousson for plaintiff in error. Proof of a license or justification of any kind cannot be given under the plea of the general issue in an action of trespass, *Druse v. Wheeler*, 22 Mich., 445; *Rosenbury v. Angell*, 6 Mich., 513; *Milman v. Dolwell*, 2 Camp., 379; *Buck v. Albee*, 26 Vt., 184; *Ruggles v. Lesure*, 24 Pick., 189; *Dyson v. Ream*, 9 Ia., 51; *Demick v. Chapman*, 11 Johns., 132; *Saunders v. Wilson*, 15 Wend., 338; *Hahn v. Ritter*, 12 Ill., 80; 1 Chitty Pl., 501, 592; 2 Greenl. Ev., [Redf. ed.] § 625.

Robert V. Briggs and *Charles C. Stewart* for defendant in error. Notice of justification is unnecessary under the plea of the general issue in trespass for cutting timber, if there was a contract to sell the standing timber and the consideration was paid, 1 Chitty Pl., 505; 2 Waterman on Trespass, 188-9.

CAMPBELL, C. J. Plaintiff in certiorari sued Labadie for trespass in cutting timber on her land. He admitted on the trial the title to the land and taking of the timber in part, and a case was made out against him very clearly on further testimony. He undertook and was allowed to show dealings with the husband of plaintiff, claimed to have given him the right to cut the trees in question.

He pleaded the general issue and gave no notice of license. The defense he sought to make out was not a denial of the trespass, but that he acted under a right which was in law a license or nothing, and which could not be relied on if not pleaded. *Vanderkarr v. Thompson*, 19 Mich., 82; *Greeley v. Stilson*, 27 Mich., 153. It should have been excluded.

It is claimed, however, that inasmuch as there was full proof that there was nothing done which was not lawful in fact, this technical mistake ought not to prevent this court from rendering such a judgment as justice requires, as authorized by Comp. L., § 5477. But on looking into the record we do not see that defendant made out any authority from plaintiff which would justify all, if any, of his acts. Upon some points there is no testimony, and on others the testimony seems to be the other way.

The facts undisputed do not furnish us with the means of giving a judgment on the merits in favor of the plaintiff for any ascertained sum. We can only give a judgment reversing the action of the circuit and justice's courts, with costs of all the courts. Plaintiff will have to bring a new suit if she desires to prosecute her claim.

The other Justices concurred.

42 128
67 393

THOMAS CHANDLER AND FRANKLIN TAYLOR v. TIMOTHY V. CHILDS.

Recoupment in actions of tort—Assumpsit on purchaser's representations.

Recoupment of damages may be had in actions of tort.

Courts must see that defendants are not prejudiced by plaintiffs' choice of one form of action rather than another.

Where a vendor has been induced by the purchaser's representations to receive in part payment a mortgage which he afterwards found to be unavailable, it was *held* that assumpsit would lie upon the purchaser's representations, as well as an action of tort for fraudulent statements.

Case made from Osceola. Submitted October 24. Decided October 30.

TRESPASS ON THE CASE. Plaintiffs had judgment below.

D. E. Corbitt for plaintiff. Recoupment cannot be claimed unless defendant's claim arises out of the same cause of action as supports the plaintiff's suit, *Hubbard v. Rogers*, 64 Ill., 434; *Walker v. McCoy*, 34 Ala., 659; in an action for the wrongful conversion of the proceeds of goods, a counter claim is inadmissible, *Scheunert v. Kaehler*, 23 Wis., 523; there can be no recoupment of unliquidated damages in cases of tort, *Hall's Appeal*, 40 Penn. St., 409; there have been instances of actions of trover for the conversion of goods in which defendant was allowed to recoup certain liens that they had on the same goods for repairs, etc., (*Stow v. Yarwood*, 14 Ill., 424) on the ground that the plaintiff should be allowed to recover only the amount of his interest, *Longstreet v. Phile*, 39 N. J., 63.

W. H. Palmer and *Beardsley & Judkins* for defendant. A defendant in an action based on fraud may recoup damages which he has sustained through the plaintiff's fraud, *Carey v. Guillow*, 105 Mass., 18: 7 Amer., 494;

Coulter's Case, 5 Rep., 30; Sedgwick on Damages, 549; in assumpsit on an implied warranty, a defendant can recoup his damages arising out of plaintiff's fraud, *Harrington v. Stratton*, 22 Pick., 510; *Van Epps v. Harrison*, 5 Hill, 63; *Burton v. Stewart*, 3 Wend., 236; *Beecker v. Vrooman*, 13 Johns., 302; *Sill v. Rood*, 15 Johns., 230; *Fisk v. Tank*, 12 Wis., 276; *Ketchum v. Wells*, 19 Wis., 25.

COOLEY, J. The question involved in this case is one of recoupment.

In June, 1877, the plaintiffs, who reside at Indianapolis, Indiana, sold to the defendant a saw-mill at the price of $550, and received in part payment therefor a real estate mortgage made by one Chase, conditioned for the payment of $270. They attempted to foreclose this mortgage, and Chase made the defense of infancy, and succeeded in establishing it and defeating the suit. Plaintiffs then brought the present suit, which counts on fraud in the defendant in representations which he made to induce them to take the mortgage. They claim as damages the amount of the mortgage and the costs of the attempted foreclosure.

In defense it is shown that the mill which was sold to defendant was not as was represented: that it was a second-hand mill, though represented to be a new one, and that its value is much less than it would have been if the assurances of the plaintiffs respecting it had been true. He therefore asks to recoup the damages suffered by him by reason of the mill not being as was represented, from any damages established by the plaintiffs. This defense is objected to; the plaintiffs insisting that in an action of tort it is not admissible to complicate the issue by the proof of another tort, thereby in effect offsetting one wrong against another. *Odom v. Harrison*, 1 Jones (N. C.), 402.

There is no doubt that such a defense complicates the issue to an extent that is undesirable, and that must tend to confuse the jury by directing their attention in

the same case to two distinct frauds, the evidences of which, though they both occurred at the same time, must be gathered separately. The nearer the controversy is to being single and distinct, the more likely is the jury to deal with it with full intelligence and justice. But successive suits to adjust the equities of a single business transaction are also attended with serious evils, and the rule that permits them all to be considered together is an old one, and is no doubt wisest and best.

No one questions the rule when the plaintiff sues in assumpsit. In this State, indeed, it is recognized by statute, and the benefits of recoupment are so far extended as to entitle the defendant to recover the balance when the damages proved by him exceed the demand established in favor of the plaintiff. Comp. L., § 5802. In *Ward v. Fellers*, 3 Mich., 281, 288, the applicability of recoupment to actions of tort was recognized, as indeed it has been generally elsewhere. But in cases of tort the damages which the defendant has suffered must often spring from some wrongful conduct of the plaintiff in the transaction on which he founds his action, and the controversy is not necessarily more complicated by reason of the defendant's damages sounding in tort rather than in contract. In either case there would be two distinct causes of action. *Thompson v. Richards*, 14 Mich., 172.

It must be borne in mind that forms of action are to a large extent left to the discretion of the party bringing suit. This imposes upon courts the duty to see that the defendant is not prejudiced by one form being chosen rather than another. In the case now before us the plaintiffs might have sued in assumpsit, upon the defendant's assurances respecting the mortgage; and had they chosen that form of action the right to recoup would probably not have been questioned. But the issues would have been as much complicated then as now; they would have been tried on the same evidence, and the jury must have found the same facts with the

single exception that they need not have found that the defendant knew his representations to be false. But the *scienter* is commonly an inference from other facts, so that the case of the plaintiffs would probably have been made out in assumpsit on exactly the same evidence as now. The defense would also have rested on the same proofs and have been supported by the same considerations. There seem, therefore, to be no reasons for excluding recoupment in cases of tort that do not apply with nearly equal force in cases of contract. It is always objectionable to make a substantial defense depend upon the form of action the plaintiff may have chosen to adopt, and we agree with the Supreme Court of Massachusetts that recoupment is as applicable in cases of tort as in cases of contract. *Carey v. Guillow*, 105 Mass., 18.

The judgment must therefore be affirmed with costs.

The other Justices concurred.

EDWIN R. D. HOWARD v. SARAH A. BOND.

42 131
66 564

42 131
111 527

Writ of assistance—Foreclosure absolute.

A writ of assistance is proper only where a party concluded by the proceedings refuses to give up possessien on request; and it should not be granted without proper evidence of such refusal after the right of possession is established.

A purchaser on foreclosure cannot demand possession until the commissioner's report of sale is confirmed.

A foreclosure sale cannot be made absolute so long as objections duly taken to the report of the commissioner have not been passed on.

Appeal from Berrien. Submitted October 24. Decided October 30.

FORECLOSURE. Defendant appeals.

Cholwell Knox for complainant.

Theo. G. Beaver for defendant. Delivery of possession on foreclosure cannot be compelled until after the sale is confirmed, 2 Barb. Ch. Pr., 529; *Demaray v. Little*, 17 Mich., 386; a writ of possession should not issue without notice to the defendant of the application therefor. See *Richards v. Morton*, 18 Mich., 262; *Hart v. Linsday*, Walk. Ch., 144.

GRAVES, J. February 20, 1879, the usual decree of foreclosure and sale was granted by the court in favor of complainant and against defendant upon pleadings and proofs. The sale was limited to take place subsequent to March 24th, and the decree required that in case a sale should be had the surrender of possession should be made to the purchaser "on production of the said deed for such premises, and a certified copy of the order confirming the report of such sale after such order has become absolute." May 14, 1879, the commissioner sold the mortgaged premises under the decree to the complainant and immediately filed his report, and the usual *ex parte* order for confirming the sale unless cause to the contrary should be shown in eight days, was entered at the same time by complainant's solicitor.

May 20th the solicitor for defendant filed exceptions, but they were not brought on for hearing until the seventh of August following. Meanwhile, and on June 19th, the complainant went to the premises and exhibited to defendant the commissioner's deed and a certified copy of the order *nisi*, entered May 14th, and demanded possession, and the defendant refused to give it. On the seventh of August the court proceeded to hear the objections made and filed against confirming the sale, and after argument by the respective solicitors, overruled the objections and confirmed the sale. Thereupon complainant presented his petition, made and sworn to on the twentieth of June, for a writ of assistance to dispossess the defendant and put complainant in possession, and it

showed no other or further demand of defendant than that made on June 19th. The court allowed the writ, and defendant appealed.

We think the circuit court mistook the practice.

A writ of assistance is proper only where a party concluded by the proceedings refuses to give up possession on request, and it is irregular to grant compulsory process without proper evidence of such contumacy. The party must be first put in fault, and this must be proved to the court on the application for the writ. But it is plain enough that this requirement cannot be answered by a demand and refusal made before the defendant's right is concluded, and before the right of possession by complainant is positively established.

Such, however, was the case here. The demand was made June 19th, and up to that time the complainant had not become entitled to oust the defendant. He could not insist upon possession or maintain a legal right to enter and put out the defendant prior to confirmation, and as yet the sale had not become absolute.

The *ex parte* order of May 14th was conditional, and the filing of objections enlarged it. The question of confirmation was in abeyance until the court decided upon the objections on the seventh of August. Hence there was no foundation for demanding possession on June 19th. The right to it by complainant was not yet fixed, and the refusal to yield to his demand made at that time did not put the defendant in default. She was not yet bound to give possession, and her refusal was consistent with her legal rights in the case.

The order should be reversed with costs.

The other Justices concurred.

JOHN OSBURN AND WILLIAM JENKINSON v. THOMAS FARR.

42 134
126 666

Infants sue on their own joint contracts in their own names.

In a suit on a joint contract made by an infant and an adult as joint parties, and under which money has been earned, the infant's father cannot sue with the other contractor in his own name as the infant's substitute.

An infant's partnership contract is not void, and in a suit under it upon a completed cause of action for the infant's benefit, he should be a plaintiff in his own name and not through another.

Case made from Kent. Submitted October 24. Decided October 30.

ASSUMPSIT. Defendant had judgment below.

D. E. Corbitt for plaintiff.

S. D. Clay for defendant. All the members of a firm should be plaintiffs in an action by the firm on a contract, Story on Partnerships, § 241; *Halliday v. Doggett*, 6 Pick., 359; 1 Chitty Pl., 11; where a minor joins in a contract as a member of a firm, the law implies a promise to himself and not to some one representing him, *Corey v. Corey*, 19 Pick., 29.

CAMPBELL, C. J. In this case the court below held that where a joint contract was sued on, made by an infant and an adult, under which money had been earned, the father of the infant could not sue with the adult in his own name as the infant's substitute in the action, as if himself had been joint contractor.

This ruling is correct. An infant's contract of partnership is not void. *Dunton v. Brown*, 31 Mich., 182. The suit was for a completed cause of action, which is for the infant's benefit. The contract was either the joint contract of the firm, or the sole contract of Jenkinson; and there was never any contract relation between

Farr and John Osburn, the father of the minor George. The infant should have been the plaintiff, and not his father. *Teed v. Elworthy*, 14 East, 210; Collyer on Part., 395; Story on Part., § 241.

The judgment must be affirmed with costs.

The other Justices concurred.

RODERICK J. McDONALD, DAVID D. ERWIN, AUGUSTUS C. TRUESDELL AND WILLIAM McLAUGHLIN v. CHARLES J. LEWIS.

Application of payments on specified judgments—Conclusiveness of docket entry—Record cannot be amended by stipulation..

Money paid to a justice to be applied upon a judgment in garnishment cannot be used to satisfy a different judgment against the same party, even though the time had expired during which the fund could be bound by the proceedings in garnishment.

A justice's docket entry that money paid into court is in satisfaction of a particular judgment cannot make him liable to the judgment creditor for the money, if it was actually meant to be applied upon a different judgment.

The record of a case in the Supreme Court cannot be amended by stipulation of counsel.

Error to Muskegon. Submitted Oct. 24. Decided Oct. 30.

ASSUMPSIT. Defendants bring error.

Smith, Nims, Hoyt & Erwin for plaintiff in error.

F. W. Cook for defendant in error.

GRAVES, J. McDonald being a justice of the peace and the other plaintiffs in error his sureties, Lewis brought this action on their statutory obligation, to recover certain money paid to McDonald, and which Lewis claims to be his. The case was heard by the circuit judge, in

session without a jury, and after finding the facts he entered judgment against the justice and his sureties, and they allege error.

A reference to the facts is necessary. August 8, 1877, McDonald rendered a judgment in favor of William H. Lewis & Sons and against A. V. Moon & Co. for $80.13 damages and $10 costs. The individual names of the plaintiffs were William H. Lewis and John H. Lewis, and of the defendants Alexander V. Mann and John W. Moon. On the same day two garnishee suits were commenced before McDonald in favor of creditors of William H. Lewis & Sons, and against said A. V. Mann & Co., the judgment defendants in the judgment recovered by William H. Lewis & Sons, and these garnishee suits were so commenced after the recovery of that judgment. On the next day, August 9th, William H. Lewis & Sons made their written assignment of their judgment to the defendant in error, on the face of the docket entry of the judgment.

August 15th, at which time the writs of garnishment were made returnable, Alexander V. Mann, one of the firm garnisheed, appeared before McDonald and disclosed for the garnishees in both cases. By such disclosure he confessed that the garnishees were indebted to William H. Lewis and John H. Lewis when the process was served on the eighth of August, in the sum of $80.13. The respective proceedings rested in this shape until the twentieth of September, at which time Mann and Moon, the garnishees, paid to the justice $90.13, a sum equal to the original recovery of damages and costs in the suit of Lewis & Sons against Mann & Co.

The judge finds that McDonald received this money in full satisfaction of that judgment, and made entry of the fact as follows:

"Sept. 20, 1877. The above judgment satisfied by the defendants paying into court the amount of this judgment and costs, $90.13, they being garnishee defendants in suits of *Dean et al. v. Lewis* and *Loomis et al. v. Lewis*."

The judge also finds that of this sum $10 was paid and received as costs in the judgment of Lewis & Sons against Mann & Co.; but that the residue of $80.13 was actually paid by Mann and Moon, to be received by McDonald in the garnishee proceedings; or in other words, that the sum of $80.13, the money in question in this cause, was paid in the garnishee cases, and not on the judgment assigned to defendant in error.

August 22d, or two days subsequent to this payment, the defendant in error demanded the money of McDonald and he refused.

The circuit judge held upon these facts that the assignment of August 9th was sufficient to transfer the judgment, and that the garnishee suits ceased to bind the fund after thirty days from the disclosure, and hence that the money paid in, which was after the thirty days, became the money of the defendant in error in the hands of the justice.

The case is governed by *Dane et al. v. Holmes*, decided this term, 41 Mich., 661.

Conceding that the judgment was transferred subject to the garnishee cases, and conceding further that the force of those cases against the fund was lost or suspended at the time of payment, and still the consequence drawn is not authorized.

There was no power to overrule the will of the garnishees and transfer their payment from the object of their choice to another which this act excluded. They were in a situation to decide for themselves concerning the application which should be made of their money, and whether they acted wisely or unwisely, is not a question to be decided here. For aught that appeared they could appropriate their means to any claim or object, however irregular, and take their own risks. And if they chose to pay upon the garnishee proceedings, which is expressly found, whether they were good or bad, it was not a payment on the judgment assigned to

defendant in error, and the money is not his money and not recoverable as though it was.

If the justice got puzzled in his attempt to record the transaction on his docket, it cannot change the question and render him and his sureties debtors to defendant in error for money the latter never owned, and which was never paid in for him either in fact or by construction of law.

The entry made against the judgment is not important. It would not be conclusive if free from all ambiguity, which it is not, and the finding indicates with sufficient clearness that it was a mistake.

The judgment must be reversed and one entered here for the plaintiffs in error with the costs of both courts.

The other Justices concurred.

NOTE.—After this opinion was prepared a stipulation by counsel was received to amend the record. Of course no amendment could be made by stipulation. However, the change proposed would not affect the result.

42 138
78 645
42 138
81 202

THE PEOPLE v. PETER SMITH.

Removal of fences encroaching on the highway.

An order from the commissioner of highways to move one's fence as being an encroachment on the highway, must state how far the fence lies from where it ought to lie.

The statutory penalty imposed by Comp. L., § 1291, for neglecting to remove a fence that encroached on the highway, after being ordered to do so by the commissioner of highways, applies only to statutory ways and not to highways by user.

Comp. L. §§ 1290-1, provides that if one whose fence encroaches on the highway does not move it within thirty days after being ordered to do so by the highway commissioner, the latter may sue him. *Held* that the landholder cannot be put in default unless he has been distinctly notified how far the fence lies from the true line, and if the notice is defective in that regard, the thirty days do not begin to run until it is perfected.

Objections raised for the first time in the Supreme Court will not be considered.

Error to Clinton. Submitted Oct. 24. Decided Oct. 30.

TRESPASS. The People bring error.

Randolph Strickland for plaintiff in error.

H. & H. E. Walbridge for defendant in error.

CAMPBELL, C. J. Smith was sued for not removing a fence charged to have been an encroachment on a highway, after receiving notice from the highway commissioner to remove it. The order was made and suit brought under sections 1290 and 1291 of the Compiled Laws.

Section 1290 authorizes the commissioner, where a highway has been laid out and opened, to order the removal of any fences or other encroachments within thirty days. The order is required to specify "the width of the road, the extent of the encroachment, and the place or places in which the same shall be, with reasonable certainty." Comp. L., § 1290; Laws of 1875, p. 94.

On the 28th of January, 1878, the commissioner made an order and gave notice that defendant should move his fence. The order gave the center of the highway as on the quarter-section line, with no other description except that the width originally intended was four rods. About the 12th of February defendant told the commissioner he did not know where the line of the highway was, and the commissioner said he would get a surveyor and come up. On the 29th of March he came up and surveyed it, and found the fence encroached. The statute, § 1297, provides that, except in case of a fence built within three months, no one shall be compelled to move it except between the first of November and the first of April.

The court below held that the thirty days' notice required by the statute did not run during the time of

the commissioner's delay in surveying, and that the requirement to remove the one hundred and fifty-two rods of fence in the single working day left in March "under such circumstances, is an outrage. The law does not require any such thing."

We think the circuit judge was right. Assuming—what is not averred—that this was a highway not by user merely, but by laying out under the statutes, (and the penalty sued for only applies to statutory ways; *Parker v. People*, 22 Mich., 93), it is matter of every day experience that the lines as described on paper are not always readily located on the ground, and fences are often honestly put on wrong lines. The object of the order and notice is to point out clearly the extent of the supposed encroachment, by declaring how far the fence lies from where it ought to lie. Merely telling where the theoretical line is drawn on paper, gives no information concerning its position relative to the encroachment. The order itself was a nullity for this reason. Until the surveyor had fixed the line defendant was not informed of the extent of the commissioner's claim. And if this survey could be treated as sufficient to correct the defect in the order, which is not very clear to us, there was no default until thirty days thereafter, which was not a time when any removal could be required. The land-holder cannot be in fault under the statute unless he has been distinctly notified how far his fence lies from what is claimed as the true line.

We think there was no error in the rulings, and the judgment must be affirmed. As the objection that the suit was brought by the wrong officer is now made—so far as we can see—for the first time, we shall not consider that question.

The other Justices concurred.

Oscar Semon v. The People.

42 141
140 1644

Bastardy—Proof beyond "reasonable doubt."

Bastardy proceedings are special and not strictly criminal, and the judgment only involves civil consequences.

The requirement that a jury must be satisfied beyond a reasonable doubt of the guilt of the accused before they can convict, is a principle of criminal jurisprudence only, and its application is determined by the nature of the prosecution and not the character of the act. It does not apply to bastardy cases.

Error to Allegan. Submitted Oct. 29. Decided Oct. 30.

Bastardy. Defendant brings error.

Fenn & Donaldson for plaintiff in error. Bastardy proceedings in England are regulated by the rules of criminal procedure, *Rex v. Archer*, 2 Term R., 270; *Rex v. Bowen*, 5 Term R., 156; in Massachusetts they have been held to be *quasi* criminal cases, *Hill v. Wells*, 6 *Pick.*, 104; *Cummings v. Hodgdon*, 13 Met., 246; *Hyde v. Chapin*, 2 Cush., 77; the requirement that the jury should be convinced, beyond a reasonable doubt, of the guilt of the defendant, applies in bastardy cases, *Zweifel v. State*, 27 Wis., 397.

Attorney General *Otto Kirchner* for the People. The object of proceedings under the Bastardy Act (Comp. L., ch. 54) is not punitory merely, but to enforce obedience to a father's duty to support his offspring, *Coon v. Hitchcock*, 11 Chic. Leg. News, 258; 1 Chitty's Bl. Com., 458 et seq.; 4 id., 65.

Campbell, C. J. The only error set up in this cause, which is a bastardy case, is that the court below denied a request to charge the jury that they should not find against the respondent below unless the testimony satisfied them beyond a reasonable doubt of his guilt, and did

charge them that they might be satisfied by a clear preponderance of evidence.

The nature of these proceedings was explained in *Cross v. People*, 8 Mich., 113, as not criminal in the proper sense of the term, but special and peculiar. The judgment, if it can be properly called a judgment, involves none but civil consequences. We do not think the rule holding it necessary to establish misconduct beyond a reasonable doubt is one which needs any extension. It is very proper where a person is subjected to criminal punishment, and is well rooted in criminal jurisprudence. But it is the nature of the prosecution and not the character of the act which authorizes its application. We held in *Elliott v. Van Buren*, 33 Mich., 49, that when a criminal act came in controversy in a civil cause, the rule did not apply. We think the principle of that case governs this, and that there was no error in the rulings below.

Judgment is affirmed.

The other Justices concurred.

William Cummins, impleaded with Michael Moore and George Linden v. The People.

Burglary—Presumption in favor of charge—Penalty.

In a prosecution for burglary it was shown that the stolen property was found near the respondent and another person in a barn where they slept on the night it was taken, and that when the arrest tood place, the other person resisted and escaped. *Held* that the resistance and flight might properly be commented on by the prosecuting attorney and considered by the jury.

Where the bill of exceptions does not set forth all the evidence, or purport to give its substance, the charge must be presumed to be warranted by the evidence.

Where a penalty is within the statutory limit, it is not reviewable on the ground of being excessive.

Error to Wayne. Submitted Oct. 29. Decided Oct. 30.

BURGLARY. Criminal information charging George Linden, Michael Moore, William Cummins and John Seipher with breaking into the dwelling house of Anne McFarlin, in the township of Hamtramck, and feloniously taking therefrom a bottle of sherry and a lot of cigars. Cummins was convicted and sentenced to imprisonment in the State Prison for seven years.

Hawley & Firnane for plaintiff in error. Cruel and unusual punishments are forbidden by Mich. Const., Art. vi., § 31.

Attorney General *Otto Kirchner* for the People.

MARSTON, J. We do not discover any error in the record in this case. The evidence tended to show that Cummins and Seipher slept together in a barn on the night of the burglary, and that in close proximity to them were found the stolen articles, and that when the officers made the arrest Seipher resisted arrest and escaped. We are of opinion that on the trial of Cummins under such circumstances, the resistance and flight of Seipher was a proper matter to be commented upon by the prosecuting attorney in his argument and considered by the jury.

It also appeared that at the time of the arrest the coat of one of the parties was missing, and complaint is now made of the charge of the court relating to that matter. The bill of exceptions does not set forth all the evidence, or even purport to give the substance thereof. We must assume that the charge as given was fully warranted by the evidence. In so far as this question is presented by the record, the respondent has no legal cause of complaint.

It is also alleged as error that the sentence was unusually severe, and that in the light of all the facts it was in violation of the constitutional provision which

declares that "cruel or unusual punishment shall not be inflicted." The sentence was not in excess of that permitted by statute, and when within the statute, this court has no supervisory control over the punishment that shall be inflicted. The statute gives a wide discretionary power to the trial court upon the supposition that it will be judicially exercised in view of all the facts and circumstances appearing on the trial. Unless the case presented differed materially from what it would appear to have been, as shown by the bill of exceptions, we think the punishment inflicted was unusually severe, and have no doubt but that on a full presentation of the facts to the chief Executive, relief would be promptly and cheerfully granted.

The other Justices concurred.

42 144
94 553

42 144
141 420

William H. Printz v. The People.

Witness—Competency to testify to value.

One who complains of the theft of a seal-skin cloak which she has worn for one winter, and who testifies that she has priced such articles, is competent to testify to its value.

Error to Wayne. Submitted Oct. 29. Decided Oct. 30.

Larceny. Respondent was convicted of the theft of a seal-skin sacque, which the owner testified was worth $125, and was sentenced to the State Prison for five years.

Hawley & Firnane for plaintiff in error. The fact that a witness has priced articles of merchandise does not make him competent to testify to the value of a similar article, *Greeley v. Stilson*, 27 Mich., 153; where

there is no competent evidence to show that stolen property was worth more than $25, the respondent should be acquitted of the higher grade of larceny, and if convicted should be discharged on review of the case, *State v. Moon*, 41 Wis., 684; *People v. Gordon*, 40 Mich., 716; a person convicted of a trivial crime and convicted again on new trial, is entitled to have his punishment mitigated to some extent by the imprisonment to which he was subjected when the penalty was imposed, *Kistler v. State*, 54 Ind., 400. See *State v. Thompson*, 46 Ia., 699.

Attorney General *Otto Kirchner* for the People.

GRAVES, J. The witness, Mary McKenzie, was competent to give the value of her seal-skin cloak. It was part of her personal apparel, which she had worn one winter. She testified that she had priced such articles, and that this one was certainly worth one hundred and twenty-five dollars. The evidence was regular and within previous decisions. It was not necessary to call dealers in second-hand furs.

The remaining objection is covered by *Cummins v. The People*, just decided, *ante*, p. 142.

There is no error and the judgment is affirmed.

The other Justices concurred.

SETH VROMAN v. SETH D. THOMPSON.

Execution sale on transcript of judgment.

An execution sale made upon a transcript of a justice's judgment is void if the transcript was made within five days after the entry of judgment.

Appeal from Kalamazoo. Submitted October 29. Decided October 30.

BILL TO SET ASIDE AN EXECUTION. Defendant appeals.

Dwight May for complainant.

Germain H. Mason for defendant.

CAMPBELL, C. J. The bill in this case was filed to set aside an execution sale made under a transcript of a justice's judgment. The transcript was made two days, and the circuit court execution issued three days after the entering of judgment by the justice. The statute does not allow a transcript to be made before an execution can be issued by the justice. Comp. L., § 5382. This cannot be done within five days except under peculiar circumstances not existing here. Comp. L., § 5395. This point was decided at the present term in *O'Brien v. O'Brien*, ante, p. 15. The transcript and execution were unlawful and the sale void.

The decree must be affirmed with costs.

The other Justices concurred.

---

42 146
s 3NW 945
132 1218
f132 2219

42 146
f152 1333

NICHOLAS F. PALMER AND WILLIAM H. GUION v. THOMAS F. MASON, W. HART SMITH AND GEORGE D. BULEN.

Attachment levy on property assigned for the benefit of creditors.

An assignment for the benefit of creditors or by way of security will be presumed honest and lawful, if possible, and will not be adjudged fraudulent as a conclusion of law drawn from its form unless that construction is necessary.

A debtor conveyed a specific portion of his real estate to trustees to pay certain debts. A transferee of some of the creditors protected thereby attached the property, and the trustees filed a bill to quiet their title as against his levy. *Held* that the conveyance was not a general assignment, and as such subject to the rules which determine that a general assignment is fraudulent in not conveying all the debtor's property or securing all his creditors, or in withholding a part of it for his own benefit.

Conveyances of realty are governed by the laws which prevail where it lies.

The rule that a voluntary assignment by a foreign insolvent debtor will be postponed to the rights of an attaching home creditor, does not apply to real property.

An assignment for the benefit of creditors is not avoided by a subsequent attachment levied before the assignment could be put on record.

Appeal from Saginaw. Submitted October 10. Decided November 29.

BILL TO QUIET TITLE as against attachment proceedings. The bill was dismissed below and complainants appeal.

Alfred Russell for complainants. Every debtor has a legal right to assign property to secure his debts, *Brown v. Minturn*, 2 Gall., 557; *Cook v. Rogers*, 31 Mich., 398; a debtor's conveyance of his homestead, even if made without consideration, is not in fraud of creditors, *Smith v. Rumsey*, 33 Mich., 183; and creditors are not concerned in the disposition of a surplus after they have been paid, *Jerome v. McCarter*, 94 U. S., 740; an assignment of part of the debtor's property without making provision for the surplus, is not void unless it is merely colorable and made for the sake of the resulting trust, Burrill on Assignments [3d ed.], § 280; *Wilkes v. Ferris*, 5 Johns., 335; *Bank v. Talcott*, 19 N. Y., 146.

Griffin & Dickinson for defendants. An insolvent debtor's voluntary assignment can never prevail over the attachment lien of a citizen of another State upon property in the latter State, *Fox v. Adams*, 5 Greenl., 245; *Ingraham v. Geyer*, 13 Mass., 146; *Felch v. Bugbee*, 48 Me., 9; *Blake v. Williams*, 6 Pick., 306; *Osborn v. Adams*, 18 Pick., 245; *Fall River Iron Works v. Croade*, 15 id., 11; *Olivier v. Townes*, 2 Mart. (La.) N. S., 93; *The Watchman*, 1 Ware, 232; *Saunders v. Williams*, 5 N. H., 213; *Mitchel v. McMillan*, 3 Mart. (La.) O. S., 676; *Towne v. Smith*,

1 Wood. & Min., 137; *May v. Wannemacher*, 111 Mass., 208; *Kelly v. Crapo*, 41 Barb., 603; *Guillander v. Howell*, 35 N. Y., 659; *Van Buskirk v. Warren*, 2 Keyes, 119; 2 Kent's Com., 497; Rorer's Inter-State Law, 138; 1 Story on Confl. of Laws, §§ 411, 416; an assignment is invalid, if it does not provide that the surplus shall be devoted to creditors not provided for, *Pierson v. Manning*, 2 Mich., 450; *Dana v. Lull*, 17 Vt., 390; *Malcolm v. Hodges*, 8 Md., 514; Bump on Fraudulent Conveyances, 430, and this applies to both general and partial assignments, *Leitch v. Hollister*, 4 N. Y., 211; *Curtis v. Leavitt*, 15 N. Y., 9; *Dunham v. Whitehead*, 21 N. Y., 131; the test of invalidity is the debtor's insolvency and not whether the assignment was general or not, *Goodrich v. Downs*, 6 Hill, 438; *Barney v. Griffin*, 2 N. Y., 365; Bump Fraud. Conv., 323; if an assignment of property in another State is invalid by the laws of the State where the property lies, it is void as against an attachment levied by a citizen thereof on real estate, *Green v. Van Buskirk*, 5 Wall., 312; Rorer Inter-State Law, 139; Burrill on Assignments, § 306; Wharton on Confl. Laws, § 353.

GRAVES, J. This bill was filed to quiet complainant's title against attachment proceedings brought by the defendant Bulen in the name of the other defendants to collect a debt against one Witthans, and the court having decreed a dismissal, the complainants appealed. All the parties are citizens of New York except Bulen, who is a citizen of Michigan.

January 9, 1877, Witthans was indebted to Smith & Mason for about $11,000, and feeling that it was questionable whether the debt could be collected, they entered into a written agreement with Bulen, who thought he could collect it here, to transfer it to him upon his call therefor—whether it should be before or after his payment of the consideration agreed upon. It was likewise a part of the arrangement that in case he should desire

to do so he might sue in their names before the transfer.

January 12th, or three days later, Witthans being insolvent, conveyed all his real property in this State subject to execution to complainants, but in trust for said Smith & Mason and certain other creditors. The instrument was executed and delivered in New York, and on its face it purported to cover only a portion of his property, and in fact a large amount of real estate situated in New York was not embraced. At the same time those named as beneficiaries were only part of his creditors. He was heavily indebted to others. The deed was immediately mailed to Saginaw to be recorded, but it did not arrive there until the 18th of January, at which time it was placed on record.

January 16th, being four days after the deed was given, and two days before its registry, the defendant Bulen caused an attachment to be issued in the name of Smith & Mason against Witthans for said debt of about $11,000, and to be levied on said lands, and had the levy perfected by a deposit in the register's office of a certified copy of the attachment, with a description of such real estate. At the filing of the bill complainants were in actual possession.

The learned counsel for defendants resists the bill on two general grounds: *first*, that the trust deed on which complainants found their right is void on its face; but if not, then, *second*, that Bulen, being equitable owner of the attachment debt, and a resident citizen of Michigan, his attachment levy on the land situated in Michigan is entitled to prevail over the trust deed given in New York between citizens of New York.

As to the first position certain provisions of the deed are claimed to have the effect to authorize the trustees to sell on credit, or mortgage the property, or use it to carry on the former business. And again, inasmuch as the deed is silent concerning the disposal of any possible surplus after payment of the named creditors, there

is, it is said, a resulting trust in favor of the grantor. And the consequence is drawn, as before stated, that the deed is void as against Bulen.

By a series of cases the rule is settled in this State that a transfer for the benefit of creditors, or by way of security, will not be adjudged fraudulent, as a conclusion of law drawn from the frame of the instrument, unless that construction is a necessary result in view of its peculiar shape and scope. Wherever the case will permit it, the court, in construing the paper, will ascribe an honest purpose and infer a lawful disposition. No attempt at subtle distinctions or strained inferences will be made to impress a bad character on the transaction. On the contrary, every reasonable intendment will be indulged against a construction implying fraudulent design, or an operation involving infringement of the law of the land. *Nye v. Van Husan*, 6 Mich., 329; *Snook v. Davis*, id., 156; *Bagg v. Jerome*, 7 Mich., 145; *Booth v. McNair*, 14 Mich., 19; *Watkins v. Wallace*, 19 Mich., 57; *Henry v. Root*, 38 Mich., 371; *Parsell v. Thayer*, 39 Mich., 467; *State Bank v. Chapelle*, 40 Mich., 447.

Wherever the provisions are susceptible of an honest application, they "cannot be said to have that necessary evil tendency which justifies the inference of a fraudulent intent." *Watkins v. Wallace*, supra.

As *Pierson v. Manning*, 2 Mich., 445, is relied on by defendants, it is proper to notice it in connection with two other cases. *Pierson v. Manning* came before the court on two questions reserved by the court below, and the first was whether the assignment was a valid instrument. It was a general assignment for the benefit of a part only of the creditors of the assignor, and it was ruled down at the instance of a creditor not provided for, as bad for reasons appearing on its face. The assignor expressly required the assignee to delay selling the real estate until the personal assets should be wholly disposed of, and this was held to be a fatal defect, as

no doubt it was. But another point was noticed. The entire estate of the debtor, both real and personal, was conveyed to the assignee, but not for the benefit of all the creditors. The benefit was expressly confined to three New York firms, and no provision was made for any surplus which might arise. The whole of the debtor's property was placed beyond the reach of the creditors who were unprovided for, and at the same time the residuum, after paying the three firms, was not appropriated.

In the opinion given it was argued that the eventual surplus, whatever it might be, would result to the assignor, and hence there was involved in the transaction a provision for the future benefit of the assignor, as against such of his creditors as were not beneficiaries under the assignment. The view expressed in this part of the case was not required to uphold the point adjudged by the court, and without assuming to assent or dissent, it is sufficient to say that it has no application to the case before us. The reasoning manifests clearly enough that stress was placed on circumstances which broadly distinguish the two controversies.

The instrument now in question is not a general assignment, and Bulen, in whose favor the defense is made, can hardly be regarded as an outside creditor. He is proceeding in the name of Smith & Mason, who hold the title, and the debt is one of the debts absolutely provided for.

Sutton v. Hanford, 11 Mich., 513, and *Price v. Haynes*, 37 Mich., 487, were cases where the instruments were executed as general and not partial assignments. In the first a sale on credit was expressly enjoined, if found necessary to prevent sacrifice, and the assignment was adjudged invalid. In the second, the debtor after ostensibly devoting all his property to creditors by an assignment colorably general, was enabled to keep back a portion by means of the restricted terms of conveyance chosen by him, and here too the assignment was held bad.

These cases have no application. As already stated, the instrument given to complainants does not profess to be a general assignment, and is very far from being one. In its nature it is a kind of security. *Lessee of Wilkins v. Wright*, 6 McLean, 340. It is a conveyance by the debtor of a specific portion of his real estate to trustees to pay the defendant's debt and some others. All the provisions are "susceptible of an honest application," and the case is quite within the doctrine of *State Bank v. Chapelle*, supra. The security was there given, as here, to a third person as trustee, and the circumstance that there was but one creditor does not affect the principle. The instrument was less regular than the writing now in question. In that case it was observed: "We do not think the questions applicable to general assignments have any bearing on a security which is only intended to secure a single debt on specific property. All of that doctrine is inapplicable. The doctrine is too elementary to bear discussion that a debtor may always give a *bona fide* security for any claim against him, and that fraud is a question of fact and not a question of law, in all cases where there is no statute to the contrary, and where an honest effect is possible."

The conclusion therefore is that the writing given to complainants is not void on its face. As there is no question of fraud in fact, no such question has been considered.

On the second ground only a few words are required. It is a general rule that one may make conveyance in his own State in accordance with its laws, of his movable property situated in another State, and that the courts of the latter, in case there are no statutes in the way, will accord the same respect to it which it would receive in the former. The tribunals of several States, however, have made a broad exception, and it is that where the conveyance is a voluntary assignment by an insolvent debtor of another State, the right of an attach-

ing home creditor will be preferred to the assignee, and the main argument is that justice and policy require the State to preserve and prefer the rights of its own people, and to exempt them from the laws of other States and from the force of transactions between citizens of other States.

The present objection is advanced on the strength of this exception, or rather on the strength of the principle which underlies it. Now whatever weight may be due to this policy of protection to home creditors, which is allowed to qualify the rule of comity that accords respect to transfers made in a different State by one citizen thereof to another, the case before us stands clear of all such considerations. It is not a title to movables which is in question. The suit relates to land only, and the law is clear that conveyance of real estate depends on the laws prevailing where it is situated. The owner, though a resident citizen of New York, was able to dispose of it lawfully to other resident citizens of the same State.

The transfer now in question was not an act of law, nor a proceeding in a course of insolvency. It was a spontaneous act of the party—a common law disposition—a transaction entirely grounded on the fundamental rights of ownership, and as we have seen already, a disposition in form and substance apparently valid under our laws.

The want of registry at the time the attachment was levied did not invalidate it. It was perfected, and lost nothing, as against the attachment, by the registry law. *Columbia Bank v. Jacobs*, 10 Mich., 349. The disposition is therefore not exposed to criticism for want of conformity to the laws of Michigan, and no sound reason is discovered to uphold a ruling against its superiority to the attachment.

The conclusion reached is required by our own decisions, and it appears to me unavoidable unless we reject their teaching and set aside views heretofore considered

settled. The final consequence is that the decree below should be reversed and one made here granting the relief prayed for, with costs of both courts to complainants.

The other Justices concurred.

42 154
136 2 63

WILKES L. STUART v. WILSON M. WORDEN, SIMEON BABCOCK, DANIEL LORD, SUSAN PRICE, ARTHUR BROOKS AND MARY E. WILCOX.

Mortgages—Construction of covenant from contemporaneous deeds and mortgage of the same land.

A mortgage is to be construed most favorably for the mortgagee.

Where property is exchanged by deeds, and one grantee gives a mortgage upon that which he receives, to secure the difference in value, the deeds and mortgage may be read together and with reference to the circumstances, in construing the intention of the parties; and their manifest intent is not to be derogated from by adhering to the literal terms of the papers.

Equity regards substance rather than form, and enforces the actual intent if lawful and just.

W owned the equity of redemption in land mortgaged to D, but deeded the land to S in exchange for certain other property, and to equalize the trade and sustain his covenant of title, he agreed to pay a certain portion of the amount due on D's mortgage, and gave S a mortgage on the property he received, to secure this agreement. S afterward quit-claimed the land to a third person subject to D's mortgage which the grantee assumed as part of the purchase price. *Held* that on W's failure to pay D what he had agreed to pay on D's mortgage, S was entitled to foreclose the later mortgage given to him to compel such payment to be made to himself.

A mortgagee of land cannot avail himself of an agreement made by a mere owner of the equity of redemption to pay the mortgage, if he was not a party to it nor in any way liable for the debt secured by it.

Appeal from Newaygo. Submitted October 15. Decided November 29.

FORECLOSURE. Defendant Babcock appeals.

Fuller & Standish for complainant. The breach of a condition in a bond and mortgage, to pay an encumbrance, gives an immediate right of action, *Thurston v. Prentiss*, 1 Mich., 193; *Hall v. Nash*, 10 Mich., 304; *Butler v. Ladue*, 12 Mich., 179.

George Luton for defendant. Where a mortgager covenants to pay off an outstanding mortgage on the same property, and the mortgagee's security for the performance of the covenant is such that he cannot suffer loss, he is not injured, so long as no demand for payment has been made, *Halsey v. Reed*, 9 Paige, 446; *Curtis v. Tyler*, 9 Paige, 432; *Crawford v. Edwards*, 33 Mich., 354; and if the mortgagee conveys away the mortgaged land, he has no farther right to bring suit upon the mortgage, *Brewer v. Dodge*, 28 Mich., 359.

GRAVES, J. October 30th, 1872, complainant owned in fee and free from encumbrance a hotel property in the village of Newaygo and twenty acres of land near there. At the same time the defendant Worden owned a farm near the village of Lowell. On that day they agreed upon an exchange. Complainant's property was valued at $9000, and Worden's farm was estimated at $10,000. But the farm was encumbered, and Worden's interest was an equity of redemption and nothing more. Certain former owners had mortgaged it January 1, 1857, to David Dows of New York for $5000, with semi-annual interest at seven per cent, and $3000 was yet unpaid, though already due and payable by the terms of the mortgage, together with interest from July 1, 1872. Worden was not personally liable for the encumbrance, but its existence qualified and reduced his interest in the place.

It seems to have been understood by Stuart that an agreement had been made with Dows to extend the time, and the papers are clear that Worden so represented,

but in fact no such agreement had been made then or has been made since. The exchange was effected on these terms: Stuart conveyed his property at the price of $9000 and Worden deeded the farm upon the understanding that if the whole interest were included, it would be worth $10,000: but as his interest actually amounted to only $7000, it was agreed that he should bring his interest in the equity of redemption up to $9000 (the amount received from Stuart), by paying off $2000 of the Dows mortgage, Stuart being left to take care of the other $1000 still behind on that mortgage. The deed of Worden embraced the usual covenants, but following the covenant against encumbrances, the qualifying expression "except as above stated" was inserted. In the body of the instrument and preceding the covenants a special provision was inserted relative to the Dows mortgage, which will be again noticed further on.

As part of the transaction, and in order to secure Stuart for the difference of $2000 between what he transferred to Worden and what Worden transferred to him, and to equalize the exchange and support the covenants of title in the deed, Worden gave back a mortgage on the property he received from Stuart. It recited the transfer from Worden to Stuart and the encumbrance, and that Stuart assumed $1000 and that it was obligatory on Worden to pay the remainder as specified in the agreement embodied in Worden's deed to Stuart; and it further recited, among other things, that Worden claimed that there was a binding agreement extending the time of payment of the mortgage to the ninth of April, 1875. It then set forth that Worden in consideration of one dollar paid by Stuart, "and in order to secure the said Wilkes L. Stuart, his heirs and assigns, against loss or damage by reason of the failure of said Wilson M. Worden to pay the amount remaining unpaid on the mortgage hereinbefore specified, excepting the part thereof assumed by said Wilkes L. Stuart, and to secure the due performance of the covenants hereinbefore particularly mentioned, do by these presents," etc.

The condition was written in these terms:

"Provided always, and these presents are upon the express condition that if the said party of the first part shall well and truly pay or cause to be paid in due season all sums of money now remaining unpaid upon the said mortgage hereinbefore particularly specified, excepting the sum of one thousand dollars and interest thereon, the payment of which is and has been assumed by said Stuart, and shall save said party of the second part harmless from loss or damage by reason of the failure of the title to the lands conveyed to said party of the second part by said party of the first part, as hereinbefore particularly set forth as represented and covenanted in said deed, it being understood that said Worden is at liberty to obtain further extension of the time of payment of said mortgage debt, and that at any time when he shall perfect the record title of the lands this day conveyed by him to said Stuart, and hereinbefore particularly specified, so as to show a complete and perfect chain of title thereto down to him at this date, then this mortgage, so far as the same relates to the title to the said land, shall cease and be null and void, and shall, on such payment as aforesaid, entirely cease and be null and void; but in case of non-payment of the said sum of money above specified, or of a failure of the title to the lands hereinbefore particularly described as covenanted by him in said deed hereinbefore referred to, to be vested in him, the said Wilson M. Worden, at said date, then" etc., there being the usual conclusion, with the addition of a clause for an attorney's fee in case of proceedings to foreclose.

The agreement in Worden's deed, to which reference is made, is as follows:

"It is understood and agreed by and between the parties to this instrument that the lands hereinbefore described are conveyed subject to a certain mortgage thereon executed by W. P. Collins and A. O. Harron and wives January 1, A. D. 1857, to David Dows, for the sum of five thousand dollars, and recorded in the office of the Register of Deeds of Kent county, Michigan, in liber N of mortgages, on page 171, on which mortgage there is claimed to be unpaid the sum of three thousand dollars of principal, at this date, by the said Wilson M. Worden, and interest thereon at 7 per cent per annum, from July 1st, 1872. Of said sum of three thousand dollars the said Wilkes L. Stuart assumes the payment of one thousand dollars and interest thereon, agreeable to the terms of said mortgage; the remaining sum of two

thousand dollars and interest as aforesaid to be paid by said Wilson M. Worden, reference being had to a mortgage of even date herewith, executed by said Worden to said Stuart, conditioned for such payment, which mortgage is of record in the office of the Register of Deeds of Newaygo county, Michigan."

These instruments were placed on record about the time they were made.

February 12th, 1873, complainant, at the request of Worden, who still held the property which had been so conveyed to him, released the twenty-acre parcel from this mortgage. June 20, 1873, Worden deeded the residue, being the village property, to Francis King, who deeded to Susan Price in the following month. July 10, 1876, she deeded to Henry M. Wilcox and Mary E. Wilcox, and each of these grants was made expressly subject to complainant's mortgage. July 20th, 1876, these last named grantees gave two mortgages on the property; one to Simeon Babcock for $2151.67, and the other to Daniel Lord for $1671.13, and both remain. On the first of August following Henry M. Wilcox quit-claimed to his co-owner, Mary E. Wilcox.

December 21, 1874, and during Mrs. Price's ownership of the Newaygo property, complainant quit-claimed the Worden farm to one Pratt, subject to the Dows mortgage, and it was expressed in the deed that $3000, and interest at seven per cent from January 1, 1873, was claimed to be due on it, and that, as between complainant and Pratt, the latter assumed that sum, or whatever should become due, and that the same was part of the purchase price.

It appears that Worden paid the interest on $2000 of the Dows mortgage for the half year following July 1, 1872, and that since his purchase in December, 1874, Pratt has kept down the interest agreeably to his contract with complainant. But the mortgage has never been paid, and no proceedings have ever been taken to enforce it.

In the fore par of 1877 complainant filed this bill to

foreclose, in his name and in his behalf, the mortgage so made by Worden, and claiming that in truth the main design and effect of the transaction was to secure to him the difference between the interest he received from Worden and the interest he granted, and that the end was left to be effectuated through payment by Worden on the Dows mortgage, if seasonably made; but if not, then, as a necessary consequence, by payment to himself.

The defendants, Mary E. Wilcox, Susan Price, and Lord and Babcock, appeared and answered. The circuit court decreed for complainant, and all the defendants acquiesced except Babcock, who appealed.

The chief defense is that the mortgage is one merely of indemnity, and that Stuart has never been damnified within the sense of the condition. But further claims are asserted which are not fully covered thereby. It is said that complainant's case shows that the $2000 and interest were to be paid on the Dows mortgage and not to complainant, and that Worden could at any time have paid the money on that and thereby have fulfilled his obligation.

Again, it is said that having sold the farm encumbered by the Dows mortgage to Pratt, whatever right complainant had under the Worden mortgage passed to Pratt, and that complainant ceased to have any interest in the payment of the Dows mortgage, and lost all interest he may have had in the Worden mortgage; that Pratt acquired such a relation and interest as made him a necessary party, and that it was error to allow interest from January 1, 1873, inasmuch as Pratt had already paid that directly on the Dows mortgage.

The condition of complainant's mortgage is not clear, and so far as necessary the court is authogized to construe it most favorably for him as mortgagee. *Jerome v. Hopkins*, 2 Mich., 97.

It was given at the same time with the deeds, and as one of the writings necessary to perfect and complete

the exchange of properties, and hence the three are to be read together to explain the intention. *Bronson v. Green*, Walk. Ch., 56; *Norris v. Hill*, 1 Mich., 202; *Dudgeon v. Haggart*, 17 Mich., 275; Fonb., b. 1, ch. 6, § 14. And in order that the court may see just how the transaction came about and received the shape it actually bears, a reference is proper to the surrounding facts. *Grant v. Merchants' & M. Bank of Detroit*, 35 Mich., 515; *Paddack v. Pardee*, 1 Mich., 421; *Norris v. Showerman*, 2 Doug. (Mich.), 16; *Facey v. Otis*, 11 Mich., 213; *Hunter v. New York etc. Salt Co.*, 14 Mich., 98; *Phillips v. Raymond*, 17 Mich., 287. There is no requirement to adhere to the literal terms in derogation of the interior sense of the transaction.

Equity regards substance rather than form, and asserts and enforces the end actually aimed at, if lawful and just. Fonbl., b. 1, ch. 6, §§ 9, 18; *Kimball v. Myers*, 21 Mich., 276; *Thurston v. Prentiss*, 1 Mich., 193; *Dye v. Mann*, 10 Mich., 291; *Butler v. Ladue*, 12 Mich., 173; *Hurd v. Robinson*, 11 Ohio St., 232; *Reid v. Sycks*, 27 Ohio St., 285; *Popple v. Day*, 123 Mass., 520.

The circumstances are strong to show that the cause of the arrangement for Worden to reduce the Dows mortgage $2000 was to equalize the exchange and give Stuart an interest of the same value as that of the interest he conveyed. Worden was not in a situation at the time to make up the difference of $2000 by paying over the money, and Stuart was willing that the end should be attained by an enlargement of his interest in the farm, if effected in "due season;" and it was felt that it could be done in that way by payment made directly on the Dows mortgage. It was the design that it should certainly be paid sooner or later, and not that it should eventually lapse to Worden or his grantees, either as a gratuity or a forfeiture, and the implication is unavoidable that it was to be paid directly to complainant if not paid to him indirectly through payment in "due season" on the Dows mortgage.

As Worden was not a party to that mortgage, or in any way liable for the debt secured by it, his agreement with Stuart could not avail anything to Dows, who was a stranger thereto. *Turner v. McCarty*, 22 Mich., 265; *Daniels v. Eisenlord*, 10 Mich., 454; *Vrooman v. Turner*, 69 N. Y., 280. Stuart was the party to be benefited, and his benefit was not to be confined to a mere indemnity against an encumbrance of unlimited duration. He believed an extension of the time had been fixed by positive agreement, and the purpose was to require payment of the $2000 in "due season," or in other words, whenever Dows could lawfully call for it. He was deceived. Worden had secured no extension, and in fact the money was subject to be demanded at once. It was already "due season."

Worden neglected to pay anything, and in the fall of 1874 Dows threatened Stuart with foreclosure. The latter thereupon made terms with Pratt and quit-claimed to him.

As the pay-day was not postponed at all, and Dows had the right to call for the money at the time the mortgage was given, and the arrangement to permit Worden to obtain further extension only contemplated a renewed extension, which was impossible, because none whatever had been made to be renewed, the $2000 was immediately due at Stuart's election. The various circumstances conduct to this conclusion, and the papers are quite reconcilable with it.

The condition calls for payment, and not merely for indemnity. It is true that payment to complainant is not expressed in terms. But it is not only not negatived,—it is justly implied, as before stated, as the natural alternative after failure to pay him through payment on the mortgage.

This case more easily bears out this construction than do several of the cases cited bear out the construction there applied with confidence.

The other points suggested are not persuasive. Com-

plainant's right to the $2000 under the Worden mortgage was fixed, and the terms of the quit-claim to Pratt are full to show that complainant did not part with it or confer on Pratt any claim to it. Pratt agreed with complainant to take care of the Dows mortgage as so much of the purchase price, and whatever he has paid has been paid at complainant's cost and in his stead, and not in the interest of defendants.

The result is that the decree should be affirmed with costs.

The other Justices concurred.

MATTHIAS BURGER v. MARTIN LIMBACH.

Sale—Dealings with a clerk on the latter's personal account.

B bought goods of L's clerk, and in an action for their value defended on the ground that by L's authority the clerk had sold them for wood to be delivered to himself. B sought to prove this defense by calling the plaintiff L as a witness, but L testified that he did not authorize his clerk to sell on his own account or to sell for wood, and that it had not been his custom to allow him to sell in that way. *Held* that B could hardly complain of the refusal to allow him to ask L if he had not on other occasions permitted his clerk to sell on his own account; or to go over in a general way the ground which had already been occupied by more definite questions and answers.

An action for the value of merchandise was defended on the ground that by plaintiff's authority the sale had been made by his clerk on the latter's own account, and payment had been made to the clerk in wood. Defendant called the plaintiff as his witness, and the latter's testimony showed that the sale had been in part on credit and in his presence, but that he had not authorized the clerk to sell on his own account. The bill of exceptions states that it did not appear that plaintiff knew of any other arrangement between defendant and his clerk, and there was no evidence that any part of the negotiation took place at any other time. *Held* that the court did not err to defendant's

prejudice in refusing to allow him to swear that on the occasion of the sale he had made a private arrangement with the clerk to pay him in wood.

Error to Wayne. Submitted Oct. 15. Decided Nov. 29.

ASSUMPSIT. Defendant brings error.

D. E. Prescott and *W. L. Carpenter* for plaintiff in error.

Van Dyke & Brownson for defendant in error. An agent authorized to sell property must sell for money unless otherwise specially instructed, *Howard v. Chapman*, 4 C. & P., 508; *Sykes v. Giles*, 5 M. & W., 645; he can bind his principal only to the extent of his authority and is presumed to be authorized to sell only in the way in which such goods are usually sold, *Kent v. Tyson*, 20 N. H., 121; *Robinson v. Green*, 5 Har. (Del.), 115; Story's Agency, 75, 209; *Delafield v. Illinois*, 26 Wend., 223; *Ives v. Davenport*, 3 Hill, 374; *Shaw v. Stone*, 1 Cush., 228.

GRAVES, J. Limbach, a hardware dealer, sued Burger before a justice of the peace for part of the purchase price of a stove and certain pipe and zinc sold to Burger some time before. He recovered before the justice and afterwards on appeal, and Burger has brought the case here on exceptions.

At the time the articles were sold one Herbst was serving Limbach as his clerk, and the theory of the defense in the circuit court was that Herbst, by authority of Limbach, sold the goods for wood to be paid to himself, and that the wood had been paid, and to prove this defense he made Limbach his witness; and the latter, testifying in that character, swore that Herbst was clerk for him, and sold the goods to Burger, and in effect that the sale was in his presence. But he further testified, as Burger's witness, that he did not authorize Herbst to sell on his own account, or to sell for wood, and moreover that Herbst on the very occasion told

him that Burger wanted to buy on credit, and inquired of witness if he should sell in that way, and that witness told him to do so, and that Burger said he would pay and actually did pay five dollars. He also swore on Burger's part that it had not been his custom to allow Herbst to sell goods for pay to be taken by himself. Having made this explicit showing by Limbach as his own witness, Burger is hardly justified in complaining of the refusal to allow him to inquire further of Limbach whether he had not on other occasions permitted Herbst to sell on his own account; nor of the refusal to let him go over the same ground in a general way, which had been covered already by more definite questions and answers.

The defense impliedly admitted that Burger knew he was buying at Limbach's shop and that the goods were his, and that Herbst could not sell them as his own without authority from Limbach. And the bill of exceptions states that it did not appear that Limbach knew of any other arrangement between his clerk and Burger than that which Burger had proved by Limbach. Moreover there seems to have been no evidence given or offered to prove that the sale or any part of the negotiation occurred at some other time. Hence it is not perceived that the court erred to Burger's prejudice in refusing to permit the latter to swear that on the occasion specified he made a private arrangement with Herbst to pay him in wood.

Whilst some of the rulings might very well have been different, we are not satisfied that there are any which would justify a reversal. The case derives a peculiar complexion from the showing actually made on Burger's part through Limbach himself, and from the shape of the questions which were ruled down.

After considerable attention to the record we think the judgment should be affirmed with costs.

The other Justices concurred.

42 16
s 3NW 93
e133 23

CLARENCE F. CURTIS AND HERMAN CURTIS, BY THEIR NEXT FRIEND ELISHA CALKINS v. JOHN L. BROWNELL.

Mortgage set aside for insanity of mortgager.

A mortgage made by a man who had been insane some time before and had periodical recurrences of insanity, and was insane at the time he gave the mortgage, though he had all along managed his own affairs with average correctness and had been treated by his neighbors as competent to do business even while they considered him of unsound mind, was set aside as being made while *non compos mentis*, though not so manifestly insane as to make the conduct of the mortgagee fraudulent in making the bargain which it was meant to secure, even though he had been given sufficient warning to put him on his guard.

Appeal from Macomb. Submitted October 16. Decided November 29.

BILL TO SET ASIDE a mortgage. Defendant appeals.

Edgar Weeks and *T. M. Crocker* for complainants. The opinions of those who speak from personal knowledge of a person are admissible to prove his insanity, Elwell's Med. Jur., 430; *Beaubien v. Cicotte*, 12 Mich., 503; *Rambler v. Tryon*, 7 S. & R., 90; *Grant v. Thompson*, 4 Conn., 203; *Dickinson v. Barber*, 9 Mass., 225; *Clark v. Fisher*, 1 Paige, 171; *Jacox v. Jacox*, 40 Mich., 473.

Aug. C. Baldwin for defendant. Mere weakness of intellect does not incapacitate one from making a contract, 2 Kent's Com., 453; *Att'y Gen. v. Parnther*, 3 Bro. Ch. R., 441; *Cram v. Cram*, 33 Vt., 15; *Jackson v. King*, 4 Cow., 207; *Farnam v. Brooks*, 9 Pick., 220; 1 Whart. & Stille's Med. Jur., §§ 1-13; but if advantage is taken of such weakness, and fraud is practiced on him, his contract is void, *Gartside v. Isherwood*, 1 Bro. Ch. R., 560; *Mann v. Betterly*, 21 Vt., 326; *Willis v. Jernegan*, 2 Atk., 251; *Stewart v. Lispenard*, 26 Wend., 254; *Osterhout v. Shoemaker*, 3 Hill, 513; 1 Story's Eq. Jur., §§

236-8; the distinction between weakness of mind and unsound mind is made in *Blanchard v. Nestle*, 3 Den., 37; where the defense of mental incapacity is made, the test is whether the party incapacitated could comprehend in a reasonable manner the nature of the affair in which he took part, *Somers v. Pumphrey*, 24 Ind., 231; *Dennett v. Dennett*, 44 N. H., 531; *Hovey v. Chase*, 52 Me., 316; *Staples v. Wellington*, 58 Me., 453; *Crouse v. Holman*, 19 Ind., 30; *Lilly v. Waggoner*, 27 Ill., 398; *Van Horn v. Keenan*, 28 Ill., 448; if one who is capable of taking care of his own interests, makes a bad or losing bargain, the law will not aid him unless deceit has been practiced against him, *Miller v. Craig*, 36 Ill., 109; *Baldwin v. Dunton*, 40 Ill., 188; *Clearwater v. Kimler*, 43 Ill., 276; *Emery v. Hoyt*, 46 Ill., 259; *Lindsey v. Lindsey*, 50 Ill., 79; *Wiley v. Ewalt*, 66 Ill., 26; *Carpenter v. Calvert*, 83 Ill., 63; *Stone v. Wilbern*, 83 Ill., 105.

CAMPBELL, C. J. Complainants filed this bill to set aside a mortgage executed by their deceased father, Byron Curtis, to defendant for $1600, dated November 9, 1875, and covering a farm of 160 acres in Shelby, Macomb county.

The mortgage is attacked on the ground that the mortgagor was insane when it was executed. It was given to secure the price of a set of mill machinery bought at that time of defendant, on which $200 deduction was to be made if paid within sixty days.

The court below granted the prayer of the bill, and defendant appealed.

The arguments of counsel dwell at some length on the rules of law applicable to such cases, but we do not think there is much occasion for discussing them. The ground on which the decision must be made is narrow, and includes nothing but the single question of insanity. The testimony does not indicate any weakness short of that, on which the transaction could be avoided, unless for fraud. We have discovered nothing in the record

which would show that any active fraud was practiced. The price, as usual in such cases, is placed by different, and so far as we discover, honest witnesses, at very varying rates, and the utmost that can be said is that it may have been higher than it was probably worth. But Curtis and not defendant was the active party in seeking to bring about the bargain, and the security he proposed to give was a third mortgage, although safe enough. If he was not insane, he had what he supposed to be sufficient reasons for buying it, even at a full price, and if his plans could have been carried out, there is reason to believe it would not have been so bad a bargain as would have excited surprise. His purpose was to put it in a mill, of which he already owned a half interest, and his brother Freeman Curtis had given him reason to believe he could have control of the whole, although he opposed this purchase, and refused to carry out his agreement, on the ground as he now claims, and with seeming truth, that he thought Byron was not in proper condition to carry it on. This purpose is not shown to have been an extravagant one, and so far as any ground but insanity is concerned, the subsequent conduct and failures could have no effect on Brownell's bargain. Unless Byron Curtis was actually insane, there is no case made out; and the rules concerning ordinary fraud have no application.

Upon the question of insanity the case presents many difficulties. As opposed to it we have very full evidence that Byron Curtis was not only engaged during all his life in business of one kind or another on his own account, but was also for many years before his death residing in the same place, as head of a family, managing his farm and some outside interests, and generally dealt with as any one else would be. And the case is further involved in doubt by the fact that he had always been a speculative and somewhat visionary character, who had been in the mining regions of the west, and whose exaggerations of business prospects and schemes

appeared much wilder in an old and sedate farming region than they would have seemed any where else. And the evidence warrants the idea that other members of his family, with less eccentric and extreme notions, had not shown much better judgment, and magnified many very insignificant things into undue importance.

Nevertheless there is evidence which has a decided bearing on insanity. We cannot profitably detail at length facts which to a large extent are of ambiguous meaning. It will be enough to refer generally to an outline of what seems to us to include the pertinent proofs.

The case shows that Byron Curtis—apart from his farm—had no considerable resources, and did business on a small scale. He owed some money secured by mortgage on his farm. There was nothing in his history or surroundings to warrant any large attempts or great expectations. And there was nothing in the situation of his property to lead to any reasonable belief that it would advance to a great importance. The laying out of the Air-line Railroad, while it might account for some wild expectations, was not, in the views of most men, likely to make great business centers in that neighborhood. Still this notion alone would not necessarily show insanity.

In 1872 the evidence is quite conclusive that he was unmistakably insane. Of this we think there is no room for doubt. And during this insanity he dwelt, among other things, upon absurd schemes of speculation which involved not only extravagant ideas of future prosperity, but delusions as to existing facts. The proof of insanity at that period does not rest upon these things alone or chiefly, but upon such mental and physical conditions as were manifest and open to no other explanation.

The schemes and projects which he talked of most when excited nearly all related to wealth and business in some form. His mind ran upon great improvements

to be made in the country and village neighborhoods where he was interested. He had periods of depression when he feared suffering from destitution, and other periods of exaltation. He expected by the aid of a mill to carry on an extensive business in making pianos and furniture from the lumber he sawed to supply the eastern markets. He meditated building a town on an adjacent farm, and building a church and large school. He thought he had invented an excavating machine which would bring him in a large sum of money from the government. He claimed to have parties to whom he could ship any amount of lumber, and to have a contract for the black walnut to be used in the State Capitol. He said there was $80,000 in Detroit which he could have. He talked of setting up a very large wood-yard in the village of Rochester, and actually attempted to make a contract for wood with one of his neighbors, who regarded him at the time as incompetent. He applied to a surveyor to survey a mill lot and a railroad branch running to it a short time before he bought the machinery from Brownell, and the surveyor avoided it partly because he appeared wrong. At the same time Curtis repeated to him some of his plans, and told him he could command $80,000. After he bought the machinery and his brother refused to put it in the old mill, he made preparations and excavated a place for a new building under unusual circumstances, and was shown by the testimony to have testified surprise after some of the work had been done, as if had not before understood what was going on. In the ensuing spring he committed suicide under circumstances which had at least some tendency to show he was then insane. There were other items of conduct having some such tendency.

The facts enumerated may not have been conclusive in themselves, although some of them seem to be more than even any extravagant talker would be likely to indulge in unless somewhat off his balance. It is per-

haps possible if there was nothing in his appearance and demeanor to indicate mental disturbance, that he might have been indulging in talking largely for the mere sake of talking. But some of these things are too wild to be reconciled with his general conduct when sane, without stretching presumptions very far. Nevertheless there was enough in the conduct of his friends to require scrutiny.

He had brothers and sisters in the neighborhood who were claimed by himself, and possibly by his wife, to have intermeddled unduly with his affairs. He had some business relations with them, and a mortgage was obtained by one of them for another member of the family during the period when he was subject to these delusions. This mortgage was a ten per cent mortgage given to take up mortgages held by other persons. It was a beneficial transaction to the mortgagee. We are not informed of the rate of interest on the other mortgages. There is no doubt at all that during the period from 1872 till just before his death in 1876 he was permitted to manage his own affairs, and did manage them with average correctness. It is also in evidence that his condition was not such as to impress strangers as amounting to insanity. We have had some difficulty in getting over this practical treatment, which would usually overcome the testimony of those who while so dealing, profess to have regarded a man as insane.

We think however that it is sufficiently explained. The proof is satisfactory that at the times when he was found speaking and acting extravagantly he was pale, haggard and unnaturally excited, and had the appearance of an insane man, and was believed to be insane by his family. These extravagances reappeared in about the same way at intervals, and during those attacks his mind reverted to the same subjects, or those which were similar. Once or twice his wife took measures to guard against mischief which he seemed likely to do to himself, but there is not much evidence that he was thought

dangerous to others. The family appear to have regarded him as more or less insane throughout, but as not enough so, except at detached periods, to interfere with his affairs. There is reason to think they were not far from the truth. The testimony of his wife gives a more complete and intelligible account than that of any one else, and if we assume, which we think we must, that he was completely insane in the early part of 1872, we cannot doubt that the recurrence in subsequent years of similar conduct was the manifestation of insanity. And it is not very important to consider or to conjecture whether insanity actually left him or was only milder during the periods of more rational behavior, inasmuch as the proofs of its existence at the very period of the Brownell bargain are unmistakable, and continued subsequently.

It is not surprising that his family acted as they did, as no necessity appeared to exist for interference, and the facts were such as might make any one hesitate to declare him insane. There were acts and conduct which we do not think it desirable to dwell upon, that may be explained better by the continuance of mental disturbance than in any other way. The case is not void of difficulty, but on a complete review of it we are satisfied that the view taken below was correct, and that Curtis was *non compos mentis* when he gave the mortgage. While it appears that Brownell had warning given which ought to have put him on his guard, we have not been satisfied that his conduct when he made the bargain was open to serious censure. It is nearly as much his misfortune as his fault.

The decree must be affirmed with costs.

The other Justices concurred.

42 172
98 73

Robinson Pashby v. Archibald Mandigo, Nicholas Mandigo and Emma Mandigo.

Deed set aside for being made to evade a prospective liability.

A surety on a promissory note, the maker of which had become insolvent, conveyed his land to his son for inadequate consideration and in evident contemplation of being held liable as surety. The other surety paid the note, sued him for contribution, and levied on the land conveyed. *Held*, on a bill in aid of execution, that the deed should be set aside as against the execution levy.

Appeal from St. Joseph. Submitted October 16. Decided November 29.

Bill in aid of execution against certain lands transferred by Archibald to his son Nicholas Mandigo. Complainant Pashby and Archibald Mandigo had been sureties on a note made by the latter's son Robert who failed. Pashby paid the note and sued his co-surety for contribution, and having recovered against him for half the amount of the liability on the note, levied on his land which Archibald Mandigo had previously conveyed to Nicholas. Complainant prays that this conveyance be set aside as void as against his levy. The bill was dismissed and complainant appeals.

William Sadler for complainant.

H. H. Riley for defendant. Fraud is a question of fact and must be proven, *Lasher v. Stafford*, 30 Mich., 369; *Williams v. Hubbard*, Walk. Ch., 28; and the grantee must have participated. In this case the grantee procured the execution of the deed, but it was done to carry out an agreement to support the grantor, made by him before the grantor had become liable as surety; see *Hill v. Bowman*, 35 Mich., 191; *Partelo v. Harris*, 26 Conn., 480; *Fifield v. Gaston*, 12 Ia., 218; *Harrison v. Trustees of Phillips Academy*, 12 Mass., 456; *Leach v.*

Francis, 41 Vt., 670; and the grantee could have maintained a bill for specific performance if the conveyance had not been made, *Twiss v. George*, 33 Mich., 253.

MARSTON, J. We are of opinion that complainant is entitled to the relief prayed for in this case. At the time Archibald Mandigo conveyed the premises levied on to his son Nicholas Mandigo, both knew that Robert Mandigo, the principal, would be unable to meet the note when it should fall due, and the effect of such failure upon the conveyance made was talked of between the parties. There were no such payments made, or responsibilities or obligations assumed by the grantee as would fairly amount to the full value of the land and other property then received by him. That Archibald Mandigo was liable as a surety on the note of his son Robert, and that a portion of such liability would ultimately fall upon him as such surety was well understood: and while a desire to avoid such liability may not have been the sole reason or only consideration for the conveyance made, yet we think it had a material bearing. The grantor was, before this conveyance was made, abundantly able to pay his proportion of the indebtedness, but he so disposed of his real and personal property to his son Nicholas that nothing remained. We are of opinion that such disposition of his property was made to avoid payment of the claim that might and was expected to accrue against him as surety as already mentioned.

The decree below should be reversed with costs, and one entered for complainant in accordance with the prayer in his bill.

The other Justices concurred.

Mary B. Pratt v. Horace B. Pratt et al.

Parent and child—Agreement for support.

An aged couple deeded their property to their son on an agreement by him to give them a good and sufficient support, without any labor or service on their part except such as they might give voluntarily. The father died and the mother continued to live quietly with her son for several years until he married, when difficulties arose and she went to live elsewhere, claiming to be entitled to her support wherever she chose to reside. *Held* that in view of the moderate circumstances of the parties the understanding evidently was that the son was to support his parents at his home, and that the mother could not demand support elsewhere unless she showed that he failed in his duty to her.

Appeal from Benzie. Submitted October 22. Decided November 29.

Foreclosure. Bill dismissed. Complainant appeals.

S. W. Fowler for complainant.

Pratt & Davis for defendant Horace B. Pratt. An agreement by a son to support his parents may be construed in view of the narrow means of the parties, to contemplate providing a home with him and not elsewhere, unless it is otherwise agreed, *Flanders v. Lamphear*, 9 N. H., 201; *Currier v. Currier*, 2 N. H., 75.

Cooley, J. This controversy belongs to that unhappy class where parents, having divested themselves of the means of independent support in favor of children, find themselves afterwards discontented in the position in which they have placed themselves, and resort to litigation with their children to the destruction of family and domestic happiness.

The complainant is the widow of Horace B. Pratt. In 1866 in the lifetime of her husband she united with him in a conveyance of their little property, consisting

of one hundred and sixty acres of cheap land and a small amount of personal property, worth in all perhaps $1200, to the defendant Horace B. Pratt, their son, taking back from him an agreement that the son should give them "a good and sufficient support during their natural lives, providing sufficient food and clothing, medicine and medical attendance when necessary, and not requiring of them any labor or service other than they may voluntarily render." The written contract contained a provision that the parents should have a lien on the property to secure performance of its stipulations.

The father did not survive this arrangement long, but the mother lived with her son after her husband's death, some eight years. They appear to have lived in a very economical way, but contented and without controversy, the mother taking general charge of the household work for the son, who was unmarried. The son then married, and difficulties arose. These, however, are entirely unexplained,—the mother giving no sufficient reason for them, but declaring that she has a reason which she chooses not to tell. We have no reason to think the son was wanting in due provision for his mother any more after his marriage than before.

When difficulties sprang up, the mother left the son's house and went elsewhere to live. She now claims to be entitled to a support by her son wherever she sees fit to reside.

When the very moderate circumstances of the parties are taken into account, it is difficult to reach any other conclusion than that it was the understanding and expectation of all the parties that the support the son was to give was to be furnished at his own home. As a business arrangement he could not have afforded to make it on any other terms. The mother, therefore, was not justified in leaving the son as she did, and demanding support elsewhere, unless she could show that he failed in his duty to her. This showing has not been made. And much as our sympathies may be excited in her behalf

by her dependent condition, we have no alternative but to affirm the decree with costs.

The other Justices concurred.

42 176
76 51
76 59
42 176
88 195
42 176
97 581
42 176
100 505
42 176
128 431

JAMES BURNS v. SAMUEL M. BERRY, ALMER THORP ET AL.

Comp. L., § 4231—Heirs take title subject to debts—Effect on mortgage lien of priority of record—Creditor's right to administration of debtor's estate.

Heirs can take no better title to real estate than their ancestor had at the time of his decease, and receive it subject to any incumbrances under which it may then lie.

Where a mortgage is left unrecorded and the mortgager's heirs give a second mortgage which is put on record, an assignee of the second mortgage, who takes it in good faith for a full consideration actually paid, and without any notice, actual or constructive, that any claim exists against the premises, and whose assignment has also been recorded, is protected and given precedence by Comp. L., § 4231 which provides that every unrecorded conveyance shall be void as against any subsequent purchaser in good faith whose conveyance is recorded first.

Where successive conveyances of the same property have been made and only the later one has been recorded, the transfer of title thereunder is not by force of the conveyance, but only of the statute (Comp. L., § 4231), which provides that an unrecorded conveyance shall be void as against a later one, that is recorded, to a *bona fide* purchaser.

Real estate descends to heirs subject to the payment of decedent's debts; and conveyances made by the heirs before administration, or before claims against the estate are paid or barred, are also subject to his debts.

A decedent's creditor may obtain administration of the estate and have the realty sold, if necessary, to satisfy the debt, even though he had lost his own mortgage lien thereon by neglecting to record it until a subsequent conveyance to a *bona fide* purchaser had been placed on record.

Appeal from Cass. Submitted Oct. 22. Decided Nov. 29.

FORECLOSURE. The bill was dismissed as to defendant Berry, and a decree granted as against the remaining defendants. Complainant appeals.

Howell & Carr for complainant. Unrecorded deeds are nevertheless good as against the grantor and his heirs, *Ralls v. Graham*, 4 T. B. Mon., 120; and only *bona fide* purchasers can take advantage of the failure to record them, *Hancock v. Beverly*, 6 B. Mon., 532; a deed not recorded until after the grantor's death is valid as against a purchaser from his heirs at law, although the purchaser does not know of its existence, *Hill v. Meeker*, 24 Conn., 211; *Rodgers v. Burchard*, 34 Tex., 441: 7 Amer., 283; *Whittington v. Wright*, 9 Ga., 23; *Marshall v. Roberts*, 18 Minn., 405: 10 Amer., 201; but see *M'Culloch v. Eudaly*, 3 Yerg., 346; the registry of a deed is notice only to those who claim through or under the grantor who executed the deed, and a purchaser is not bound to take notice of the record of a deed executed by a prior grantee whose own deed had not been recorded, *Ely v. Wilcox*, 20 Wis., 530; *Corbin v. Sullivan*, 47 Ind., 356; the recording acts are for the protection of persons claiming under the same title, and have no operation on a hostile claim, *Embury v. Conner*, 2 Sandf., 98; *Webster v. Van Steenbergh*, 46 Barb., 211; the act avoiding an unrecorded deed as against a subsequent purchaser in good faith applies only to successive purchasers from the same grantor, *Raynor v. Wilson*, 6 Hill, 469; a deed that purports only to pass the grantor's right, title and interest will not exclude the operation of a prior unrecorded mortgage, *Bragg v. Paulk*, 42 Me., 517; *McLaughlin v. Ihmsen*, 85 Penn. St., 364; the assignee of a mortgage generally takes it subject to all equities against it, *Dutton v. Ives*, 5 Mich., 515; *Bloomer v. Henderson*, 8 Mich., 395; *Warner v. Whittaker*, 6 Mich., 133; he can go no farther than the mortgagee in enforcing it, *Crane v. Turner*, 67 N. Y., 439; *Davis v. Bechstein*, 69 N. Y., 442.

Breese & Stearns for defendant Berry. An assignee

of a mortgage without notice is a *bona fide* purchaser within the meaning of the act protecting *bona fide* purchasers where previous deeds of the same property have not been recorded, 1 Jones Mortgages, §§ 475, 558, 560; and a conveyance from the grantor's heirs is as fully protected as if it had been made by the grantor. See *Powers v. M'Ferran*, 2 S. & R., 44; *Kennedy v. Northup*, 15 Ill., 148; *cited*, id., 540; *Earle v. Fiske*, 103 Mass., 491; *Youngblood v. Vastine*, 46 Mo., 239; *Vaughan v. Greer*, 38 Tex., 530.

MARSTON, J. On the 9th day of November, 1872, Edmund Thorp, being the owner in fee of certain premises, executed and delivered to James Burns a mortgage thereon to secure the payment of a promissory note of even date therewith, given by him to said Burns. This mortgage was not recorded until the 29th day of December, 1876. On the 28th day of May, 1874, Edmund Thorp died intestate, leaving as his heirs at law three sons, Aaron, Almer and Elbridge. No letters of administration were taken out, and the estate of said deceased has never been administered upon. On the 1st day of March, 1875, Aaron and Elbridge conveyed by quit-claim deed all of said mortgaged premises to their brother Almer, and on the same day Almer mortgaged the same premises to Aaron to secure the payment of $3643.56, this being Aaron's share as one of the heirs. This deed and the mortgage were duly recorded the same month, and on the 3d day of May, 1875, Aaron assigned this mortgage to Samuel Berry, the said assignment having been recorded the same day.

Burns filed his bill to foreclose the mortgage given him, setting forth all the above facts and charging that each of said heirs, and that Berry at the time of taking said assignment, had full notice of his note and mortgage and of the non-payment thereof.

Berry claims to have purchased in good faith without notice, and to have paid full consideration for the mort-

gage assigned to him, and the proofs fully sustain him.

It also appears that Edmund Thorp at the time of his decease left personal property sufficient to pay all his debts including this Burns mortgage, but which has since been disposed of, and that he also left unencumbered real estate other than that in question, of sufficient value to pay all his debts.

What then are the respective rights of Burns and Berry upon the facts stated?

The heirs could take no other or better title to the real estate than their father had at the time of his decease. They therefore took it subject to the Burns mortgage, whether they had notice thereof or not, and the conveyances made to each other would in like manner be chargeable with the payment of the Burns mortgage.

Berry having taken an assignment of the second mortgage, which was first recorded, in good faith for a full consideration actually paid, and without any notice either actual or constructive, that Burns had any claim against these premises, is protected we think under the registry laws.

Our statute provides that "Every conveyance of real estate within this State, hereafter made, which shall not be recorded as provided in this chapter, shall be void as against any subsequent purchaser in good faith, and for a valuable consideration, of the same real estate or any portion thereof, whose conveyance shall be first duly recorded." 2 Comp. L., § 4231. This section applies to mortgages and assignments thereof. Id., §§ 4236, 4237.

The protection which this statute gives to a *bona fide* purchaser does not proceed upon the theory, and is not made to depend upon the fact, that the grantor at the time of such conveyance had any interest in the premises whatever, or that any passed from him by his conveyance to such subsequent purchaser. It is not by force of the conveyance, but by the terms of the statute, that such subsequent purchaser acquires title to the premises.

His grantor having previously conveyed, has no title left to convey, and could therefore by his deed, unaided by the statute, pass none to any third person. Our registry laws however step in, and for the purpose of protecting an innocent purchaser, give him what he supposed, and from an examination of the records had a right to suppose, he was acquiring by his purchase, and to this extent cut off the previous purchaser who negligently failed to record his conveyance. I am of opinion, therefore, that in this proceeding defendant Berry is protected and that the mortgage of Burns must be treated, as against defendant Berry, as a second or subsequent mortgage.

There is however still another view to be taken of this case, and which it might be well to notice, so that if possible the rights of each may be fully protected.

The note given to Burns by Edmund Thorp became on his decease a personal debt against his estate. For aught that appears in this case, had the estate been administered upon, this note might have been proven, allowed, and paid out of the personal assets, and for want of sufficient thereof, the real estate, including the premises in question, might under the order of the probate court have been sold for the payment thereof. Burns, as a creditor, might have applied for letters of administration and in this way collected his debt.

The real estate of the deceased descends to his heirs subject to the payment of his debts, and conveyances made by them before the estate is administered upon and the claims paid or barred by the statute of limitations are in like manner subject to the debts of the deceased; and as against the debts proved against the estate our registry laws afford no protection. Subsequent purchasers take subject to the right of the administrator to have the same sold for the payment of the debts and the expenses of administration.

So that while our registry laws, under the facts in

this case, cut off the mortgage lien of the complainant as against Berry's mortgage, they did not cut off complainant's right to have the estate of the deceased properly administered upon and the real estate of the deceased sold for the payment of this debt if necessary; and in this way complainant's claim would take precedence over the Berry mortgage.

The complainant may, in this case, take a decree for a foreclosure and sale of the mortgaged premises, subject to defendant Berry's mortgage, and the decree of the court below will be modified accordingly, with costs to defendant Berry.

The other Justices concurred.

---

42 181
96 421

MARY E. MILES v. ADA SKINNER ET AL.

Statutory foreclosure for instalments due—Title of bona fide purchaser after period of redemption—Comp. L., § 6913—Facts only set up in the answer are not at issue.

Matters not set up in a bill but only in the answer are not thereby put in issue and cannot properly be adjudicated.

Whether the title obtained by one who buys from the purchaser on statutory foreclosure after the time for redemption has expired, can be passed upon in a foreclosure proceeding for a second instalment under the mortgage—*Q.*

Where a foreclosure by advertisement for the first instalment due on a mortgage and for interest on the other instalments, has become absolute, and the land has been bid off and not redeemed, the mortgager's wife may, with her own money, buy it from the purchaser on foreclosure, and if the sale was not made subject to succeeding instalments, she acquires full title.

Comp. L., § 6913, by which the lien of a mortgage is preserved for successive foreclosures by advertisement for instalments of the debt as they fall due, would not, *it seems*, apply where title was obtained by a foreclosure on default in the payment of interest on a note, and the sale was not made subject to the principal debt.

In foreclosing by advertisement a mortgage securing separate notes, the mortgagee can preserve his lien for subsequent foreclosures by selling the premises subject to the payment of the principal indebtedness; if he sells them discharged from farther incumbrance, he can depend on the mortgager's personal liability.

Appeal from Berrien. Submitted October 23. Decided November 29.

FORECLOSURE. Complainant appeals.

Edward Bacon for complainant. A purchaser on foreclosure obtains the rights held by the mortgagee, *Gilbert v. Cooley*, Walk. Ch., 494; *Lillibridge v. Tregent*, 30 Mich., 106; and a deed from him to a third person conveys all his rights in the land, *Niles v. Ransford*, 1 Mich., 338; *Johnstone v. Scott*, 11 Mich., 246; *Thayer v. McGee*, 20 Mich., 208; the mortgager's wife can buy it from the purchaser on foreclosure, even though she joined in the mortgage, *Gantz v. Toles*, 40 Mich., 728.

O. W. Coolidge for defendants. If an answer to a bill in chancery sets up interests not touched upon in the bill, the defendant invokes the jurisdiction of the court as to them and is bound by the decree, *Banker v. Cleveland*, 19 Mich., 230; *Adams v. Preston*, 22 How., 473; *Peterson v. Lothrop*, 34 Penn. St., 223; a court of equity has full jurisdiction over the conflicting interests of the parties, *McCurdy v. Clark*, 27 Mich., 451; a wife who unites with her husband in a mortgage cannot become a purchaser against the mortgagee's interest, *Nash v. Spofford*, 10 Met., 192; *Dudley v. Cadwell*, 19 Conn., 218; *Wadleigh v. Glines*, 6 N. H., 17.

MARSTON, J. November 16, 1866, Hiram C. Miles made and delivered to John Slonecker his note wherein he promised to pay Slonecker or order one thousand and fifty dollars with ten per cent interest one year from the date thereof, or two hundred and ten dollars with ten per cent interest annually for five years. On the same day to secure payment thereof, Hiram C. Miles and his

wife Mary E., the complainant in this case, executed and delivered to Slonecker a mortgage upon certain real estate. January 15, 1868, Slonecker, the mortgagee, commenced proceedings by advertisement, in which it was set forth that default had been made in the payment of two hundred and ten dollars, and interest on one thousand and fifty dollars at ten per cent from the sixteenth day of November, 1866, "which is claimed to be due and unpaid at the date of this notice on a certain mortgage and note accompanying the same (reference thereto being had), bearing date the 16th day of November, A. D. 1866." Pursuant to this notice the premises were sold April 14, 1868, to John H. Lee for the sum of $407.85. This amount he paid to the officer making the sale, and the usual deed was executed and filed with the register of deeds, and there being no redemption, this deed was duly recorded April 30, 1869.

In July, 1869, complainant Mary E. Miles received from her father $400. She then purchased the premises from Lee, receiving from him a warranty deed. She paid him the money she had received from her father and a small sum in addition thereto; the precise amount is immaterial at present.

Complainant claims to have remained in possession of the premises under the deed from Lee, and to have paid the taxes and built a barn thereon of the value of $250.

In August, 1870, Slonecker, the mortgagee, filed his bill in the usual form in the circuit court in chancery to foreclose this mortgage, claiming that there was then due $840 and interest. Complainant was made a party defendant on the ground that she had executed the mortgage as the wife of Hiram C. Miles. Lee was made a party defendant as a subsequent purchaser or incumbrancer, in accordance with the rules and practice.

Complainant and Lee answered, setting up the foreclosure by advertisement, the purchase by Lee at such sale, his deed thereunder, and conveyance to Mary E.

Miles as already set forth. A replication was filed, proofs taken, and the usual decree rendered for a sale of the mortgaged premises. A sale was had and the mortgagee, Slonecker, became the purchaser; the sale was confirmed, and in 1874 possession taken thereunder.

No question is made as to the regularity of the foreclosure proceedings by advertisement or of the subsequent foreclosure in chancery.

The complainant in this case asks that the amount paid by her to Lee, with interest thereon, the value of the barn and taxes paid by her with interest, be allowed her, and prays for such general relief as she may be entitled to.

The above is a substantial statement of the facts without reference to the charges made concerning the purchase by Lee and conveyance made to complainant, which are not sustained by the proofs.

The claim made that this entire matter was passed upon in the second foreclosure or chancery case, is not well taken. The interest which this complainant had acquired under her purchase from Lee was not set up or referred to in the bill of complaint in that case, and although set up in the answer, it was not thereby put in issue, and could not therefore properly be adjudicated upon. Even had the complainant amended his bill, and thus put the matter in issue, it is very questionable whether her title could have been passed upon, or what benefit the complainant in that case could have derived therefrom. She at least had acquired a lien on the premises, under her purchase from Lee, which could not be cut off in the subsequent foreclosure case. *McCurdy v. Clark*, 27 Mich., 445.

In this case the foreclosure by advertisement was not made subject to the subsequent installments. This however would make no difference had the sale been made for the first installment with interest thereon. The case last cited would then govern. Here the foreclosure was

not only for the amount of the first installment with interest thereon, but for the interest upon each of the subsequent installments.

The several installments are to be treated as several independent notes and mortgages. No one however would have any preference over the rest by reason of its falling due sooner; all would have equal claims to be paid ratably, and under our statute, as construed in *McCurdy v. Clark*, a sale for one installment would not cut off the others.

Suppose however that default being made in the payment of interest upon a note not due, which is secured by mortgage, and the mortgagee proceeds to foreclose under the statute by advertisement for the interest due, and the sale is not made subject to the principal debt, would there be any doubt but that the purchaser at such sale, after the time for redemption had expired, would take the title relieved from the mortgage lien entirely? The statute (§ 6913*) does not apply to such a case and save the lien of the principal sum. In this case each installment was a separate note, and the amount for which the premises were sold under the first foreclosure, when Lee became the purchaser, included the interest then due on each installment, and there being no redemption, the purchaser took the premises free and clear from all farther incumbrances under this mortgage. In case of non-payment of the interest or any part thereof, the mortgagee was authorized to foreclose and sell the premises. In doing this he could protect himself by selling the premises subject to the payment of the principal indebtedness (*Kimmell v. Willard's Adm'rs*, 1 Doug. [Mich.], 217), or he could offer them for sale with-

*(6913) * * * In cases of mortgages given to secure the payment of money by installments, each of the installments mentioned in such mortgage, after the first, shall be taken and deemed to be a separate and independent mortgage, and such mortgage for each of such installments may be foreclosed in the same manner and with the like effect, as if such separate mortgages were given for each of such subsequent installments, and a redemption of any such sale by the mortgageor shall have the like effect as if the sale for such installments had been made upon an independent prior mortgage.

out reference to the farther incumbrance—discharged therefrom—and look to the personal liability of the mortgagor. Where the mortgage is foreclosed in chancery, the statute makes provision in cases like the present, under which the rights of all parties may be protected, but there are no corresponding provisions where the foreclosure is by advertisement under the statute and power of sale contained in the mortgage.

We can see no escape from the conclusion that Lee, the purchaser at the first foreclosure sale, acquired title to the entire premises sold, discharged from all farther liability under the mortgage, and that the title so acquired passed from him under his conveyance to the complainant, and that the subsequent foreclosure proceedings in chancery in no way injuriously affected her title to the premises, and a decree must be entered accordingly.

The other Justices concurred.

Louis Lamore v. Harriet M. Frisbie et al.

Sale of homestead—Sunday contracts or payments.

A man agreed to sell a piece of land on which he lived and which exceeded a statutory homestead. The family moved to another place and the purchaser made payments after the removal, which were accepted, the last being made after the vendor's death to his widow. *Held* that the vendor's devisees could not contest the contract on the ground that it was for the sale of the homestead.

Where a land contract was delivered on a week day, the mere fact that it was dated as if made on Sunday is not material and will not avoid it.

Payments made on Sunday and not returned, but allowed on a final accounting, will not avoid the contract on which they were received as one made in violation of the Sunday laws.

Inability to produce a contract that has been fulfilled does not furnish any conclusive presumption against its existence.

Where a man, after making a contract of sale, leaves a life estate in all his property to his wife, and there is no administration, payments on the contract are good if made to her.

One who is entitled to a full conveyance waives nothing by taking a conveyance from the owner of a part interest in the legal title, and still retains his right to demand the remainder.

Appeal from Berrien. Submitted October 23. Decided November 29.

INJUNCTION to restrain an action of ejectment. Bill dismissed. Complainant appeals.

Edward Bacon for complainant. Where a husband leaves the entire life estate in all his property to his wife, a land contract to which he was a party passes to her as personalty (*House v. Dexter*, 9 Mich., 247; *Wing v. McDowell*, Walk. Ch., 175; Pomeroy on Spec. Perf., 314) and her discharge of the obligations of the other party, on his performance, is as valid against any remainderman as if it had been given by the husband, *Jones v. Jones*, 25 Mich., 401.

A. H. Potter, *C. B. Potter* and *Geo. S. Clapp* for defendants. A contract signed on Sunday is void (Rev. Stat. 1846, ch. 43, § 1; Comp. L., § 1984; *Tucker v. Mowrey*, 12 Mich., 378; *Peck v. Cavell*, 16 Mich., 9; *Hall v. Parker*, 37 Mich., 590) and cannot be ratified by subsequent acts, *Day v. McAllister*, 15 Gray, 433; *Ladd v. Rogers*, 11 Allen, 211; *Bradley v. Rea*, 14 Allen, 22; *Cranson v. Goss*, 107 Mass., 440; a contract for the conveyance of a homestead, not signed by the grantor's wife, is void and not enforceable in equity, *Beecher v. Baldy*, 7 Mich., 506; *Dye v. Mann*, 10 Mich., 298; *McKee v. Wilcox*, 11 Mich., 361; *Ring v. Burt*, 17 Mich., 472; *Phillips v. Stauch*, 20 Mich., 380; *Fisher v. Meister*, 24 Mich., 452; *Wallace v. Harris*, 32 Mich., 398; where a contract is in duplicate, the loss of both copies must be proved before secondary evidence of their contents can be given, *Crane v. Partland*, 9 Mich., 493; 1 Greenl. Ev. (11th ed.), § 558; 1 Phil. Ev. (5th Am. ed.), 485.

CAMPBELL, C. J. Complainant filed his bill to stop an ejectment suit and compel a release from defendant of certain lands once owned by Elijah Pratt, deceased, and now claimed by defendant under his will. Complainant sets up a purchase from Pratt during his life-time, and payment in full under it, partly before and partly after his death. When Pratt died in 1852 he left a will devising and bequeathing his entire estate for life to his widow Lydia Pratt, and after her death to their adopted children, Clarissa Frisbie and the defendant who is her brother, and who obtained a quit-claim of her interest. Lydia Pratt died in 1863. The ejectment was begun in 1877, and the quit-claim was made just before.

Elijah Pratt purchased the property in question in 1850 of Edward Hart, subject to a mortgage to one Voorhees, for $100. Complainant's claim is that in 1851 Pratt made an agreement in writing to sell the land to him for $800, of which $100 was paid down, and $150 paid June 1, 1852, and $200 and interest paid to Rufus W. Landon, an agent of Elijah Pratt, in June, 1852. The remainder was paid or secured May 1, 1854, partly by the Voorhees mortgage which Lamore had taken up, and partly by executing to Mrs. Pratt a mortgage which was afterwards paid to defendant, to whom she had assigned it. On this settlement, of which a full memorandum was made by Mr. Landon at the time and given to Lamore, Mrs. Pratt executed a warranty deed to Lamore for the expressed consideration of $800, and took back the mortgage just mentioned.

In the summer or fall of 1851, while Pratt was still in the place, an arrangement was made for the convenience of an adjoining mill, whereby the owners—two men named Hipp—exchanged six acres or thereabouts of their land for an equivalent out of the land owned by Pratt. This fact is admitted and complainant sets it up as an arrangement made with and for himself, while defendant denies that he had any interest.

At the time of the alleged contract Pratt and his

family occupied the land, which exceeded in quantity a statutory homestead. After he went to California in the fall of 1851 his wife moved back to a farm they had previously occupied in Pipestone, about two miles from the land in question, which is in Berrien. Lamore went into possession in 1851 and has occupied or possessed it ever since.

Pratt's will, though admitted to probate, had appointed no executor, and no administration was ever had under it. Mrs. Pratt remained in the enjoyment of the estate until her death.

The defense, in addition to a general denial of the contract and of most matters set out by complainant, relied at the hearing on the homestead occupation as avoiding the contract, and also insisted that, assuming the memorandum of Mr. Landon to be true, the contract was made on Sunday, and a considerable payment made on another Sunday,—which it is claimed avoided them. It is also insisted that Lamore never owned any interest beyond the life estate of Mrs. Pratt, which ended in 1863. It is also claimed that the contract is not set up or proved with certainty.

With the exception of one or two minor law points the controversy is chiefly one of fact.

The homestead question does not seem to be of any importance. It is true that when the contract was made Pratt was in possession. No homestead had ever been defined out of the larger tract, and the removal of Mrs. Pratt to their old home in Pipestone in pursuance of this arrangement indicates that there was no intention to retain any homestead rights. Payments were made and taken after the removal, and Mrs. Pratt accepted the remainder in 1854, and set up no such claim.

Neither is there any force in the objection that the contract violated the Sunday laws. The evidence does not indicate that any business was done on Sunday, but shows the contract to have been delivered on another

day. The written date is not material. And, while there is, we think, no reason to believe any payment was subsequently made on Sunday, yet if it was, the money never was returned, and was allowed on the final accounting.

The contract is not set out in the bill in all its details, but it does appear distinctly what the consideration was, and that it was all paid. The usual course, on closing up such a contract, is not so uniformly in favor of retaining a fulfilled contract as to make it strange that the vendee is not able to produce it. The evidence of Mr. Landon, who drew it, is positive and clear as to all its material contents, and the proof shows that he acted as Pratt's agent throughout during his life, and for the widow subsequently. He reckoned up the amount paid and unpaid on May 1, 1854, and a settlement was made in accordance with the memorandum which has been preserved. We think the case very fully and clearly made out, not only as to the contract and its fulfillment, but also as to the arrangement with the Hipps, which is shown to have been made with Lamore as the interested party, as well as with Pratt.

Under Pratt's will this money belonged to the control of his wife, and payment to her was a good payment. There was no administrator, and no one but the widow to claim any interest in it. *Sutphen v. Ellis*, 35 Mich., 450; *Proctor v. Robinson*, id., 291. On making payment to her, Lamore was thenceforth equitable owner of the land, and entitled to full conveyance and specific performance against the estate. He could waive nothing by taking a conveyance from the owner of a part interest in the legal title. He still retained his right to demand the remainder. There is nothing in the record at all supporting the theory that his rights in the land originated in a purchase of a mere life estate. It is evident to us that he was misled by an erroneous notion that Mrs. Pratt, because she had a right to receive the money, had power to convey the entire fee. But this did not

diminish his right as equitable owner of land fully paid for; and his possession was rightful as the true proprietor. It is not likely that there was any error made in computing the sums due at a time when all was within the personal knowledge of Mr. Landon, who had charge of the business. If there had been any such mistake it must have been trifling, and Mrs. Pratt had full authority to close the account.

We are not informed on what ground the bill was dismissed. The case seems to us very clear, and we have no doubt of complainant's title. We have not found it necessary to resort to any of the testimony of Lamore as to his personal dealings with Pratt, and need not discuss it.

The decree below must be reversed and a decree made in accordance with the prayer of the bill, with costs of both courts.

The other Justices concurred.

LAUREN CARPENTER v. JOHN H. GRAHAM.

Sale—Transfer of title—Assumpsit on waiver of tort.

A quantity of barrels were sold from a large stock stored in the warehouse of a bailee who was accustomed to deliver to purchasers upon presentation of a bill of sale. He was notified of the sale by both parties, and at the request of the purchaser, to whom a bill of sale had been given, he undertook to keep the barrels safely until called for. But they were not designated, nor separated from the rest, which were of the same size and quality. *Held* that there was sufficient delivery to pass title, and protect the barrels sold from an execution levy against the vendors, upon the general stock.

A purchaser's delay in removing merchandise from the charge of a bailee in a reasonable time after constructive delivery, cannot subject the vendor to the risks of storage.

42 191
66 575
67 630
42 191
79 650
42 191
94 130
42 191
107 79
42 191
114 614
42 191
128 307

Where mortgaged goods have been converted and sold, the mortgagee cannot bring assumpsit for the amount received.

Error to Berrien. Submitted Oct. 23. Decided Nov. 29.

ASSUMPSIT for value of property converted. Defendant brings error.

Clapp & Fyfe for plaintiff in error.

Potter & Potter for defendant in error.

MARSTON, J. Kneibes & Gentle were engaged in the business of manufacturing apple barrels at Benton Harbor. As barrels were manufactured by them, they were stored in a building belonging to John Thomas of the same place, who delivered the barrels when sold upon the order of the manufacturers, and received one cent per barrel for storage and services in delivering.

On the 29th of May, 1876, Kneibes & Gentle sold John H. Graham one thousand barrels then stored in the dry-house building referred to, and gave him a written bill of sale therefor, and shortly afterwards Mr. Gentle informed Mr. Thomas of such sale. Graham also informed Thomas of the purchase, showed him the bill of sale, and requested Thomas to take care of one thousand barrels for him, and in reply Thomas said he would do his best to keep Graham's one thousand barrels,—would see they were not sold, and that they should be kept there.

At this time there were some seven thousand barrels or upwards in Thomas' warehouse, and no steps were taken to separate, mark, or set apart or in any way designate any particular lot of barrels as those of Graham. After this time barrels were taken out and others put in by the manufacturers. At the time the levy was made out of which this controversy arose, there were between two and three thousand barrels in the warehouse. In the meantime Graham had taken out some fifty barrels, but there was no designation of the remainder.

While things were in this shape, the sheriff by virtue of an execution issued upon a judgment rendered against Kneibes & Gentle, levied upon and sold the barrels to Carpenter, who afterwards sold them at private sales. The plaintiff Graham waived the tort and brought assumpsit to recover the amount received by Carpenter on such sales.

The material question is whether at the time of the levy Graham was the owner of any nine hundred and fifty barrels in Thomas' warehouse.

In this case the barrels were manufactured and stored in a certain warehouse. They were alike in size and quality, and no inspection or designation was intended or necessary to distinguish the particular lot sold from the others in store. There was an absolute bill of sale, and the person in whose warehouse the barrels were stored was notified by both parties of the sale made. In accordance with the custom, it was his duty to then deliver them to the vendee, and this in substance he agreed to do. In my opinion this was sufficient and passed the title. If at the time this bill of sale was given and the warehouseman notified, there were one thousand barrels made by the vendors, in the warehouse, the purchaser would become the owner in common of that number, and he would have the right to call and take them away at any time. The vendors had done everything on their part to pass the title and complete the sale. The purchaser by leaving the barrels in the warehouse could not thereby subject his vendors to the risks attending such storage without their consent. Had the warehouse and its contents been destroyed by fire, certainly after the lapse of a reasonable time within which the purchaser might have taken the barrels, but did not, the vendors could not have been subjected to the loss. They could not compel the purchaser to take immediate possession by removal. He could permit the barrels to remain in the warehouse for any length of

time the owner thereof might permit or agree to. They were subject to the order and control of the purchaser alone, and a sale made afterwards by the vendors, of more barrels than they had in the warehouse would not have deprived this purchaser of his right to demand and receive the number of barrels he had purchased. This case resembles *Young v. Matthews*, L. R. 2 C. P., 127, cited in *Lingham v. Eggleston*, 27 Mich., 328, where the authorities cited and principles stated sustain the view here taken. See also *Adams Mining Co. v. Senter*, 26 Mich., 79, where it was said: "After the contract was made, Frue did all that was possible to effect a delivery. Such delivery must necessarily be constructive, and the agent in charge of the timber, having been instructed, and having undertaken, by the joint directions of Frue and Senter, to hold it for the latter, the delivery was complete."

The case differs from *First National Bank of Marquette v. Crowley*, 24 Mich., 496. There the sale was of iron to be afterwards manufactured, and there was nothing in the contract binding the company to deliver this quantity from the first manufactured, and no act was done by the vendors indicating a delivery or intention to deliver. This case is also clearly distinguishable from *Hahn v. Fredericks*, 30 Mich., 224 and *Crapo v. Seybold*, 35 Mich., 169.

A question was also raised whether the sale of the barrels was an absolute one or merely as security for a loan made. The court in substance charged the jury that if a mortgage, the mortgagee could recover in this action to the full amount of his mortgage lien. This was erroneous. The contrary was held in *Randall v. Higbee*, 37 Mich., 41. For this error the judgment must be reversed with costs and a new trial ordered.

GRAVES and COOLEY, JJ. concurred.

CAMPBELL, C. J. I concur on the second point.

HORACE BOWE AND SUSAN BOWE v. GILBERT L. BOWE.

42 195
117 698

42 195
124 629

Guardianship—Mortgage extorted from ward.

Relief may be granted as against a mortgage extorted by a son from his parents by oppressive means and for an inadequate consideration, while he was practically in a position of guardianship over them and their property.

A son whose parents have turned over their property to him in consideration that he will support them, is in a position of guardianship over them and is bound to take no advantage of them in dealing with them.

Where a mortgage was cut down on appeal by the mortgager on a bill to set it aside, complainant was granted costs of both courts, and was permitted to apply them, when taxed, as payment on the mortgage.

Appeal from Van Buren. Submitted October 23. Decided November 29.

BILL TO SET ASIDE A MORTGAGE. Bill dismissed. Complainants appeal.

Clapp & Fyfe for complainants.

Benjamin F. Heckert for defendant.

COOLEY, J. The bill in this case was filed to set aside a mortgage given by parents in extreme old age to a son.

In August, 1877, the complainants, who then owned a little farm of thirty acres in Van Buren county, worth perhaps fifteen hundred dollars, conveyed the same to their son, the defendant, on an understanding that he was to take possession of and work it, and to give them a support and home in his family. To secure the support a life lease was given back. The father was then seventy-five years of age, the mother somewhat younger. The son was married, and there seems to have been on the part of the old people some fears that the two women would not get along well together. The apprehensions proved well founded, and at the end of a year or there-

abouts the son reconveyed the land, but demanded and received from his parents a note for eight hundred dollars, secured by mortgage on the land, to satisfy the claims which he then made against them. These claims were made up in great part of charges for the support of his parents after the deed was given, for work done and improvements made upon the farm, small sums paid for the use of complainants, etc. The bill seeks to set aside this mortgage as having been obtained by undue influence, and as being without consideration.

It is claimed by the complainants that they were over-persuaded into the first arrangement by the importunities and artifices of the defendant. On the other hand the defendant denies this, and insists that the arrangement was entered into by him on the urgency of his parents. The proofs give some countenance to the claims on each side, but we are not called upon to decide between them. That arrangement has been rescinded, and we are concerned only with the transaction of the settlement and the giving of the note and mortgage. The previous transactions are important in so far as they fixed the relations of the parties when the securities were taken, but no farther.

And we think that those relations were such that the defendant was under obligations, not only to commit no fraud and resort to no artifice, but to deal fairly and frankly, and to take no advantage. The complainants were in extreme old age and had put themselves in his hands as their protector and provider. For the time he was in possession of their little property and held the title to it. They had found the arrangement one that deprived their old age of comfort, and were extremely solicitous to regain their former independence. At the time defendant gave assent to this, he practically held a position of guardianship over them, and over their property, and if he saw fit to dictate unfair terms was morally certain to obtain them. It is not necessary, under such circumstances, that the court should be satisfied the

case was one of fraud, or even of undue influence: it is enough if the defendant has dealt oppressively with his parents, and that the consideration for the mortgage was either wanting or was inadequate.

An examination of the evidence convinces us that defendant had a just claim, but that he took advantage of the anxiety of his parents to recover the home of their old age, and extorted a mortgage which threw upon them all the pecuniary losses of their previous unfortunate arrangement. There was no equity in this, and it would not have been submitted to by persons who were dealing on equal terms.

A large part of the consideration of the mortgage is made up by charging the parents with their board while defendant had them with him on the farm. Other little items would be as unjust as this, unless the defendant is charged with rent of the place. We are of opinion that the support of the parents and the work done by defendant in cultivating the place, with some small payments made by him for them, should be offset against what he was able to realize from the farm and moneys and other things of theirs which he made use of, and that if he is the loser from this adjustment, the loss must be regarded as an inevitable incident to an unwise arrangement whereby people of incompatible dispositions were brought into daily and hourly intercourse.

But the defendant made some permanent improvements upon the place, for which he should be allowed. If he had taken from his parents securities to the extent of four hundred dollars, we think it would have been all that under the circumstances he could in good conscience demand, and that the excess above that sum must be held to be without consideration. The able and careful presentation of the case made in the brief for the defendant does not enable us to see the case in any light more favorable to him. We put aside as having no important bearing on the case some old claims now brought forward by the defendant, which are stale and would doubt-

less long ago have been passed if well founded and unsatisfied.

The decree will reduce the note and mortgage to four hundred dollars, to bear interest from this day. The complainants will recover costs of both courts, and the costs, when taxed, may be applied as payment on the mortgage.

The other Justices concurred.

THE CITY OF DETROIT v. EUGENE ROBINSON AND JESSE H. FARWELL.

Paving contract—Partnership contract not affected by agreements with individual partners.

Where one member of a firm of paving contractors, makes an individual contract to pave a street, the fact that the firm as a firm has already made an agreement by which they are to receive a certain royalty upon the kind of pavement used, does not make any difference with the construction of the individual contract.

A contract whereby the owners of the right to use a patent pavement are to receive from a city a certain royalty for the use of the pavement, will not prevent their contracting to lay the pavement; nor would the paving contract affect the royalty contract unless it contained apt words for that purpose.

One member of a firm, or one of a number of joint contractors, cannot by his subsequent individual contract vary or affect the joint obligations which have been already incurred; though he may bind himself thereby.

In letting a contract for laying a patent pavement, the city of Detroit stipulated that it might withhold a certain fixed sum per square yard to protect itself from claims for royalty, and the bids were to include that sum. The city assessed and collected a paving tax amounting to the entire contract price including the royalty, which it had made a separate contract to pay, but it afterwards appeared that the patent was void. *Held* that the contractors were not concerned in the city's liability for royalty and were not entitled to receive the sum withheld to pay it.

Error to Superior Court of Detroit. Submitted October 24. Decided November 29.

ASSUMPSIT. Defendant brings error.

City Attorney *William C. Maybury* and City Counselor *F. A. Baker* for plaintiff in error, cited the following cases as illustrating failure of consideration, *Couturier v. Hastie*, 5 H. L. Cas., 673; *Jacox v. Clark*, Walk., Ch., 508; *Quick v. Stuyvesant*, 2 Paige 84; *Stewart v. Loring*, 5 Allen, 306; *Lebanon v. Heath*, 47 N. H., 353; a promise to pay money is without consideration and void where there is no legal liability or cause of action, *Palfrey v. Portland R. R.*, 4 Allen, 55; *Farnham v. O'Brien*, 22 Me., 475; *Silvernail v. Cole*, 12 Barb., 685.

Griffin & Dickinson for defendants in error.

MARSTON, J. The principal facts in this case are in no way different from those presented in *Detroit v. Robinson*, 38 Mich., 108. Some additional facts were presented in this case on the trial. No question was made but that the pavement laid was the one specified in the contract.

It was conceded upon the trial, for the purpose of this case only, that the patent under which the pavement was laid, was void for want of novelty. It farther appeared that the agreement entered into between the Board of Public Works and Robinson & Farwell, for payment to the latter of sixteen cents per square yard for use of the Stowe patent wood pavement, that being the pavement laid, never became a binding contract with the city, because not approved by the common council. This does not appear to have been known at the time the contract in question was entered into and the work done. The full contract price, one dollar and twenty cents, was assessed and collected under the provisions of the charter, and the amount claimed, being a part of such asessment, is still in the city treasury undisposed of.

The paving contract of June 29th, entered into between the city on the one part and Eugene Robinson on the other, for the paving of Brady Street by the latter, and under which the work was done, must be construed in connection with the previous writings relating to the subject-matter, and the fact that Robinson was one of the firm of Robinson & Farwell, which had made or was supposed to have made, an agreement under which such firm was to receive a royalty upon the pavement laid, can make no legal difference in the construction of his contract. The contract must be construed the same as though made with a stranger—one who had no connection or relation whatever to the city, the patentees, or those representing them.

The contract which Robinson & Farwell had entered into as to the royalty which they were to receive on account of the use of the patent pavement which they owned or represented, would in no way prevent them from contracting to lay the pavement, and a contract made by them to pave a street, would not deprive them of their rights under their royalty contract, or in any way modify the same, unless it contained apt and proper words for such purpose, which cannot be claimed in this case.

The agreement in reference to the royalty was made with Robinson & Farwell, while the contract to pave Brady street was made with Robinson alone. One member of a firm, or one of a number of joint contractors, cannot by his individual contract change, vary or affect the contract obligations which his firm, or he and his co-contractors have previously entered into. If in his subsequent individual contract he undertakes to do this, he may bind himself therein; but the previous joint or firm contract will be unaffected thereby. In an action brought upon the joint or firm contract, it would be no answer or defense, either in whole or in part, to show that one of the plaintiffs had subsequently made another different and inconsistent contract relating to the same

subject matter, with the same defendants. If Robinson & Farwell made a valid contract with the city, under which they were entitled to recover a royalty of sixteen cents per square yard for all Stowe wood pavement laid in the city, they would be entitled to recover the same, and there is nothing in the subsequent contract made with Robinson which would cut off their right.

April 5, 1875, Eugene Robinson and Jesse H. Farwell, in a written communication to the Board of Public Works, offered the use of the Stowe pavement for the season of 1875 for the sum of sixteen cents per square yard. This offer was accepted April 23d. June 19th the board advertised for proposals for paving Brady street, and a clause was inserted therein that "Bidders for patent wood pavement must include in their proposals the amount of royalty which the city has contracted to pay the owners of the patent." Eugene Robinson addressed to the Board an offer "to execute and perform the work specified in the advertisement hereunto attached" for furnishing and laying Stowe wood paving, including ballast and top dressing, per square yard $1.20. June 29th a contract was entered into with Robinson under which he was to receive $1.20 per square yard, containing this clause:

"And it is further mutually understood that the party of the second part (Robinson) shall, and the party of the second part especially agrees that he will pay all royalty or money necessary to be paid or to become due on account of putting down the pavement required by this contract and said specifications, and protect the city against all claims for damages of every kind and nature on account of the use by the party of the second part of any patent, or infringement of any patent, in the construction of said pavement. And to secure this end the controller shall retain out of the first installment of money to be paid said contractor a sum fully sufficient to pay all royalty due on account of the laying down of said pavement."

The amount in dispute was retained in accordance with this clause, and was what the board had agreed to

pay Robinson & Farwell for the use of the pavement, viz.: sixteen cents per square yard.

The advertisement, the bid made thereunder, and the contract in pursuance thereof, were all upon the assumption that there was a valid existing contract under which the city was obligated to pay Robinson & Farwell sixteen cents per square yard for all Stowe pavement laid. And this sum, which the city supposed it was bound to pay, was to be included in the bid to be made by parties offering to do the work. Not that they were to receive the sixteen cents—they were to include it in their bid, so that the city might assess and collect the same and pay over, not to the contractor, but to the owners of the royalty. The contractor for furnishing and laying the pavement was to receive one dollar and four cents per square yard, and beyond this he had no farther claims. The city had made a contract, whether valid or not, to pay sixteen cents per yard to the owners of the patent. This was known to the bidders, and they were required to include this amount in their bids, surely not to be received and retained by them, but to enable the city to collect and pay under its agreement. The amount being thus definitely known to all parties, the contractor could not, under the general clause in his contract quoted above, have been held for a larger sum, even should the city have become liable therefor; nor would he have been entitled to any part of this sixteen cents had the city settled with the patentees for a less sum. What the city should pay, or whether it paid any sum whatever, was something which could in no way concern the contractor, so long as he was not called upon to pay the royalty. Robinson, therefore, under his paving contract can have no claim against the city; he or his assignees, the plaintiffs in this suit, have received the full contract price. If the agreement made with Robinson & Farwell is valid they may recover upon it, but if not, that fact cannot enlarge or change the rights of the

parties under this agreement. If the contract of Robinson could be construed as entitling him to the full price of one dollar and twenty cents per square yard, he to pay the royalty, and giving the city the right to retain a certain amount as indemnity merely, then, if there were no royalty, or upon his paying the same or relieving the city from all liability, he might be entitled to recover. Such, however, is not the legal construction of his agreement in the light of the facts and circumstances under which it was entered into.

Nor can the fact that the city has assessed, collected and still retains this sixteen cents per yard, while under no obligations to pay any royalty, entitle these parties to it. Their contract gives them no such right, and there is no equitable consideration which would give it them. Although the city may have no legal or equitable claim to retain this money, something farther is required to entitle these plaintiffs to it. The right of the parties from whom it was collected would be far superior, and we may well assume that the city still holds this money for them, and that upon settlement of all question concerning the same, it will be paid back.

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

The other Justices concurred.

FRANCES S. FISH v. FIRST NATIONAL BANK OF DETROIT.

Indorsement guarantees prior indorsements—Notice of non-payment.

An indorser admits that previous indorsements were duly made and warrants the title and genuineness of the paper he transfers; and he is not released if it appears that a previous indorsement is invalid.

One who receives negotiable paper need not look beyond the signature of the last indorser if he is satisfied that it is genuine, and has no notice of facts that should put him on inquiry.

An indorser denied having received notice of non-payment, but did not attach to the plea an affidavit of denial as required by Comp. L., § 603. There was proof of demand, protest and the mailing of notice, and notarial certificates were duly attached to the protested paper. *Held* that there was no error in charging that the notice was sufficient.

Error to St. Clair. Submitted Oct. 24. Decided Nov. 29.

ASSUMPSIT. Defendant brings error.

Whipple & Voorheis for plaintiff in error. A joint obligation of indorsers brings them within the rule governing joint debtors, 1 Pars. N. & B., 247; a release of one releases all, *Tuttle v. Cooper*, 10 Pick., 281; *Robertson v. Smith*, 18 Johns., 459; *Reading v. Beardsley*, 41 Mich., 123; *Culver v. Leovy*, 19 La. Ann., 202.

Geer & Williams and *Brown & Farrand* for defendant in error. Notice to an indorser of non-payment is sufficiently shown if it is not denied by affidavit, and if there is an undisputed showing that due notices of protest were mailed seasonably, Comp. L., § 603; *Ogden v. Cowley*, 2 Johns., 274; *Miller v. Hackley*, 5 Johns., 375; *Renshaw v. Triplett*, 23 Mo., 213; *Beale v. Parish*, 24 Barb., 243; *Manchester Bank v. Fellows*, 28 N. H., 315; 1 Pars. N. & B., 478; an indorsement of a promissory note is a guaranty of the genuineness of the previous signatures and of the capacity of the indorsers to contract, Story Prom. Notes [3d ed.], § 135; Byles on Bills [6th ed.], 152; 2 Pars. N. & B., 25; 3 Kent's Com., 88, n 2; *Ogden v. Blydenburgh*, 1 Hilt., 182; *Erwin v. Downs*, 15 N. Y., 575; *Turnbull v. Bowyer*, 40 N. Y., 456; *Remsen v. Graves*, 41 N. Y., 471; *Dalrymple v. Hillenbrand*, 62 N. Y., 5; *Chambers v. Nat. Bank*, 78 Penn. St., 205; *Meacher v. Fort*, 3 Hill (S. C.), 227.

MARSTON, J. This action was brought by the bank to

recover upon certain promissory notes made payable to the order of I. N. Jenness & Co. and Frances S. Fish, and indorsed by them. The indorsement of Mrs. Fish was under and made after that of I. N. Jenness & Co. The defense set up is that at the time these notes were given and indorsed, the firm of I. N. Jenness & Co. was not in existence, because of the death of Henry Fish, one of the members thereof; that if Mrs. Fish is liable upon these notes, she is jointly liable with Isaac N. Jenness, and that if he is released because there was no such firm, then she is released also. These notes were given to the bank to take up other notes upon which the firm name of I. N. Jenness & Co. appeared, that firm having done business with the bank previous to the date of the paper in question.

An indorsement admits all prior indorsements to have been duly made. It is said the indorser warrants the title and genuineness of the paper he transfers, and that when sued he cannot deny the existence, legality or validity of the contract which his indorsement put in circulation, for the purpose of defeating his own liability. Edwards on Bills and Notes, 289, 291.

This is strictly right. Parties dealing in such paper are not expected to be familiar with the signatures of the several indorsers. If satisfied that the last indorsement is genuine, they are not required to look beyond in the absence of a knowledge of such facts as would impute to them bad faith in case they did not. A person has no right to indorse paper, thereby making it negotiable, and offer it or permit it to be offered in the usual course of business, unless satisfied that the signatures previously appearing thereon are genuine. Mrs. Fish is not in a position in this case to escape liability upon the ground that the prior indorsement was invalid.

Mrs. Fish in her evidence denied having received notice of the non-payment of some of these notes. She did not annex to her plea an affidavit denying the fact of having received such notice, as required by the stat-

ute. 1 Comp. Laws, § 603. There was direct and positive evidence given on the trial by the notary, of demand made, protest and notice thereof regularly mailed to the defendant, and the usual notarial certificate was attached to each of the notes. The facts are undisputed, and we discover no error.

The judgment must be affirmed with costs.

The other Justices concurred.

42 206
69 461
42 206
76 393
76 394
76 396
42 206
88 576
42 206
93 239
93 249
42 206
102 571
42 206
106 217
42 206
108 250
109 115
42 206
115 616
42 206
116 338
42 206
118 301
42 206
136 [5]196
42 206
f150 [8]350
42 206
e146 [10]469
42 206
152 195
153 [13]707
153 710

ALEXANDER FRASER, FRANCIS P. FRASER, ELLIS P. FRASER, MARY COLVIN ET AL. v. WILLIAM JENNISON ET AL., PROPONENTS OF THE WILL OF ALEXANDER D. FRASER.

Separate right to peremptory challenges—Opening to the jury—Conclusions of witness—Leading questions—Expert evidence as to testator's sanity—Physician's testimony—Drag-net questions—Testimony as to family history not hearsay—Trial of cases should be so managed as to avoid error.

Where parties impleaded together appear by the same counsel, and after their right of peremptory challenge is exhausted, other counsel take charge of the case for part of them, the latter have no farther right of challenge.

Contestants in a will case offered in their opening to read to the jury a passage from a work on mental diseases, enumerating certain causes of insanity. *Held* that the court properly refused to allow it.

The question in a will case whether or not the testator was an eccentric man is not objectionable as calling for a conclusion instead of a fact.

The contestants of a will put the following questions: "Did you notice during the spring any weakening of [testator's] mind?" and "In your opinion, during the spring of 1877, had [testator's] mind weakened?" *Held* that these questions were not leading.

A trustee named in a will was also a subscribing witness, and testified to its due execution and the testator's sanity. He was asked on cross-examination as to whether he had proved a claim

against the estate, and an offer was made to show that the witness had himself drawn the will, that testator was very old, and that before his will was made he had been prompt to pay his debts. *Held* proper to exclude the question and the testimony. The witness was not so interested in the will, either as trustee or as claimant, as to affect his testimony, and the evidence could at most raise a mere suspicion that his claim was unfounded or that the testator had become mentally dependent or helpless. If the claim was valid it made no difference whether the will was sustained or not, and if the claim was unfounded it should have been disputed when presented for allowance and when its validity was the question at issue.

The fact that a testator had expressed regret that he had made a particular bequest has no bearing on his mental capacity.

The error of admitting a will in evidence without having called a particular subscribing witness out of several, to prove its due execution, is cured by calling him afterwards and allowing the contestants to cross-examine him.

Error will not lie on a direction to counsel not to spend time on certain issues as their opening to the jury would not warrant it, where, though counsel excepted to the ruling, they made no suggestion at the time that anything had been omitted from the opening, and did not afterwards offer evidence to establish the excluded issues, or necessarily tending to establish them.

Expert evidence should be confined within reasonable bounds; and where the contestants of a will had examined five experts to show testator's mental condition, it was *held* proper to decline to allow another to be called.

The rule excluding a physician's testimony as to matters learned while attending a patient (Comp. L., § 5943) may be waived by the patient or by those who represent his interests after his death; and it will not prevent the proponents of a will from showing the testator's competency by the evidence of his physician.

Letters showing friendly relations with a brother are not admissible many years afterward as tending to show that the writer, in not leaving any bequest to the brother's children, with whom friendly intercourse had not been kept up after the brother's death, had so lost his natural affection as to indicate insanity; and affectionate letters to and from other relations, equally remote, to whom, however, he had left bequests, though they may not be strictly inadmissible, may be properly excluded.

In a will case in which the testator's sanity is in issue, an omnibus question to an expert, presenting a hypothesis covering many things of which there was neither proof nor offer of proof, including conditions which necessarily indicated insanity as well as facts which might co-exist with a state of mental soundness,

and going not only into the history, eccentricities and physical condition of the testator, but into the personal traits of his relations, is properly excluded as tending to make the jury suppose that each of the enumerated circumstances indicated insanity, and to leave them at discretion to decide whether the will was suitable and proper and satisfied their judgment.

Incapacity, either criminal or civil, must for legal purposes be judged of by manifestations in conduct or language; symptoms of insanity which only physicians can perceive and which have no apparent effect upon one's ability to transact business are not enough to vitiate one's civil acts.

It is intended by the Statute of Wills that every person shall be at liberty, in making his will, to select the objects of his bounty among his relations at discretion, or to pass them all by if so disposed.

A will is not necessarily to be set aside on proof that the testator suffered from a mental disorder when it was executed; it must also be shown that it affected the provisions of the will.

Derangement of the mental faculties ought not to incapacitate one from making his will if it does not make him incapable of acting rationally in the ordinary affairs of life, or manifest itself in the testamentary provisions.

A will ought not to be overturned without reasons that are intelligible to the common sense of mankind.

Testimony that a witness knows by repute that her father and his brother came to the State together, and that they were the only two brothers of the family that did come to the State, is not objectionable as hearsay.

An examiner should avoid an objection to the form of a question by changing its form, instead of relying upon bringing error on a ruling sustaining the objection.

Parties should so manage their cases in the trial courts as fully to develop their merits in order that the verdict and judgment may be final; and in will cases this is particularly important.

Where it does not appear that adverse rulings have prevented a party from making a full showing of the case, the appellate court may decline to disturb the judgment for errors in overruling questions on formal objections, when their exclusion does not appear to have done injury.

It is not error to refuse requests for instructions to the jury where the court gives a connected charge that is fair and sufficiently full to present all the important questions of law with which the jury have anything to do, and is likely to guide the jury better than the instructions asked.

Error to Wayne. Submitted Oct. 28. Decided Nov. 29.

APPEAL from probate of a will. Contestants bring error.

Henry M. Duffield and *Griffin & Dickinson* for plaintiffs in error, cited as to the admissibility in proceedings to contest a will, of evidence of a testator's physical condition and of his eccentricities, and antecedents, Maudsley's Responsibility in Mental Disease, pp. 55-6, 72, 75; Brown's Med. Jur. of Insanity, p. 103; changes in the testator's disposition may be shown as bearing on the question of sanity, Redf. Wills, 67, 69; as also may his statements inconsistent with bequests already made, *Harring v. Allen*, 25 Mich., 508; evidence of delirious attacks to which testator's brother was subject are relevant, *People v. Garbutt*, 17 Mich., 9; *People v. Smith*, 31 Cal., 466; 1 Redf. Wills, 156-7. All the subscribing witnesses to a will should be called and examined by the proponent, *Hudson v. Kersey*, 4 Burn. Ecc. Law, 91; *Bootle v. Blundell*, 19 Ves. Jr., 501; *Ogle v. Cook*, 1 Ves. Sr., 177; *Chase v. Lincoln*, 3 Mass., 236; *Brown v. Wood*, 17 Mass., 768; *Thornton v. Thornton*, 39 Vt., 122; *Dean v. Dean*, 27 Vt., 750; *Ragland v. Green*, 22 Miss., 194; *Evans v. Evans*, 18 Miss., 402; *Jackson v. Vickory*, 1 Wend., 406; the testimony of a physician as to the mental state of his patient is inadmissible (*Johnson v. Johnson*, 4 Paige, 460; *People v. Stout*, 3 Park. Crim. Cas., 670; *Brand v. Brand*, 39 How. Pr., 193; *Rogers v. Lyon*, 64 Barb., 373), even after the patient's death, *Edington v. Mut. Life Ins. Co.*, 67 N. Y., 194; *Sloan v. N. Y. C. R. R.*, 45 N. Y., 128.

William Jennison, *William A. Moore* and *G. V. N. Lothrop* for defendants in error. It is not necessary to swear all of the subscribing witnesses in proving the due execution of a will, *Tatham v. Wright*, 2 Russ. & Myl. 1; *Lowe v. Jolliffe*, 1 W. Bl., 365; 1 Redf. Wills, §§ 8, 9; in contesting a will on the ground of insanity, the contestants cannot read to the jury from works on insanity as to its predisposing causes, *Com. v. Wilson*, 1 Gray, 337; *Washburn v. Cuddihy*, 8 Gray, 430; *Ashworth v. Kittridge*, 12 Cush., 193; *Collier v. Simpson*, 5 C. & P.,

73; 1 Redf. Wills, 146; 1 Greenl. Ev., § 440, *n*; the executors of a testator may waive the statutory privilege excluding a physician's testimony as to facts learned while attending on their decedent, *Cahen v. Cont. Life Ins. Co.*, 41 N. Y. Sup. Ct., 296; and the statute does not apply to testimony as to testamentary capacity; *Allen v. Public*, 1 Bradf., 221; *Kempsey v. McGinniss*, 21 Mich., 137; *Horn v. Pullman*, 72 N. Y., 275-6; nor to knowledge of matters apart from those which must be revealed in the line of medical treatment, *Baxter v. Abbott*, 7 Gray, 71; *Campau v. North*, 39 Mich., 606; *Johnson v. Johnson*, 4 Paige, 460; *Collins v. Mack*, 31 Ark., 684; *Hanford v. Hanford*, 3 Edw., 468; see *Alderman v. People*, 4 Mich., 422; letters from a testator to his devisees showing his relations to them are admissible in a contest of his will for testamentary incapacity, *Shailer v. Bumstead*, 99 Mass., 112; but their letters in reply are not relevant, *Cont. Ins. Co. v. Horton*, 28 Mich., 173.

COOLEY, J. This case involves the validity of the will of the late Alexander D. Fraser, of Detroit, one of the oldest and best known members of the Michigan bar. The will bears date May 17, 1877. It was proved and allowed in the probate court for the county of Wayne, and an appeal was taken from that allowance to the circuit court. A copy of the will is given in the margin.*

*In the name of God, Amen. I, Alexander D. Fraser, of the city of Detroit, State of Michigan, counselor at law, do make and declare this my last will and testament, in manner and form following:

I resign my soul into the hands of Almighty God, hoping and believing in a remission of my sins by the merit and mediation of Jesus Christ, and my worldly estate I give, devise and bequeath as follows:

1. I give and bequeath unto my neices, Margaret Davidson and Isabella Davidson, both of Inverness, Scotland, and to the survivor of them, the sum of $4000, the interest of which shall be quarterly or semi-annually transmitted by my executors or trustees to them, as has been heretofore done by me. This sum I estimate to be about the amount in which I am now indebted to them for moneys to which they succeeded through their mother's last will and testament, and which sum, therefore, I bequeath to them in full payment and discharge thereof, and on that condition. The amount transmitted by me heretofore, quarterly or semi-annually, has been twenty or forty pounds sterling, and should the interest accruing from said sum be inadequate to pay the premium of such amount, the residue

The decedent was upwards of eighty-three years of age at the time the will was made. The proponents of the will are special administrators on the estate, appointed by the Wayne probate court, and the contestants are children of Peter Fraser, a brother of the deceased, who, with others constitute his heirs at law. By their pleading the contestants set up the following defenses: *first*, they deny the due execution of the supposed will; *second*, they aver that at the time of the supposed execution the decedent was of unsound mind, and incapable of making a valid will; *third*, they allege that the will was the result of insane delusions in the decedent; *fourth*, they aver that the execution of the alleged will was procured by undue influence, but without specifying by whom the undue influence was exerted.

On the trial in the circuit court the contestants at first all appeared by the same counsel, and when the jury were called challenged peremptorily two whose names were drawn. Another counsel having then appeared to take charge of the case for two of the contestants, he claimed a right on their behalf to further peremptory challenges, but this was denied, and an exception taken. The ruling was within the decision in *Stroh v. Hinchman*, 37 Mich., 490, and requires no discussion.

---

may be paid from my estate. I enjoin upon my trustees or executors to be prompt and punctual in the transmission of this annuity.

2. I give and bequeath to another niece, Ann Munroe, of Inverness, aforesaid, for her own use and benefit, and excluding the *jus mariti*, the sum of $500.

3. I give and bequeath to Mrs. Octavia Seymour, of Detroit, the sum of $1000, in consideration of her constant attention and kindness to me during my illness.

4. I give and bequeath to William Adair and John Pettie, of Detroit, in trust for the St. Andrew's Society of Detroit, the sum of $500, which shall be permanently invested by said society when it shall have become duly incorporated under the laws of this State, the interest of which shall be regularly drawn and added to the benevolent fund of the society, and appropriated in all future time to the relief of any of the natives of Scotland living here who may be in necessitous circumstances, and under such regulations as the society may make from time to time.

5. I give and bequeath to the Rev. A. Fraser, minister, of the parish of Kirkhill, Aird (Free Church), Scotland, living at Bogroy, the sum of £50 sterling for the poor of his parish, to be appropriated under his direction.

The proponents began their evidence by calling all of the five subscribing witnesses except John Pettie, each of whom gave evidence tending to show the due execution of the will, and the sanity of the decedent at the time of execution. On the cross-examination of Mr. Bishop, he testified that Mr. Fraser about 1856 lost the sight of one of his eyes by paralysis, as he understood it. The contestants thereupon proposed to question the witness further with reference to this loss of eyesight, but the court excluded the proposed evidence.

When Mr. Jennison was cross-examined he was asked: "Did you prove a claim against the estate of A. D. Fraser, and if so, how much?" This question was objected to, and ruled out. The contestants then offered to give evidence that the will was drawn by Mr. Jennison, who was one of the trustees named in it; that during its execution Mr. Jennison and Mr. Pettie, another trustee,

---

6. I hereby bequeath to my friend, Robert McClelland, the "Chatham Correspondence," in four volumes, in testimony of our uniform friendship.

7. I give and bequeath to Mrs. Julian Williams the sum of $100, to be appropriated by her for the purchase of a ring to be kept as a token of our uniform friendship.

8. As to all and singular my real and personal estate which I now own or may own at the time of my death, and wheresoever situate and of what nature soever, I hereby give, devise and bequeath to William A. Moore, William Jennison, William Adair and John Pettie, of Detroit, Michigan, and their heirs and assigns forever, and their heirs and administrators respectively (not already disposed of), *but in trust only*, and for the uses and purposes hereinafter mentioned, and not otherwise:

1. The trustees, or a majority, or any two of them, shall take charge of all said real and personal property, and shall pay all dues and public burdens thereon, and sell and dispose of the same at such time and place and on such terms as to them shall seem proper. They shall lay out my property on the Chene farm, Detroit, in lots so that those lying between Woodbridge and Franklin streets may front on Chene street, and of such size as they shall think fit.

2. My said trustees and executors are especially enjoined to pay all care and attention to my beloved wife Caroline, whose health has suffered in consequence of my illness. This disposition is made to relieve her from all unnecessary care and anxiety in the settlement of my estate. My said trustees and executors shall provide all comforts for her that she may possibly require, and furnish her with such means as she may at any time need, and she may select her own residence. This kindness and attention I expect she shall receive during her natural life. It is my desire and intention that my said wife should be maintained and should live in the manner that she has been accustomed to.

were continuously present; that Mr. Fraser was then upwards of eighty-three years of age; that previous to that he had been a man prompt and particular in the payment of his debts; that upon his death Mr. Jennison and Mr. Pettie, two of the trustees, presented claims respectively for $4650 and $2500, the first for services in attending to Mr. Fraser's business, and the second for services as his nurse. This evidence was objected to and ruled out, as was other evidence of a similar nature. The witness was then asked whether Mr. Fraser did not afterwards express regret at having made the bequest to Mrs. Seymour; but this question also was overruled. The will was then offered in evidence by the proponents, but its reception was objected to, because Mr. Pettie, the fifth subscribing witness, had not been examined respecting its execution, the proponents declining to examine him at that time. The objection was overruled.

---

3. None of the legacies above specified shall be paid until my said real estate or an adequate portion thereof shall be sold and paid for, except the annuity payable to my said two nieces, Margaret and Isabella Davidson.

4. I direct that my trustees and executors shall procure and erect on my lot (30) in Elmwood cemetery a monument of Scotch granite to my family, and I do hereby constitute and appoint the said Wm. A. Moore, Wm. Jennison, Wm. Adair and John Pettie, or any two or more of them, to be the executors of this my last will and testament, and I dispense with any executors' or administrators' or trustees' bond, hereby revoking all former wills and codicils by me made.

Finally, on the demise of my said wife and the settlement of my estate and the payment of all expenses connected therewith, I direct my said trustees and executors to transmit to my two nieces last above mentioned, Margaret and Isabella Davidson, whatever balance or balances may remain in their hands. It being hereby my intention to give and devise to them whatever surplus may remain undisposed of to their use and benefit, and should any of said real estate remain undisposed of, to convey the same to them or the survivor of them. But it is my intention that in case of the death of both of my said nieces before the death of my said wife then their share shall go to their sister, Ann Munroe, of Inverness.

In witness whereof I have hereunto set my hand and seal at Detroit, this 17th day of May, in the year of our Lord one thousand eight hundred and seventy-seven.

A. D. FRASER. [SEAL.]

Witnesses: ROBERT MCCLELLAND.
D. BETHUNE DUFFIELD.
WM. JENNISON.
LEVI BISHOP.
JOHN PETTIE.

Counsel for contestants then opened their case to the jury, in the course of which he offered to read a passage from Griesenger on Mental Diseases, to the effect that grief, loss of fortune and disappointed ambition are among the causes of insanity; but the court very properly refused to permit it. At the close of the opening address, no part of which is given in the record, the judge said to counsel for contestants: "I will say to you in view of your opening that you need not spend any time on the question of undue influence. Your opening does not disclose that undue influence can be shown, or any undue influence such as could go to the jury. So you must confine yourself to the capacity of the testator." Counsel for the contestants excepted to this, but they did not then or at any subsequent time say to the court that they desired to go into evidence to establish the allegation in their pleading that undue influence had been employed, nor was any suggestion made that anything had been omitted in the opening.

Counsel for contestants then called Dr. Brodie, who testified that he had seen the sore on the nose of Mr. Fraser, which afflicted him more than twenty years ago; but on objection the evidence on this subject was ruled out.

Mary Colvin, one of the contestants, was then called, and testified that she was niece to the decedent, and daughter to his brother Peter: that she knew by repute that her father and the decedent came to Michigan together, and that they were the only two brothers of the family that did come to Michigan. The proponents objected to this evidence as being mere hearsay, and the court ruled it out.

Contestants then offered to prove that the relations between the decedent and Peter Fraser were always friendly and affectionate, and that the testator was in the habit of visiting his brother at his residence in Berrien in his life-time; but the offer, on objection, was overruled. They also asked Mary Colvin, "What rela-

tives have you living besides your brothers and sisters?" Whereupon proponent's counsel inquired whether the purpose was to show undue influence; and contestant's counsel making no response, the court overruled the question.

Contestants also offered to prove by this witness that Peter Fraser, in his life-time, upon the least chill or the slightest attack of illness, was subject to delirious fits; but the evidence was not received. The witness testified that Peter Fraser had been dead twenty years; that she never saw the decedent, and never saw or heard from the Misses Davidson mentioned in the will.

Letters by the decedent to Peter Fraser, dated in 1845 and 1851, were offered to prove the friendly relations existing between them, but they were ruled out.

The contestants then called a witness and offered to prove by him that Alexander J. Fraser, a son of the contestant, was a young man liberally educated by his father, admitted to the bar of Detroit, and gave fine promise; that early in his youth he became dissipated, and continued so during his life-time; that he died or was drowned in 1871 while under the influence of liquor in one of his sprees; that Mr. Fraser was well aware, during the latter part of his son's life, of his course of life and habit; and that the knowledge of his son's life and death continued to influence Mr. Fraser during his own life. This offer was overruled. In the same connection contestants stated that they expected to prove by one of the witnesses that Mr. Fraser, after he became insane, frequently alluded to his son Alec; but no witness was called to the stand to make such proof.

The contestants then called Samuel W. May and asked him whether or not the decedent was an eccentric man? The question was objected to as calling for a conclusion and not a fact, and was ruled out on that ground. The objection was untenable. It might as well be said that the questions whether a man was tall or not; whether he stooped in walking; whether he was

slow of speech and so on, are objectionable as calling for conclusions. All such questions involve conclusions, but they are nevertheless the proper and suitable questions to bring out the facts to which they are directed, whenever the evidence they call for is competent and material. It is therefore difficult to understand why this was objected to, especially as a favorable ruling must imperil the case. Evidence by the same witness that decedent was a peculiar man to get along with, and not every day alike, was struck out on objection.

One Augusta Mollenopski was then called, who testified that she had been constantly employed as a domestic in the family of the decedent for the four years immediately preceding July 1877. The following questions were then put to her, all of which were overruled:

"Do you know whether Mrs. Seymour wanted to come in the house and stay in charge of the house? Do you know whether Mr. Pettie forbade her coming into the house? Do you know whether Mr. Jennison was consulted with about Mrs. Seymour coming into the house? Do you know whether Mr. Jennison also objected to Mrs. Seymour coming into the house? Do you know whether Mrs. Seymour desired to come into the house and take charge of her uncle and aunt, and whether she was prevented from doing so by Mr. Jennison and Mr. Pettie?"

Other questions were then put to the witness as follows: "Did you notice during the spring any weakening of Mr. Fraser's mind?" "In your opinion, during the spring of 1877, had Mr. Fraser's mind weakened?" Both these questions were objected to as being leading, and were ruled out. Neither of the questions was open to the objection made. Both were entirely proper in form, and the witness should have been permitted to answer them.

Contestants then offered to prove that Miss Emma Morton, who was not remembered in the will, had for seventeen years before Mr. Fraser's death been in the habit of reading to him; that in the last three months of his life she nursed him and cared for him "with more than a daughter's devotion;" that she did this without

any promise of compensation on his part, but solely from affection; that so far as anything appeared that transpired between them decedent was very affectionate towards her and cared for her very much as a man would care for his daughter in his ordinary intercourse with her, and his desire to have her with him. This offer was overruled, though accompanied with the statement that experts will testify that in making their diagnosis this ingratitude is a material and important consideration.

Dr. Henry Hurd was then called, who testified that he was superintendent for the Eastern Asylum of Michigan for the Insane, and was familiar with mental diseases, their causes and symptoms. He was then asked: "Will you state if you please, what are certain uniformly recognized causes—predisposing causes—of mental disease?" The question was objected to and ruled out. The witness was allowed to state, however, that he should consider such delirious attacks as it had been proposed to prove in the case of Peter Fraser as material and bearing on the diagnosis of the case of the decedent. The contestants then renewed their offer to prove such attacks, but the evidence was not received.

Dr. Hurd was then asked the following question:

"Assuming that Mr. Fraser's nephew died insane; that at the date of the making of the alleged will, May 17th, 1877, Mr. Fraser was in his eighty-third year; that up to the year 1865 he had been a most laborious practitioner at the bar, and had as such performed more than the ordinary amount of labor; that in 1856, while arguing a cause in court, he had suddenly lost the sight of one of his eyes by what the physicians called *amaurosis;* that for twenty years he had suffered from an irritating and loathsome disease, known in medicine as *lupus exedens*, and located on the right cheek, near the nose and eye; that his physicians had informed him there was no cure but death; that although he had been all his life more than ordinarily fond of the society of friends, in the winter of 1876–7 he changed in this respect and became averse to their society, and declined to see them when they called, and abandoned meeting with the bar, of which he was president; that although

theretofore studiously neat in respect to his person and clothing, he became changed in this respect—was slovenly as regards his clothing; that he never washed himself or took a bath after the fall of 1876 until his death; that from a temperate man he became, after the winter of 1876, addicted to the free use of liquor; that during the last year of his life his memory began to fail him, and in the succeeding winter and spring of 1876 and 1877 he was in such a state in regard to ordinary affairs that he would frequently give orders for a particular piece of work to be done, or particular kind of food to be prepared, and when it was done as directed he would deny having given any such order, and fly into a passion about it; that during the same time his attendants say he appeared silly and childish, doing such acts as the following: he would tell the housemaid to turn his wife's niece, to whom he left a thousand dollars in his will, off the steps, and not to let her in the house, and tell the cook not to let her have anything to eat, but when she came in would be pleasant to her; would call the daughter of the last named lady vile names, and forbade her the house; would, without cause, fall into a passion with his servants, whom he had always before treated kindly, and when told of it by his wife would say that he had done nothing, and then cry and beg them not to go away from him; he would stand in front of the looking-glass half an hour at a time, all the time brushing the few hairs he had on his head; that, having been a loving and affectionate husband, he in April, 1877, kicked his wife and called her vile names; that in March, 1877, he told his servant to go to his attorney and get $4000, and upon the servant's returning, Mr. Fraser put the money in a tin box in the closet, and said to the other servant to be very careful, that he had $4000 in there; that in April, 1877, his wife, who had faithfully attended him through his illness, became insane to a marked degree, and knowledge of the fact came to him, causing him to break down and give way to tears and emotion; assuming that these circumstances all preceded the making of the will, and assuming, further, that at the date thereof his disease had progressed so far that it had eaten away all of the upper lip and nose—the entire right eye had come away in a running matter a month before the execution of the paper; that at the time of the execution of the will, the disease had spread to the arch of the eye and nearly down the lower bone, while inwardly it had penetrated to the wall of the orbit of the eye—the membranes of the cheek about the eye were destroyed, the bone was perfectly bare of all the soft parts, and the upper portion of the maxillary bone had exfoliated

and come away in little pieces; that the day on the evening of which the paper was executed he was dressed as usual, but, shortly before the time appointed for its execution, he took off his clothes, and, directing the servant to hunt up a Scotch cap he had in the house, but had not worn for a long time, he appeared before the subscribing witnesses in a long night gown and with a Scotch cap on his head; that he concluded the execution of the paper by drinking hot Scotch whisky, and had what a subscribing witness calls 'a jollification;' that within four weeks after this date he began to have delusions as to his locality, and was terrified by his own imaginings, and attempted to strike the servant with a chair; that these delusions increased and his violence increased to the time of his death; that he sent for his attorney to get out a writ of *habeas corpus;* he became maniacal, and shouted and raved at least three weeks before his death so that it disturbed his neighbors in the next block; that on the second of August, 1877, he died from the disease of which he had so long been the victim; —assuming the foregoing facts to have existed, state whether, in your opinion, Mr. Fraser was of sound or unsound mind on the 17th of May, 1877, at the time of the execution of the paper sought to be proved as his will."

In answer to this question the witness testified that he should say that the decedent was not of sound mind at the date of the execution of the paper in question. A number of similar questions, not greatly different, were put to the witness and overruled by the court. Four other witnesses were called who, as medical experts, testified to the same effect with Dr. Hurd. This made five in all. A sixth was called, but the court declined to hear more.

Contestants further gave evidence tending to prove that the decedent was of unsound mind at the date of the will; that for twenty years or more he had been a victim to a painful and loathsome disease known as *lupus exedens,* commonly called cancer in the face, with no hope of relief but death; that since the fall of 1876 he had been confined to his house but not to his bed; that during the warm weather he exercised in his garden and rode out several times; that his children and grand-children were all dead; that his wife became

insane in the spring of 1877, and his own mind had begun to weaken in the memory of recent events.

Counsel for proponents, to rebut the case made by the contestants, called Dr. Peter Klein who testified that he was a physician of the city of Detroit; that he had been employed since September, 1876, by the decedent as his physician, and had attended him up to the time of his death. He was then asked: "About the last of April or first of May, 1877, what was Mr. Fraser's mental condition with reference to soundness or unsoundness of mind?" This was objected to on the ground that the proposed testimony would be in violation of professional confidence, and therefore forbidden by the statute; but the court overruled the objection, and the witness testified that he should say it was sound—perfectly sound. And the witness was allowed, under objection, to give particulars of the decedent's disease, and of his treatment of it.

Counsel for proponents then called John Pettie and examined him respecting the sanity of the decedent at the time of the execution of the will. The evidence was objected to on the ground that the proponents had declined to call him in making out their *prima facie* case; but the court received it.

The proponents then offered in evidence a letter from the decedent to the Misses Davidson, dated May 7, 1875, the purpose of which was stated to be to show friendly feelings on his part towards them. Also what purported to be a letter from Margaret Davidson in reply. The signature to the reply was not proved, but it was shown to have been found among the papers of the decedent. Both letters were objected to but received.

When the case went to the jury the contestants proposed twenty-one instructions, all of which the court rejected. These are given hereafter, pp. 236–8 *post*. The following are the instructions given:

"GENTLEMEN OF THE JURY:—You are called upon in this case to determine whether Alexander D. Fraser, on the 17th of May, 1877, possessed sufficient mental capacity to make a will.

A paper has been offered in evidence which the proponents claim to be his last will and testament. If you believe the testimony of the subscribing witnesses, the paper was executed in accordance with the laws of this State; but conceding this to be true, it is claimed on behalf of the contestants that the paper is void because Mr. Fraser, at the time of its execution, did not possess sufficient mental vigor or capacity to comprehend and realize what he was doing. This is the question of fact, or the principal question of fact, you must determine from the evidence that has been admitted. You must be careful, gentlemen of the jury, to confine your attention to the evidence introduced, and not permit your minds to be influenced by any statements made in your presence or hearing, by the counsel in this case, as to matters that were not permitted to go in evidence.

The rule, gentlemen, stated by the weight of authority, undoubtedly is that a less degree of mind is required to execute a will than a contract. Although the testator must understand substantially the nature of the act, the extent of his property, his relations to others who may or ought to be the object of his bounty, and the scope and bearing of the provisions of his will, and must have sufficiently active memory to collect in his mind, without prompting, the elements of the business to be transacted, and to hold them in his mind a sufficient length of time to perceive at least their obvious relations to each other, and be able to form some rational judgment in reference to them, yet he need not have the same perfect and complete understanding and appreciation of any of these matters, in all their bearings, as a person in sound and vigorous health of body and mind would have; nor is he required to know the precise legal effect of every provision contained in his will.

To use still another form of expression, gentlemen, the will is not valid unless the person making it not only intends of his own free will to make such a disposition, but has capacity to know what he is doing, or understanding to whom he is giving his property, in what proportions, and whom he is depriving of it as his heirs or devisees under the will he makes. When a man has mind enough to know and appreciate the natural objects of his bounty, and the character and effect of the disposition of the will, then he has a mind sufficiently sound to enable him to make a valid will.

With these instructions in your mind, weigh the testimony of all the witnesses. Many of these were persons who spoke from actual knowledge of the deceased. Consider the testimony of those as well as that of the experts, and give to each and every one of them such

weight as you may deem proper. This question of capacity is entirely and exclusively for your disposition and decision.

It rests upon the proponents to satisfy you by a preponderance of proof that the deceased was of sound mind when the paper was executed. As bearing upon the state of Mr. Fraser's mind, his declarations—that is, what he said to persons—have been admitted, and are to be construed by you for this purpose only, not as proving any facts stated in the declaration.

If, under these instructions, you reach the conclusion that A. D. Fraser possessed sufficient mental capacity on the 17th of May, 1877, to make this will, your verdict should be for the proponents. It, on the other hand, you determine he did not possess this mental capacity, your verdict should be for the contestants."

The verdict sustained the will.

The legal questions arising on this statement of facts are not numerous, and for the most part they are simple.

I. The fact that the decedent was careful in money matters, prompt and particular in the payment of debts, and that, notwithstanding this, Jennison and Pettie, two of the trustees named in the will, presented large claims against his estate for services performed for him, had nothing whatever to do with the issue being tried. The parties named were not, as claimants, in any manner interested in the will. If their claims were valid, they were equally good whether the will was sustained or defeated. Such interest as they might have as trustees had nothing to do with the claims. It is true that evidence such as was offered might raise a suspicion either that the claims were unfounded, or that Mr. Fraser in his old age had fallen into a condition that rendered him mentally dependent and helpless, but it could at best do no more than raise a suspicion, and suspicions are not evidence. If the presentation of a suspected claim could prove a decedent insane at the time of its alleged accrual, who could escape being retrospectively made a madman? But the time to expose such a claim is when it is presented for allowance, and when its validity will constitute the very question in issue.

II. If decedent expressed regret for making a gift to Mrs. Seymour, the fact might prove a change in desire, but nothing more. It had no bearing on mental capacity.

III. If the court erred in not requiring the proponents to call Mr. Pettie at the time the other subscribing witnesses were examined, the error was cured by his being called afterwards. He was put upon the stand by the proponents, and the contestants had the benefit of cross-examination. Presumptively they were not prejudiced by his not being called at first. They lost no evidence and no privilege in consequence.

IV. The ruling of the court that, on the opening for the contestants, the question of undue influence was out of the case, does not appear to have harmed them. It is not shown that during the trial they proposed by their proofs to raise that question. They did indeed offer some evidence that might have tended in that direction, but the court was not told that that was the purpose, and presumptively it was offered on the issue of sanity. Had the court been informed by counsel that through inadvertence his opening had been made less broad than was intended, and that an important branch of the proposed defense had been omitted, it is not to be doubted that liberty would unhesitatingly have been given to supply the omission. We should never consent that rules of procedure be made use of to cut off a right to full trial because of such an omission: their purpose is to further the right and aid in accomplishing justice. But the record does not inform us that in the court below any mistake or omission was pretended, and it is too late now to suggest it.

The question of undue influence being found not to be in issue, the court did not err in excluding evidence that Mrs. Seymour was kept away from the decedent, or any other evidence that only tended in the same direction.

V. The court was quite justified in declining to permit Dr. Johnson to be called as an expert by the contestants after five other experts had been called and

examined on their behalf. If testamentary cases are ever to be brought to a conclusion, there must be some limit to the reception of expert evidence, and that which was fixed in this case was quite liberal enough. To obtain such evidence is expensive, since desirable witnesses are not to be found in every community; but an army may be had if the court will consent to their examination; and if legal controversies are to be determined by the preponderance of voices, wealth, in all litigation in which expert evidence is important, may prevail almost of course. But one familiar with such litigation can but know that for the purposes of justice the examination of two conscientious and intelligent experts on a side is commonly better than to call more. And certainly when five on each side have been examined the limit of reasonable liberality has in most cases been reached. The jury cannot be aided by going farther. Little discrepancies that must be found in the testimony of those even who in the main agree, begin to attract attention and occupy the mind, until at last jurors, with their minds on unimportant variances, come to think that expert evidence, from its very uncertainty, is worthless. This is not a desirable state of things, and it can only be avoided by confining the use of expert evidence within reasonable bounds.

VI. The court did not err in permitting Dr. Klein to be examined by the proponents to show the condition of the decedent while he was treating him as a physician. The statute provides that "No person duly authorized to practice physic or surgery shall be allowed to disclose any information which he may have acquired in attending any patient in his professional character, and which information was necessary to enable him to prescribe for such patient as a physician, or to do any act for him as a surgeon." Comp. L., § 5943. This statute, as we have held, covers information acquired by observation while the physician is in attendance upon his patient, as well as communications made by the patient

to him, *Briggs v. Briggs*, 20 Mich., 34; but the rule it establishes is one of privilege for the protection of the patient; and he may waive it if he sees fit, *Scripps v. Foster*, 41 Mich., 742; and what he may do in his lifetime, those who represent him after his death may also do for the protection of the interests they claim under him.

VII. The letters by the decedent to his brother Peter were properly excluded. The last was written more than a quarter of a century before the will was made, and Peter had been dead more than twenty years, and it appeared in evidence that family intercourse had not been kept up since. Concede that the relations were previously affectionate and brotherly, and this legal controversy is in no manner affected thereby. That he should not have kept the children of his brother in remembrance as objects of bounty, after all this lapse of time, is not so unnatural as to suggest insanity, or even the absence of ordinary affection. It was not unnatural that in his extreme old age his mind should turn more affectionately to the place of his birth, and to the relatives he had left behind him there, than to those who had passed beyond him to seek fortunes in new homes. The most that can be suggested is that the decedent discriminated in his bounty between those connected with him by ties of blood.

The letter[1] of the decedent to the Misses Davidson

[1] DETROIT, 7th May, 1875.

MY DEAR NIECES: I received your last letter in due course, and I now send you inclosed a draft for £20 sterling. I presume you have heard nothing from the and I think you never will.

It is proper that I should mention to you that the disease that affects my nose turns out to be a cancer, and has seriously affected my right cheek. I am in the hands of the Dr., who thinks he can check its progress, but that must be difficult at my age, for you will remember I shall be 80 on the 20 of Jany. next, if I see that day. I have at already a greater age than any of my family except your mother, and my health (aside from this disease is perfectly good, altho much confined to the house in the winter, which has hardly yet disappeared. I am in the hands of that God who has often showered blessings upon me, through a long life: to His decree I bow with reverence to remove me from this scene whenever it shall be His divine will. I trust when that time comes I

might well have been kept out of the case, though we do not say it was inadmissible. It proved nothing but affectionate sentiments, and these the will proved as well. The reply,[2] purporting to be written by Margaret Davidson, was for the purposes of the case an idle document. It indicated friendly solicitude, and nothing more; and that may always be taken for granted between near relatives. The letter could in no manner have influenced the jury.

---

shall meet as a humble Christian who relies on the merits of the Savior. Let not what I have here stated give you any uneasiness. I have made abundant provision for you both as long as you live, and I have not forgotten your sister, Ann Munroe. I shall write you from time to time how I get along. My wife is in good health, and wishes to be remembered to you all. Write soon.

I am, dear nieces, yours affectionately,

A. D. FRASER.

MISS MARY and ISABELLA DAVIDSON.

P. S. Of late some of my brother Peter's children have been trying to be familiar here, altho I have known but little of them before, except Ellis, who claims to be a Dr. and seems to be an unsteady young man. The motive which led them to seek me out at this time (after the loss of all my descendants) was too plain to me and I repulsed them. They saw me with property comfortably situated in the decline of years and in delicate health, and thought now was their time. I declined to see them. Ellis treated my son before he died, in some difficulty they had so cruelly that my wife cannot bear the sight of him or to hear his name. I understand he wrote one of your family some years ago. Now it is my wish and that of my wife that neither of you ever correspond with Ellis or any of his family or with his sisters. A. D. F.

[2] 11 HUNTLEY PLACE, INVERNESS, 2 September, 1875.

MY DEAR UNCLE: Your kind letter we received in due time, and we are glad to understand that you are again able to have your usual walks. Indeed, it is a great blessing to you that you are able to have some exercise in that way, as it will prove beneficial to your health.

I am also glad to learn from your letter that Mrs. Fraser is enjoying good health, and it affords strength to my mind and spirit to hear of you both enjoying health. Dear uncle, it gives me many a bitter thought. If you will be taken from us what will become of us, or what shall we do. You, who has acted to us as a friend, indeed as a father. Since my dear Brother Alick has been taken from us, if now that any thing will happen to you, who shall look to us and our affairs the Almighty only knows, and we trust in Him that your years may be prolonged and that He will do for you and us better than we can ask.

Dear Uncle, I hope your nose is not much pained or worse than it was. Did the Dr. do anything to prevent its progress? I shall be most anxious to hear from you soon if convenient for you.

I must now conclude by bringing you to present our kind love and our sister Annie's to Aunt Mrs. Fraser, and not forgetting (?) yourself, dear Uncle.

I remain your Affectionate Niece,

MARGARET DAVIDSON.

VIII. From the statement we have made of the facts, it is obvious that the most important questions on the trial concerned the admission of evidence to show insanity. For this purpose the contestants sought to inquire into the particulars of a disease originating twenty years before; into the behavior and habits of the decedent's son; into the relations existing between himself and collateral relatives; into the disease of a brother; into personal eccentricities, etc.; and they suggested, by the extraordinary question to Dr. Hurd, a multitude of things which, so far as this record shows, they neither proved nor offered to prove, and which, consequently, they should not have been permitted to embrace in a question to an expert. Respecting the evidence offered and ruled out, we have been unable to satisfy ourselves that the court committed any error. Many of the facts suggested may be said to have a remote bearing upon the question of insanity to this extent: that they would be facts more likely to attend or precede a condition of insanity than one of mental soundness. But any one of those circumstances may co-exist with a perfectly sound mind, and any one of them may be looked for as not an improbable misfortune or peculiarity in the lot of a perfectly sane person.

Now that it has become so common to assail, on allegations of mental disease, the wills of those who in life, in all their business and family relations, were treated as sane, it becomes of high importance that evidence should not be received as suggesting insanity unless it has some legitimate tendency to prove it. We are persuaded that much wrong has unwittingly been done in many cases by allowing misfortunes, family calamities and personal peculiarities to go to the jury as having some necessary tendency to unsettle the mind, and therefore some bearing on the issue of mental soundness. As disturbing causes may be discovered in the family or personal history of almost every living person, the general result is that occasion is found for contesting the

validity of almost every will, especially if the estate is sufficient to tempt the endeavor. Was the decedent afflicted with a loathsome disease? Then this presumably affected his mental health. Were his ambitious hopes disappointed? Then his reason must have given way. Did a brother have fits? Then there must have been insanity in some ancestor which has tainted the brain of all descendants. Has the only son gone to ruin? Then he must have inherited mental weakness from his father, and his bad conduct has probably reacted upon the father and disturbed his reason. Did the deceased have ways differing from most men, and rendering him eccentric? Then surely, as most men are sane, he must have been insane. Has he failed to remember some nurse or some cousin in the distribution of his bounty? Then behold, in ingratitude and want of family affection, the plain indication of mental disorder. But we need not pursue the list. Give free admission to such evidence, and no man can feel assured that the jury which examines his will in the light of his family history and personal peculiarities, will not adjudge him a madman.

We do not doubt that Dr. Hurd was correct in saying that in the diagnosis of the decedent's mental condition it would be proper to have in mind any mental disease of his brother. Very remote circumstances may properly be taken into the account by the medical examiner or expert, as affording possible clues to the real condition; but by themselves they prove nothing, and they mislead when they come into the case as being evidence of insanity. They not only mislead, but they tend to bring jurors and the public to a conviction that in contemplation of expert evidence one person is as sane as another, and that not even a thin appreciable partition divides reason from madness. It would be better to take away altogether the power of testamentary disposition than to have such a state of things exist; for then estates might at least be saved to relatives, which now are lost in litigation.

This case will fairly illustrate the mischiefs that might flow from such evidence. Mr. Fraser lived and was received among the people of Detroit as unquestionably a sane man. He managed with skill large interests until his physical disorder made it necessary for him to withdraw from active business life. This court may well take notice of his great legal ability and acumen, continuing so long as he remained in practice. Governor McClelland, who was at the bar with him before Michigan became a State, who was his neighbor and of whose uniform friendship he speaks in his will, detected no symptoms of mental unsoundness at the time when the will was executed. Neither did the other attesting witnesses. It is said the provisions of the will betray ingratitude and a want of natural affection: he did not remember the nurse who cared for him with a devotion so remarkable and disinterested, and he did not distribute his estate equally among his relatives. But how do these facts prove a want of testamentary capacity? He may have justly supposed that commissioners upon his estate would award to the nurse full compensation for her labors, and nothing is more unquestionable than that, by the Statute of Wills, it was intended that every man should be at liberty to select the objects of his bounty among his relatives at discretion, or even to pass them all by if so disposed. When no will is made the Statutes of Descents and Distributions regulate the division of decedent estates on the rule of equal claims, among next of kin; and if this were supposed to be the only just and proper distribution, the law would permit no other. But the right to give property by will is conferred for the very reason that the owner is supposed to be able to make, in his particular case, a better distribution of his estate than could be made by any general and unvarying rule; that he knows who by their needs, their affection, their care and solicitude for his welfare, their kind regard for himself and for those to whom he has been attached, and by the thousand other circumstances nat-

urally operating upon the mind, should be remembered in his bounty, better than any others can possibly know, and much better than any general legislation can possibly provide. *Matter of Gleespin*, 26 N. J. Eq., 523. And even when provisions appear unnatural, it can seldom be known that there were not undisclosed reasons which would fully justify what was done if we knew them.

But we cannot admit that in this case the provisions of the will have even the appearance of being unnatural. The decedent remembered first his obligations to his Maker; then his pecuniary indebtedness to the two Misses Davidson; then the kindness and attention of Mrs. Seymour; then the necessities of his countrymen in the land of their adoption; then the poor of his native parish; and then, after providing for a suitable monument for himself and for small gifts to intimate friends, he divides all the residue among near relatives, selecting as the chief beneficiaries the next of kin remaining at his old home, to which, in his declining years, his affectionate remembrances would naturally turn. If a fond remembrance of one's birth place, charity for one's needy countrymen, gratitude for kindness received, affectionate remembrance of friends, admission of pecuniary obligations, and recognition of the ties of blood are unnatural, then this will is unnatural, but not otherwise. We may regret that the decedent did not at the time remember also the family of his brother from whom he had been so long separated, but it is scarcely strange that he failed to do so. It was certainly not unnatural, for very few testators remember in their bounty all near relatives; and it is certainly none of our concern.

The practical objection to allowing the contestants to put into the case, as evidence tending to show insanity, all the facts they proposed to prove would be this, that they tended rather to put before the jury the question whether the will was a suitable and proper one, and thus led them to try the will itself rather than the testator's sanity. At best, as has been said, they did not

prove unsoundness, though they might lead it to be suspected.

If there is to be any practical and just administration of the law in will cases, such as shall protect the right of testamentary disposition, there must be some discretion in the trial court to limit the range of inquiry, especially in the examination of experts. The long question put to Dr. Hurd in this case has been characterized as extraordinary, and the justice of this must appear on the most cursory reading. It admitted of but one answer, for it embraced conditions which necessarily indicated insanity. But it also embraced many which were consistent with mental health, and one of the improprieties of the question consisted in this, that the jury might be led to infer from the general answer that each of the circumstances enumerated tended to the proof of insanity, and they might in consequence have found the existence of mental unsoundness, though they disbelieved the alleged facts which, if true, would indicate its existence. This is mentioned not because it is important on this record, but because an evident misapprehension exists regarding the province and effect of expert evidence when insanity is in question.

It is not an uncommon impression that a will must be set aside whenever the existence of any mental disorder at the time of its execution is established. *Waring v. Waring*, 6 Moore's P. C. Cas., 349. That this is not the law is apparent from the fact that the testamentary dispositions of monomaniacs are often sustained in spite of the mental disorder. When the monomania is conceded, it is only necessary to inquire further whether the provisions of the will are or are not affected by it, and the will stands or falls by that test. *Dew v. Clark*, 1 Add. Ec., 279: 3 Add. Ec., 79; *Dunham's Appeal*, 27 Conn., 192; *Lucas v. Parsons*, 24 Ga., 640; *Boardman v. Woodman*, 47 N. H., 120; *Crum v. Thornley*, 47 Ill., 192; *Thompson v. Kyner*, 65 Penn. St., 368; *Benoist v. Murrin*, 58 Mo., 307; *Banks v. Goodfellow*, L. R. 5 Q. B., 549;

Pidcock v. Potter, 68 Penn. St., 342. A man may believe himself to be the Supreme Ruler of the Universe, and nevertheless make a perfectly sensible disposition of his property, and the courts will sustain it when it appears that his mania did not dictate its provisions. The law refuses to aggravate the misfortune of his mania by taking from him the means of attaching others to his interests through his property, when he appears to control his property as sensibly as do his fellows. But the existence of insane delusions on one subject is much more cogent evidence of general derangement than is the fact that his father was deranged, or that a brother had delirious fits, or that a son became dissipated and went to ruin. Indeed an expert would be slow to admit that there can be a mania on one subject and a normal condition in all other particulars; and if for legal purposes we must so assume, it is evident that a state of perfect mental health cannot logically be demanded in other cases.

It may probably be assumed that medical men judge of mental disease by somewhat different standards from those applied by the public generally. The public judge from the conduct which they observe, and which seems to indicate either sense or insane delusions; but the medical expert discovers various indications of unsoundness which would escape others, and which may co-exist with careful, able and prudent management of private affairs. It is fortunate that experts have this greater ability and insight, for it enables them to prescribe for mental disease in its beginnings, and to advise the treatment of asylums before it becomes too late to arrest a growing disorder. But it would be in a high degree dangerous, as well as unjust, to deprive a man of the control of his property so soon as the indications of mental disease appear, notwithstanding he may still be managing it with propriety and judgment. For legal purposes, incapacity, either criminal or civil, must be judged of by manifestations in conduct and language.

The circumstances and symptoms in which a physician alone can perceive a tendency towards mental disorder, may aid in understanding the manifestations subsequently appearing, but they can have little further value. The expert can never be put in the place of the jury, and be allowed to decide the case on his opinion of what was naturally to be looked for in the mental history of a person shown to have had peculiar surroundings and a peculiar experience.

It is with mental health as with physical; a physician discovers evidence of actual or incipient unsoundness in numerous cases of those who pass with their fellows as persons in perfect health. For the purposes of treatment this is useful, but for the ordinary purposes of life the physician must adopt the same standard with the rest of the community, and those persons will be considered in health who pursue their ordinary avocations, and discharge the ordinary duties of life without being incommoded or inconvenienced by physical disorders. For practical purposes this is a sufficient test by which to distinguish those who are sick from those who are in health. The medical adviser needs to look further when professional objects are in view.

Under the law, no doubt, whoever may make a contract may make a will; but the manner in which will cases are treated would naturally lead to a different conclusion. If, in the case of contracts alleged to be void for want of mental capacity, the same delicate tests were applied, and the same range of inquiry permitted which have become customary in testamentary cases, no one could ever know when he would be safe in dealing with his fellows; for in business one must necessarily act upon appearances, and upon the common recognition of capacity by the community; and he cannot stop to investigate whether there was insanity in the family; or eccentricity in the conduct of the person with whom he contracts or barters, or whether there is bad behavior among his children. Commerce of all descriptions must lan-

guish if contracts were subjected to the sort of inquiries which seem to be thought proper in the case of wills. Yet in law this is as admissible in the one case as in the other, and as reasonable. But nothing can be more illogical than the notion that a perceptible taint of insanity, not evidenced by any delusion or disorder which the public can detect, and not apparently affecting the ability to manage business concerns, shall vitiate all civil acts, even though it is conceded that an unquestionable partial insanity shall not have the like consequence, provided the delusion is upon some subject foreign to the act done. For our part we are not ready to assent to any rule that shall make a derangement of the faculties operate to incapacitate a person from making a valid will, when it is neither of a character to render the person incapable of acting rationally in the ordinary affairs of life, nor has it manifested itself in the testamentary provisions. *Meeker v. Meeker*, 75 Ill., 260-266. Whatever court overturns a will ought to have reasons to stand upon which are within the grasp of the common sense of mankind.

The present case does not call for any extended examination of the general subject. There is no doubt that the law of insanity is in danger of falling into contempt in testamentary cases as well as in criminal, and very largely because the examination of experts is conducted under an apparent belief that the slightest taint of mental disorder destroys capacity, even though the conduct has apparently never been affected by it. No doubt this view leads to the setting aside of valid wills in some cases. It is a valuable service when a trial court keeps these investigations under the control of common sense rules. And in our view it was quite proper for the court to do what was done in this case: exclude the evidence of facts having only a remote bearing, until there had been some positive testimony to conduct evincing such mental unsoundness as would be appreciable by laymen as well as experts. To permit the throwing of a drag-net over

the man's life and acquaintanceship, and the placing of the facts indiscriminately before the jury, is equivalent to leaving the jury to act at large in their discretion, and to lead them to reject any will that does not satisfy their judgment. Reviewing the whole record carefully, we are not satisfied that the court abused its discretion in this case.

We have already said, however, that the court erred in one instance in overruling questions because they were leading, and in another because they called for conclusions and not facts. The court also erred in holding that the questions put to Mary Colvin respecting family history, were objectionable on the ground of being hearsay. It is that sort of evidence of all others that is not objectionable on this ground. *Shields v. Boucher*, 1 De Gex & Smale, 40. But this last evidence, though not objectionable for the reason stated, might well have been rejected as immaterial.

The question now arises, whether the judgment shall be reversed for the two errors specified. In passing upon that question it is proper to take into consideration the fact that the objections which were sustained related to matters of form merely. When the rulings were made, the contestants had two courses open to them—either to avoid the objections by a change in the form of the questions, or to rely on the error in the rulings on removing the cause to the appellate court. It is scarcely necessary to say that public policy requires that the former course should be encouraged, not the latter. It is always desirable that parties so manage their cases in the trial courts as to develop the merits fully there, and so that the verdict and judgment there shall be final. And in no class of cases is this more important than in will cases.

In this case we think the contestants should have acted upon this principle. And we are not satisfied that they failed to do so, or that they lost any evidence in consequence of the rulings. The important fact they

sought to bring out was that Mr. Fraser's mind weakened in the last year of his life; and as they appear to have gone fully into the question of mental soundness, we must suppose this ground to have been covered. On the whole, we all agree that we ought not to reverse the judgment because of the rulings mentioned.

We also agree that a new trial should not be ordered because the judge refused the requests for instructions,[1] and gave a connected charge. The charge as given was fair, and sufficiently full to present all the important questions of law with which the jury had any concern. It was no doubt a more useful guide to the jury than would have been such instructions as the contestants proposed. The first five of these, so far as not objec-

[1] The instructions requested were as follows:

First—All persons are in law either of sound or unsound mind. If the decedent was not of sound mind, the law treats him as of unsound mind, and he is to be compared with himself and not with others in determining whether he was of unsound mind or not.

Second—That the term "sound mind," as used in the statute, stands opposed, not only to idiocy, but to all derangements of the mind occasioned by melancholy, grief, sorrow, misfortune, sickness or disease, whenever such derangement deprives one of the rational faculties common to man.

Third—If the jury find that Mr. Fraser's faculties were so far enfeebled and overcome by disease as to render him incapable of properly understanding his relations to others, their relative claims upon his bounty, the particulars of his property and the nature of the dispositions made by the will, they should give their verdict for the contestants.

Fourth—That in order to make a valid will the decedent must understand substantially the nature of the act, the extent of the property, his relations to others, who might or ought to be subjects of his bounty, and the scope and bearing of the provisions of his will, and he must have sufficient active memory to collect in his mind without prompting the elements of the business to be transacted, and to hold them in his mind a sufficient length of mind to perceive, at least, their obvious relations to each other, and be able to form some rational judgment in relation to them.

Fifth—That unsoundness of mind embraces every species of mental incapacity from raging mania to that delicate and extreme feebleness of mind which approaches nearer to and often degenerates into dementia.

Sixth—That the testator must have something more than mere passive memory. He must retain sufficient active memory to collect in his mind without prompting, the particulars of the business to be transacted, the estate which he has to dispose of, and the proper objects of his testamentary bounty.

Seventh—To make the decedent competent he must have sufficient active memory to recollect, without prompting, the elements of the business to be transacted, and to hold them in his mind a

tionable in form or in law, are given in the charge; the sixth, seventh and eighth would require caution to prevent their misleading; the ninth and tenth might be proper in a case of monomania, which was not pretended here; the eleventh, twelfth, thirteenth, twentieth and twenty-first are sufficiently covered by the charge; the fourteenth, fifteenth, sixteenth, seventeenth and eighteenth do not present questions of law; the nineteenth

---

sufficient length of time to perceive their obvious relations to each other, and to be able to form a rational judgment in regard to them, and it is not sufficient in law that he appeared to have mind enough when he made the will to answer familiar and usual questions.

Eighth—That in order to make a valid will the testator is required by law to be of sufficient capacity to exercise judgment about his property and the justice of his testamentary bounty, and he must be capable of discerning and feeling the relations and obligations of family blood.

Ninth—That a person may have upon some subjects, and even generally, mind, memory and sense sufficient to know and comprehend ordinary transactions, and yet upon the subject of the objects of his care and bounty he may be of unsound mind.

Tenth—That a person may have upon some subjects sufficient mind to know and comprehend ordinary transactions, and yet upon the subject of property which he is about to dispose of, he may be of unsound mind.

Eleventh—That the burden of proof is upon the proponents of the will to show that at the time of its execution the decedent was of sound mind.

Twelfth—That the burden of establishing testamentary capacity remains with the proponents to the end of the trial, and they must produce evidence sufficient to outweigh that which is opposed, and the whole evidence offered by either party is for the consideration of the jury.

Thirteenth—That if the jury should find that upon the other testimony relating to the testator's mental soundness the evidence was balanced, they should not allow the presumption of sanity to decide the question in the testator's favor; the burden of proof is on the proponents of the will to establish capacity by other evidence than the presumption of sanity, and that presumption cannot have the force of an independent fact to serve as a substantial make-weight against counter proof.

Fourteenth—That, as a general rule, extreme old age raises some doubt of testamentary capacity.

Fifteenth—That the loss of memory is one of the earliest and surest indications of the approach of mental infirmity.

Sixteenth—That propriety and delicacy would dictate that one interested in the provisions of the will should not conduct its making and execution; and the law requires that there should be satisfactory proof in such cases that the decedent clearly understood and freely intended to make that disposition of his property which the instrument purported to direct.

Seventeenth—That if the jury find that the will was written by one interested in its provisions, and that Mr. Fraser consulted with no other person in reference thereto, proof of the most clear and satisfactory character is required to establish the paper.

is immaterial and is also incorrect. On the whole, we think the court in the instructions dealt with the case wisely and fairly.

We have passed over such assignments of error as seemed to us to call for no remark. We are of opinion that the judgment under review should be affirmed.

The other Justices concurred.

Eighteenth—That if the jury find that the will was written by one of the trustees named therein, and that Mr. Fraser consulted with no one else in reference thereto, and at the time was enfeebled by extreme old age and a loathsome disease of long standing, the law requires that there should be proof of a clear and satisfactory character that he clearly understood and freely intended to make that disposition of his property which the instrument purports to direct.

Nineteenth—That to make the devise to the trustees valid the jury must be satisfied of the due execution of the paper by testimony other than that of the two trustees who were subscribing witnesses; the jury must be satisfied that Mr. Fraser was of sound mind at the time of the execution thereof.

Twentieth—That in determining the question of testamentary capacity, the jury may consider the opinions of professional witnesses as inferences of fact from the evidences of physical or mental manifestations.

Twenty-first—That upon the questions relating to the mental capacity of a person to make a will, the opinions of men skilled in medical science, though not founded on their own personal observation of the facts in a particular case, are admissible in evidence; that the opinion of an expert is a fact bearing on the questions of the mental condition of the decedent, and as such its proper weight falls within the province of the jury to determine.

42 239
82 92

42 239
s3NW 850
s3NW 913
130 3190

42 239
141 3 60
141 3 61

42 239
f147 3553

Ex rel. Joseph L. Hudson v. Judge of Superior Court of Detroit.

Writ of prohibition—Bankrupt's assignee not affected by judgment against the marshal—res judicata.

An assignee in bankruptcy who has sold goods supposed to belong to the bankrupt, and received the money therefor, is not damnified or delayed in the execution of his duty by a judgment in trover against the United States marshal for seizing them.

Parties to a controversy cannot, after judgment, receive it in another court and cause, in order to raise again the questions already in issue and adjudicated.

A writ of prohibition is a common-law preventive against the encroachment, excess or improper assumption of jurisdiction, and can only be restored to in clear cases and where other remedies are ineffectual. It may lie at the suit of one or more parties on either side to restrain the action of the court so far as it exceeds its jurisdiction and thereby affects the petitioner; but it is a discretionary writ and will not be granted unless it appears that the petitioner has vainly applied for relief to the court against which he wishes it to issue.

An assignee in bankruptcy may be entitled to a writ of prohibition to restrain a State court from enjoining his proceedings in the Bankrupt Court to quiet his title to goods turned over to him by the marshal as assets of the bankrupt's estate.

Writ of Prohibition. Motion submitted October 28. Denied November 29.

Griffin & Dickinson and *Alfred Russell* for the writ.

Wisner & Speed and *G. V. N. Lothrop* against.

Marston, J. March 14, 1878, Cauffman & Dinkelspeil et al., residents of the city of Rochester in the State of New York, filed a petition in the District Court of the United States for the Eastern District of Michigan, praying therein that Schott & Feibish of Detroit might be adjudged bankrupts. They also filed a petition showing that Schott & Feibish had disposed of their property in fraud of the Bankrupt Act, and obtained thereon from

said court a provisional warrant directed to, and which was placed in the hands of Salmon S. Matthews, the marshal of said district.

The marshal found in the city of Detroit certain goods in boxes marked "S. Schwab, Helena, Montana" which, believing to be a part of the assets of Schott & Feibish, he seized under the provisional warrant.

April 27, 1878, Schwab commenced an action of trover in the Superior court of Detroit against Salmon S. Matthews, Christopher R. Mabley, Henry Michaels, Bernard Rothschild and Ferdinand Hays, to recover the value of the goods so seized by the marshal. The defendants appeared in said action by their attorneys and put in a plea, and a judgment was on July 12th, 1878, rendered in favor of the plaintiff, which was in effect affirmed in this court. *Mabley v. Judge of Superior Court*, 41 Mich., 31.

In September, 1878, and during the pendency of certain proceedings in said Superior Court in reference to said judgment, the defendants therein, joining with Joseph L. Hudson, filed a bill of complaint in the Circuit Court of the United States for the Eastern District of Michigan, in equity, against Samuel Schwab. A supplemental bill was afterwards filed. As the writ here asked for is to prohibit any interference with the prosecution of this equity case, a clear understanding is necessary, of the facts therein set forth, and of the object and purport of the bill.

The facts preceding, and which led to the commencement of the bankruptcy proceedings already referred to, are set forth quite fully, but are of no special importance in the determination of the questions here raised.

It is alleged that certain goods had been placed by Schott & Feibish in the possession of Joshua W. Smith and others, in violation of the provisions of the Bankrupt Act, and that the transfer thereof was made to prevent the property from coming into the hands of an assignee in bankruptcy, and that no sale thereof was made in

fact or intended: "therefore said creditors insisted that the said goods and chattels were a part and parcel of the assets of said Schott & Feibish, and that the said goods were liable to seizure by said marshal under said provisional warrant, and demanded that the marshal should seize and hold the same, and they gave to said marshal the bond of indemnity provided by General Order 12;" that the marshal, so believing, took possession of certain of said goods, and he also ascertained that a pretended purchase of the Joshua W. Smith goods had been made by Schwab; that said marshal learned where the goods were secretly stored in boxes marked "S. Schwab, Helena, Montana;" and that by virtue of said provisional warrant he seized and took possession thereof as part of the assets of said bankrupts, and that, as said marshal believed and had reason to believe, immediate seizure was necessary to prevent the goods being placed beyond the reach of the said creditors; that proceedings were afterwards had upon said creditors' petition, and on April 13th, 1878, Schott & Feibish were duly adjudged bankrupts, and on May 6th complainant Hudson was elected assignee; that he filed his bond and became duly qualified to act as such, and upon the same day an assignment of the estate and effects of said bankrupts was duly made and delivered to him by which he became entitled to the effects of said bankrupts, and the same became vested in him as such assignee; and that on May 6th the marshal turned all of said goods over to said Hudson, assignee.

It is also alleged that for the goods seized from other parties suits were commenced in the State courts against said marshal by the parties claiming to own the same, and from whose possession they were taken; that Schwab, April 27th, 1878, commenced an action in the Superior Court, as already stated; that said suit is at issue and upon the docket for trial at the then term of said Superior Court, and had been assigned for trial for October 8, 1878; that on May 6, 1878, Schwab had commenced

a suit in the Wayne Circuit by capias against said Matthews, Rothschild, Hays and Michaels, which was for the identical cause of action as that commenced in the Superior Court; that the goods so seized upon said provisional warrant were sold by said Hudson, assignee, under an order of said Bankruptcy court, made upon application, stating all the facts in relation thereto as to the claim made by said Schwab *et al.*, and that the proceeds of said sale are held by said assignee, to be applied as a part of the estate of said bankrupts, if the title shall be found in him as assignee, and that said funds are awaiting the determination of said question; that complainant Hays and Michaels had nothing to do with the seizure, except as creditors of said bankrupts in directing the seizure; that said Mabley had nothing to do with the seizure except to act as an appraiser of some of them after they were seized, and that Mabley is not a creditor of Schott & Feibish.

Facts are then set forth tending to show that these goods remained the property of said bankrupts, and that the pretended sales to Schwab and others were fraudulent, etc.; and complainants aver that the goods named in the declaration in the said case commenced by Schwab in the Superior Court, are goods which were transferred through said Smith & Freund by the said Schott & Feibish when insolvent, and with the intent on their part to prevent them from coming into the hands of an assignee in bankruptcy, and to defeat the provisions of the Bankrupt Act; and that the sale was made within three months before the filing of the creditors' petition, and that Schwab knew Schott & Feibish were insolvent, and were acting in contemplation of insolvency and bankruptcy proceedings, and to defeat the object of the Bankruptcy act; therefore complainants aver and charge that the sale was void and that the title of the goods became vested in the assignee.

It is then alleged that said Hudson, assignee, claims that by reason of such suits he is unable to proceed

with the settlement of the estate of said bankrupts; that the funds so received from the sale of the disputed goods must be kept by him until the question in reference to the title thereof shall be determined; that the suits so commenced against the marshal and others are intended to impede and delay the settlement of said estate; and "the question in regard to the fraud so attempted by said bankrupts, and by the said plaintiff in said suit, to wit, Samuel Schwab, cannot be determined without the aid of this court, and that said question cannot be litigated, tried or determined in the State court."

Complainant Hudson states and claims that said Schwab's suit in the Superior Court against said Matthews, as marshal, "is an obstruction to his duties in the settlement of said estate; that the same ought not to be allowed to be prosecuted in the State courts, where the complicated matters in relation to the alleged fraud in regard to the transfers of said goods cannot be fully determined, and that the suit so pending in the State courts in relation to the estate of said bankrupts are a direct obstacle to the speedy settlement and adjustment of the estate, and that the parties therein should be enjoined from the prosecution of said suits; and if said Samuel Schwab has any title or claim to said goods, he should litigate the same in the court of bankruptcy, where matters relating to said estate are pending. And said complainants also claim that the title of said goods so claimed by said Samuel Schwab involves the determination of the title of said Joseph L. Hudson, assignee of said Schott & Feibish in bankruptcy, under the Bankrupt Act. The State courts have no jurisdiction to try that question, and this court should determine the same."

Complainants pray that Schwab and his attorneys be enjoined from any farther prosecution of said suit in said Superior Court, or in any other court of the State, in regard to the goods so seized by said Matthews as marshal, and for any damages therefor, and that if Schwab claims any title, lien, or interest therein, he proceed to

establish the same in said United States Court, or in the District Court wherein said bankruptcy matters are pending; and that the sale, transfer or assignment by Schott & Feibish or others to Schwab be set aside and held for naught and decreed to be in violation of the Bankrupt Act, and that they be decreed to be a part of the assets of said bankrupts, and that said assignee's title thereto may be quieted and perfected.

In February, 1879, a supplemental bill was filed by said complainants in said United States court reciting the substance of the original bill and service of a restraining order upon the attorneys of Schwab, and that no appearance or service upon Schwab had been put in or made, and that a copy of the restraining order had been filed in said cause in said Superior Court, and the action of said Superior Court in setting aside an order granting a new trial and reinstating the judgment in said cause, wherein Schwab was plaintiff and Matthews *et al.* were defendants, and the facts and proceedings in relation thereto; that an execution had been issued upon said judgment from said Superior Court and placed in the hands of the sheriff of Wayne county, and a levy made thereunder upon the property of defendant Mabley, and a sale thereon about to take place. Complainants pray for an injunction to restrain said Schwab from collecting or in any manner attempting to collect said Superior Court judgment, and to restrain the sheriff and attorneys in the case from attempting or directing the enforcement of said judgment, and that the collection of said judgment be perpetually enjoined and be declared null and void, and that the goods for which the judgment was rendered be decreed to have been at the time of the seizure by the marshal, a part of the estate of the bankrupts.

July, 1879, Schwab filed his bill of complaint in the Superior Court in equity, setting forth the commencement of suit by him in said court against Matthews *et al.*, already referred to, and the various steps and proceedings

therein in detail; the commencement of said suit in equity in the United States Court and the proceedings thereunder; that under the proceedings in said cause defendants in this case, complainants in the case in the United States court, are obstructing the complainant Schwab in collecting his judgment; that unless permitted to collect said judgment complainant is without remedy, and he prays relief by injunction against defendants from interfering with complainant, his attorneys, or the said sheriff in the collection of said judgment; also from prosecuting or maintaining any suit at law or equity in any court, save the Superior Court or a court appellate thereto, involving the controversies referred to; from presenting or applying to any court or judge for process against his agents, attorneys or the sheriff to prevent the collection of said judgment. The usual order was made allowing an injunction to issue as prayed for.

A motion was made by defendants Mabley and Matthews for a dissolution of this injunction, and denied. Hudson appeared in said chancery cause in said Superior Court, but has asked no relief by motion or otherwise. He now comes into this court and by petition asks that a writ of prohibition may issue to said Superior Court to prohibit it from any farther proceedings in said chancery case, and from exercising jurisdiction over the subject matter thereof or parties thereto, and for such farther relief as justice may require.

Upon this petition an order was granted requiring the Judge of the Superior Court to show cause why a writ should not issue to prohibit any interference with said Hudson's prosecuting his said equity suit in the United States Court to determine his title to said goods, and the question now arises upon return made to that order.

From a careful examination and consideration of all the facts set forth in the original and supplemental bills filed in the United States Court, it is apparent that the principal aim and object sought, if not indeed the only one, was, in the first instance, to prevent the prosecution

of the case of *Schwab v. Matthews et al.*, pending in the Superior Court, and since judgment was rendered therein, the collection thereof. The question of quieting and determining the title of Hudson, as assignee, to the goods seized, or the avails thereof, is but secondary, and even to that extent of doubtful good faith. If the latter were the real object, there would be no necessity, or even propriety, in joining as parties complainants the defendants in the Superior Court case, some of whom were not even creditors of the bankrupts, or interested in the proceedings taken against them.

Be this as it may, however, and without adverting at length to the propriety or legality of seeking to set aside and having declared null and void in this way a valid judgment of the Superior Court, we cannot, from the showing made, see how the assignee in bankruptcy can be at all delayed or obstructed in the performance of his duties by the judgment rendered in the Superior Court, or the efforts of the plaintiff therein to collect the same from the defendants in that case. The assignee is not a party defendant in that case, and is neither personally nor as assignee bound by the judgment. The payment of that judgment by the defendants therein, or its enforced collection against them, cannot take away or affect injuriously the assets of the bankrupts in the hands of the assignee. There is no pretense made, in either the original or supplemental bill, that any person other than Schwab, as against the bankrupts or their assignee, claims the goods in dispute, or any part thereof or interest therein, and payment or satisfaction of the Superior Court judgment effectually settles all farther claim by Schwab to the goods or avails thereof, thus leaving the proceeds thereof unquestioned in the hands of the assignee to be distributed amongst the creditors of the bankrupts. How, therefore, the assignee or those he represents can be injuriously affected by the collection of that judgment, is not apparent. True, those who indemnified the marshal, and those against whom the

judgment was rendered, may be affected, but we do not understand it to be the duty of the assignee to protect them. Certainly the bills filed do not proceed upon the theory of affording protection to those creditors who indemnified the marshal. The indemnifying creditors are not made parties in the equity cases, nor is relief asked in their behalf as such. The marshal and those who were joined with him as defendants in the case in the Superior Court had an opportunity to be there heard. If they submitted themselves to the jurisdiction of that court, and permitted a judgment to be rendered against them, we do not consider or understand it to be one of the duties of the assignee in bankruptcy to relieve them from the consequences thereof. Should the assignee proceed, and the court determine and decree that the title to the goods claimed by Schwab was in the assignee, and that they were a part of the assets of the bankrupts, how would the judgment rendered in the Superior Court in such a case affect the assignee? Would he thereupon have the right to apply for relief to prevent its collection against the defendants therein, and upon what grounds? The decree would be a direction and protection to the assignee in the distribution of the proceeds of the goods, but would still leave the judgment of the Superior Court valid and binding as against the parties defendants therein.

We do not consider worthy of any very extended examination the right of the defendants in the Superior Court case to proceed in this way, either as sole complainants or joined with the assignee, to have set aside and declared void the judgment of a court of record, rendered against them in a cause of which the subject-matter was clearly within the jurisdiction of the court, and they were properly brought in, appeared and given an opportunity to defend. The complainants, who were defendants in that case, have not sought either the proper forum or remedy for that purpose, nor have they made any case entitling them to any such relief. The judgment rendered against them must be held conclusive,

and they cannot be allowed to revive the controversy in another court and cause for the purpose of raising the same questions then in issue and passed upon. Cooley's Const. Lim., 46, 47. Certainly this court should not lend its assistance, in the exercise of a discretionary power, to the aid of those defendants to proceed in another tribunal, to have declared null and void a judgment which this court has already declared valid, and affirmed. Nor should we aid in this way a stranger to that case to prevent its collection, where his rights cannot be prejudicially affected thereby.

The writ of prohibition is a remedy provided by the common law to prevent the encroachment of jurisdiction. It is a proper remedy in cases where the court exceeds the bounds of its jurisdiction, or takes cognizance of matters not arising within its jurisdiction. It can only be interposed in a clear case of excess of jurisdiction, and may lie to a part and not to the whole. It simply goes to the excess of jurisdiction, and the application for the writ may be made by either the plaintiff or the defendant in the case, or if more than one, by either where the excess of jurisdiction affects him. It can only be resorted to where other remedies are ineffectual to meet the exigencies of the case. It is a preventive rather than a remedial process, and cannot, therefore, take the place of a writ of error or other mode of review. It must also appear that the person applying for the writ has made application in vain for relief to the court against which the writ is asked. The writ is not granted as a matter of strict right, but rests in a sound judicial discretion, to be granted or not according to the peculiar circumstances of each particular case when presented. 8 Bac. Ab., tit. "Prohibition;" 3 Bl. Com., 111; *Appo v. People*, 20 N. Y., 531; *People v. Seward*, 7 Wend., 518; *Arnold v. Shields*, 5 Dana, 21; *Washburn v. Phillips*, 2 Met., 299; *Ex parte Hamilton*, 51 Ala., 62; *Blackburn Ex parte*, 5 Pike, 22; High Ext. Rem., §§ 773, 765.

In the bill of complaint filed in the Superior Court, Schwab, the complainant therein, prays that the defendants be restrained and enjoined "B—From prosecuting or maintaining any suit at law or equity in any court save the Superior Court of Detroit, or a court appellate thereto, involving the controversy aforesaid." In so far as this asks and the injunction issued thereon enjoins the relator from proceeding in the United States court to quiet or determine the title to the goods turned over to him by the marshal, if it does, we are of opinion the relator would be entitled to relief were it not that he has made no application whatever to the court below or the judge thereof for relief. A motion was made by some of the other defendants for a dissolution of the injunction, a relief which they clearly were not entitled to. Had the relator made a proper application for relief to the extent mentioned, we must assume it would have been granted. In so far as relator or his co-complainants through him, seek to have the judgment of the Superior court set aside or declared null and void, or seek to interfere with the due and proper collection thereof by the plaintiff and his attorneys, and ask this court to assist them therein by issuing a writ of prohibition as prayed for, we must decline. No application having been made by relator to the Superior Court for relief, the writ must be denied with costs against relator.

The other Justices concurred.

EX REL. HENRY H. DENNIS v. THE CIRCUIT JUDGE FOR KENT COUNTY.

Jurisdiction of circuit court over a special administrator to protect the rights of a solicitor in a fund on which he had a lien—Recalling a fund withdrawn from court on an ex parte application—Notice.

A case in which an administrator is complainant may still be open for the allowance of orders necessary to the protection of a fund, even though the administrator has been relieved from duty.

Notice of an application to withdraw a fund from court should be given to an attorney who has a lien upon it.

An administratrix withdrew from the custody of the court a fund belonging to the estate and on the same day was relieved, by her own request, from her position as administratrix. *It seems* that the court still retains power to recall the fund on a satisfactory showing that it had been imposed on, and that the fund had been withdrawn in fraud of the solicitor of the estate, who had a lien on it.

Where the circuit court had cognizance of a case in which an administratrix was complainant, and the administratrix procured her discharge, and the probate court appointed in her place a special administrator, who filed a bill to enable him to enforce the decree granted in the case, and thus acquired a standing in the court as an intervening litigant, it was *held* that he was a *quasi* party to the case and sufficiently within the authority of the court to be subject to an order recalling into the custody of the court a portion of a fund which the administratrix had improperly withdrawn and paid over to him.

MANDAMUS to vacate an order directing a special administrator to pay into the circuit court money withdrawn therefrom by his predecessor under an order improvidently granted. Submitted October 28. Decided November 29.

Champlin & More for the writ.

Norris & Uhl against.

GRAVES, J. At the last April term of this court the decree of the circuit court for the county of Kent in chancery in the case of *Heath v. Waters* was affirmed (40 Mich., 457), and our determination being certified to the court below, the defendant Waters satisfied the decree so far as it related to him by paying into court $22,508.27; but as against the defendant Remington it remained unaffected and subject to be enforced. Subsequently, and on May 3d, Mrs. Heath, in accordance with her own request, was discharged by the probate court from the

place of administratrix, and the relator was appointed special administrator in her stead. And on the same day of these proceedings she applied to the circuit court to pay to her thereout the entire sum of $22,508.27 which Waters had paid in.

This application was *ex parte* and made without the knowledge of Mr. Rogers, who had been one of her solicitors and counsel during all the later years of the litigation, and was still holding the same relation. The court entertained the application, and on the same day and without requiring notice to Rogers, ordered payment to Mrs. Heath of the whole sum, less $1000, and the fund was paid out to her accordingly.

It is not entirely clear from the papers whether the order and payment under it did or did not precede her retirement from the place of administratrix and the substitution of relator. But it is admitted that she passed to relator, on the same day, $6804.83 of assets of the estate, and that he still holds the same, less $1552.72, and that no debts exist against the estate beyond such as have arisen since the testator's death, and that the estate is solvent. It is not an unfair inference, at least as against the relator, that the sum he so received from Mrs. Heath, and the most of which he retains, is a part of the same fund which was paid to her out of court.

May 15th, on Rogers' application, the circuit court ordered that the sum of $1000 still in court should be paid to him, and it was done.

May 26th the probate court appointed relator to be administrator *de bonis non* with the will annexed, and he at once qualified and assumed the trust, and thereafter, and on June 17th, he filed his bill to revive the case for prosecution in his character of administrator and to obtain a complete execution of the original decree. That proceeding is still pending and has not yet been carried to a decree.

Subsequent to the filing of that bill, and in September, Rogers filed a long petition setting up that he held a

solicitor's lien to the amount of $5000 and upwards on the fund recovered against Waters and paid into court, and alleging that the order for paying the money to Mrs. Heath was obtained by unwarranted practice, and by imposition on the court and in fraud of his rights, and praying that the order might be set aside, so far as needful for his protection, and that $4000 of the fund might be recalled, and for other relief. The petition represented that relator had been appointed general administrator, and was holding between six and seven thousand dollars of the assets, and asked that he might be substituted in the place of Mrs. Heath, as complainant. It is unnecessary to repeat or notice the elaborate details of the petition.

The relator made answer to this petition and stated several objections to the proceeding, of which those deemed material are: *first*, that in consequence of the shift of administration, the case was not on foot for the passage of an order; and *second*, that he was not yet amenable to the authority of the court.

September 22d the court passed on this controversy and ordered relator to pay into court, within forty days, the sum of $2000 of the fund in question. He now asks for a mandamus to compel the court below to vacate this last order, and the final grounds of the application are as previously mentioned.

Besides the circumstances before noticed, the papers show that proceedings are pending in the court of probate upon an accounting by Mrs. Heath, and which proceedings cover the transactions between herself and Rogers, and that he has filed an account there against her of more than $6000. It is also stated that relator has taken steps for an appeal against the order complained of. Whatever importance may belong to these matters, or to the question whether Rogers has a subsisting claim, and if so, to what amount, and against whom, or to the question as to the mode and place of investigation, the present proceeding does not reach them.

The inquiry now is, as before suggested, *first*, whether by reason of Mrs. Heath's retirement from the place of special administratrix, in which character she was complainant, the court was disabled from making the order; and if not, then, *second*, whether in the state of things existing, the relator was subject to the authority of the court for the purpose of the order.

As to the first question. The general rule is no doubt that when a sole complainant is an administrator, and the representative character is determined, the cause is wholly suspended and is not open for the allowance of orders, but it is not universal.

There are many exceptions founded on reason and justice, and among them are reckoned such orders as may be necessary for the protection of a fund. 2 Dan. Ch. Pr., 1542 et seq. and notes; Barb. Ch. Pr. (2d ed.), b. 3, ch. 8, p. 677 et seq. and cases; *Cazet v. Hubbell*, 86 N. Y., 677; *Hogan v. Hoyt*, 37 N. Y., 300; *Hale v. Clauson*, 60 N. Y. 339.

In making the order objected to, the court based its action on the showing that in getting the fund out of court, and in bringing about the change of administration on the same day, and without notice to Rogers, a fraud was committed against him, and an imposition practiced on the court. That he was entitled to notice of the application, as the circumstances now appear, we have no doubt, and after being brought to suffer the withdrawal of the fund on Mrs. Heath's summary request, we think the court, in view of the whole facts brought to its attention, had power, notwithstanding such change of administration, to take steps to bring back the fund, or at least the portion of it attempted to be recalled.

The determination went no further than to recall $2000 of the amount to the custody of the law, from whence it had been drawn irregularly, to say the least. There was no offer to award it to any party or claimant.

As to the second question. It would not be profitable to refine upon the point of the precise position the relator held relative to the cause, and with reference to his power to deal with it at the time Rogers petitioned for a recall of the money.

The proceeding called in question is not one which was in the direct line of controversy in the suit. It was a collateral incident of the litigation, and a question between the estate as the real party and the solicitor of the estate, and the true inquiry is whether the relator was so situated in reference to the estate and the cause and the fund that the court could require him to return to its custody $2000 of that fund under the application made by the solicitor of the estate. The relator had been appointed administrator in place of Mrs. Heath, and had accepted the place and assumed the trust. He had received and still held more than $4000 of the fund which had been taken out of court. He had filed a bill to be allowed in his character of administrator to enforce the very decree under which the fund had been paid in; and he was, therefore, before the court and under its authority as an intervening litigant. He had an established relation to the cause in court, and to the state and preservation of the subject of the cause. Although not yet a party in a sense to permit him to enforce the decree against the defendant Remington, he was sufficiently connected with the cause, and had such standing in court as to be deemed *quasi* a party, and to be called by the court, on the solicitor's petition, to restore to the keeping of the law what, in his character of representative of the estate, he still held of the fund which had been improperly withdrawn. No case standing on similar facts has been noticed, but reason and analogy favor this result. *Ex parte Bailey and Hope; In re Barnard*, 14 Beav., 18: 7 E. L. & E., 203; *Walworth v. Holt*, 6 E. L. & E., 50; *Francis v. Francis*, 2 DeG., M. & G., 73: 15 E. L. & E., 47; *Ellison's Estate*, 35 E. L.

& E., 553; *Wilton v. Hill*, 2 DeG., M. & G., 807: 21 E. L. & E., 602; *Wharam v. Broughton*, 1 Ves. Sr., 180; *Hale v. Clauson*, supra.

The motion must be denied.

The other Justices concurred.

42 255
89 76
42 255
99 623
42 255
123 235

JAMES STUART v. THE PEOPLE.

Waiver of examination on criminal charge—Alibi.

One who is arrested on a criminal warrant can either insist upon or waive examination, and if he waives it, may be held for trial on the showing upon which the warrant for arrest was issued.

Where a person under arrest waives a preliminary examination, the magistrate may bind him over for trial for the offense charged in the complaint and warrant, and the prosecuting attorney can file an information charging him with any offense covered by the warrant and sustained by the evidence on which it was issued.

If a person is arrested on a warrant charging an offense including lower grades, he should not waive examination if he wishes the examining magistrate to specifically designate the offense committed.

Where persons held for trial for a joint offense were arrested on separate complaints and warrants, they may still be joined in the information and jointly tried unless they claim separate trials under Comp. L., § 7960.

An information as for a joint offense may be filed even though it does not appear from the return of the examining magistrate that it was committed jointly; but the burden of proving that it was jointly committed is on the prosecution.

Proving an *alibi* does not impose the burden of showing that the accused was absent at the very time at which the evidence for the prosecution tends to show the offense was committed, nor need it absolutely preclude the possibility of his being at both places.

In a prosecution for burglary, *it seems* that the mere possession of articles stolen is not *prima facie* evidence of guilt of the burglary.

Error to Superior Court of Grand Rapids. Submitted October 29. Decided November 29.

BURGLARY. Plaintiff in error was found guilty below.

Fred A. Maynard for plaintiff in error. The possession of property recently stolen is only evidence against the accused which must be considered by the jury in connection with other evidence, 2 Bish. Cr. Pro., § 740; *Reg. v. Langmead*, 9 Cox Crim. Cas., 465; *People v. Walker*, 38 Mich., 156; *Gablick v. People*, 40 Mich., 292; *Stover v. People*, 56 N. Y., 315; *State v. Hodge*, 50 N. H., 510; *People v. Chambers*, 18 Cal., 382; *People v. Rodundo*, 44 Cal., 538; *People v. Getty*, 49 Cal., 581; *People v. Ah Ki*, 20 Cal., 177; *Conkwright v. People*, 35 Ill., 204; *State v. Hogard*, 12 Minn., 293; *Yates v. State*, 37 Tex., 202; *State v. Williams*, 2 Jones (N. C.), 194; *State v. Shaw*, 4 id., 440; *State v. Reid*, 20 Ia., 419; 1 Hawley's Crim. Cas., 574; in setting up an *alibi* the defendant need not establish it beyond a reasonable doubt if there is sufficient evidence to cause a reasonable doubt, 2 Bish. Crim. Pro., [2d ed.], § 16; *French v. State*, 12 Ind., 670; *Adams v. State*, 42 Ind., 373; *Binns v. State*, 46 Ind., 311., *West v. State*, 48 Ind., 483; *Kaufman v. State*, 49 Ind., 248; *Line v. State*, 51 Ind., 173; *Toler v. State*, 16 Ohio St., 583; *Miller v. People*, 39 Ill., 458; *Fife v. Com.*, 5 Casey, 429; a prosecution for distinct offenses coupled in one count and subject to different penalties should be confined to a distinct act, *People v. Jenness*, 5 Mich., 305; *People v. Clark*, 33 Mich., 112; *People v. Schweitzer*, 23 Mich., 501.

Attorney General *Otto Kirchner* for the People.

MARSTON, J. The respondent was charged, tried, convicted and sentenced. Several errors have been assigned. Each will be considered, so far as deemed important.

The respondent was arrested upon a warrant issued upon a complaint sufficient in form and substance, waived

examination, and was thereupon held for trial. A motion was made to quash the information and denied. This is alleged as error.

It was insisted upon argument that even although the respondent waived an examination before the examining magistrate, yet that evidence must have been introduced by the People in order that the magistrate might find that a crime had been committed and that there was probable cause to believe that the respondent was guilty thereof; and where more than one offense was charged in the complaint and warrant, that the magistrate might be able to judicially determine from such evidence, for which offense the party might be committed and put on trial, and in support of these positions we are cited to Comp. L., § 7855 and *Yaner v. People*, 34 Mich., 286.

The section referred to requires the magistrate before whom any person is brought upon a charge of having committed an offense not cognizable by a justice, to proceed as soon as may be, to examine the complainant and the witnesses in support of the prosecution, in regard to the offense charged. A compliance with this section the accused has a clear right to insist upon, and he just as clearly has the right to waive it, thereby consenting that he be held for trial for the offense charged against him. The statute clearly recognizes this right, and authorizes an information to be filed where such examination has been waived. § 7944. And where the accused waives his right to such examination, no witnesses need be produced, sworn or examined on the part of the prosecution. The magistrate is not authorized to issue a warrant except upon complaint made that a crime has been committed, and after an examination by him of the complainant on oath, and any witnesses that may be produced by him. If it appears from such examination that a criminal offense has been committed, then the warrant is issued. The showing thus made for the issue of a warrant is sufficient evidence upon which the magis-

trate may hold the person charged in the complaint and warrant, if when brought before him he waives the right given him by statute to have an examination of the witnesses in his presence. Such we believe has been the well settled practice, acquiesced in under this statute. There is nothing in the case of *Yaner v. People* indicating even a different practice. In that case there was an examination of witnesses under the statute in presence of the accused. In such a case the magistrate must, from the evidence then introduced, unless after a part is given, further examination is waived, determine what offense has been committed and whether there is probable cause to believe the person accused guilty thereof. Where such examination is waived, the magistrate binds the party over for trial for the offense charged in the complaint and warrant, and the prosecuting attorney may file an information charging any offense contained in the warrant which in his opinion the evidence will sustain. If the accused desires that the examining magistrate shall more specifically designate the offense committed, where the one charged in the warrant includes others of less degree, then he must not waive examination as in this case.

It appeared that the complaint and warrant under which the respondent was arrested and bound over charged him alone with the commission of the offense. Three others had been complained of, examined and held for the same offense. The information filed charged the four jointly. Error is alleged that respondent having been arrested and held for trial on a separate complaint and warrant, he could not be charged jointly with others in the information.

Where parties have been arrested upon separate complaints and warrants, and held for trial for a joint offense, we are of opinion that they may be jointly charged in the information, and so tried, unless they claim separate trials under the statute. That the offense was by them committed jointly, need not necessarily appear from

the returns of the examining magistrate, in order to give the prosecuting officer the right to file a joint information. The proof upon the trial must show the offense to have been jointly committed, and the burden of so proving would be on the People. Criminal prosecutions for offenses not cognizable by a justice may be commenced and carried on before the examining magistrate by private persons, and without the consent or even knowledge of the prosecuting attorney. They cannot, by a severance in the first instance, thus bind the public prosecutor to file separate informations. If parties jointly concerned in the commission of a criminal offense, when tried therefor upon separate informations, could be called as witnesses for the accused, in the particular case on trial, as urged by counsel—a point we need not determine—it would be a very strong reason why the prosecuting officer should have the right to join them in the same information, even where they had been arrested and examined separately. Many cases must arise where all the parties implicated in the commission of a criminal offense, may for the first time appear on the examination of those first charged and undergoing examination. In such case it should not be necessary to discharge those arrested, examined or bound over, and commence again against all, in order that they could be put on trial jointly, so all may be jointly complained of and charged in the warrant, but because not arrested in time, may be examined separately; yet no good reason appears why in such cases the trials should be separate.

No one can be informed against and put upon trial until it has been judicially determined that a crime has been committed, and that there is probable cause to believe him guilty thereof, and whether this has been done upon a joint or separate complaint, the right of the accused is fully protected. He is not put upon trial for another or different offense than the one upon which he was arrested and examined, or waived examination. He is put upon trial for the same offense, with

others who, in like manner, it has been determined, jointly participated with him in the commission of the offense, and if the evidence introduced on the trial, shows they acted together, they have been deprived of no legal right, and have therefore no just cause of complaint.

Evidence was introduced tending to show that the respondent was not guilty of the offense charged, because absent from the place at the time it was committed. The charge of the court upon this question appears in a note hereto.[1] The instruction that proof of an *alibi* "must cover the time that the offense is shown to have

[1] "Now the defense in this case consists in what is termed in law an *alibi;* that is, it is claimed on the part of the respondent that he was not there at the time of the commission of this offense and had nothing to do with it, and he introduces what is termed in law evidence tending to show an *alibi;* the prisoner relies upon evidence of an *alibi;* that is, to show that he was at the time at another place, at the time that this crime was committed. That is the defense, and this defense, when satisfactorily made out, necessarily overturns the strongest circumstantial evidence, and it is sometimes the only available defense to an honest, innocent man; but in every case where a defense of *alibi* is resorted to, it should be closely scrutinized. It is a defense which may be contrived by subornation of perjury, and by perjury. The proof, therefore, to sustain it, should be subjected to rigid scrutiny, because, while attempting to contradict or rebut the evidence of the fact sustaining the charge, it attempts to prove affirmatively another fact wholly inconsistent with it. And this defense is equally available, if satisfactorily established, to avoid the force of positive as of circumstantial evidence.

If there be any conflict of evidence then tending to support, or tending in some degree to overthrow the other, it is for the jury to decide where the truth lies. The prisoner has undertaken to prove that he could not have been where this offense was committed, or the means were used to effect it. Your attention is directed to the time at which the witnesses for the defense testify that they saw the prisoner, and to the particular circumstances in detail, keeping in mind the other evidence in the case showing the hour in the night that the offense was committed.

Now I call your attention particularly to the instruction that I gave you. When the defense raises the proof of an *alibi*, it must cover the time that the offense is shown to have been committed, so as to preclude the possibility of the prisoner's presence at the place of the burglary. Although the prisoner makes no admission of guilt by setting up the *alibi*, yet clearly the value of the defense consists in his showing that he was absent from the place where the deed was done, and at the very time that the evidence of the People tends to fix its commission upon him. If, however, it be possible that he could have been at both places, the proof of *alibi* is valueless. With these instructions, gentlemen, the court will now proceed to give you such requests of counsel as the court has thought proper and legal to give."

been committed, *so as to preclude the possibility of the prisoner's presence at the place of the burglary,*" * * and that "the value of the defense consists in his showing that he was absent from the place where the deed was done, and *at the very time* that the evidence of the People tend to fix its commission upon him. If, however, *it be possible that he could have been at both places, the proof of alibi is valueless,*" was casting a burden upon the accused much heavier than the law would justify or than it required. No such strict proof is required, and to so hold would render the defense, no matter how honestly made, in most cases valueless. For this error the judgment must be reversed and a new trial ordered. *Sullivan v. People*, 31 Mich., 1.

Exceptions were taken to that part of the charge wherein the court instructed the jury that if they should "find that the burglary was committed, and there were articles stolen from the store at the time of the commission, and these articles were found upon the person of the respondent, or he assumed the control over them, then it raises the presumption that the respondent not only stole the articles but committed the burglary."

This instruction, if standing alone, could not be sustained. Possession alone, unsupported by other facts indicative of guilt, would not, we think, be *prima facie* evidence that the respondent committed the burglary. When taken and considered with other evidence in the case it might be sufficient to satisfy the jury. It is not quite clear but that, taking the entire charge relating to this question, the error was cured. We need not, however, consider this question at length, as the objectionable portion of the charge above quoted will not be likely to be given again upon a new trial.

For the error already pointed out the judgment will be reversed and the respondent remanded to the custody of the sheriff of Kent county, for farther proceedings.

The other Justices concurred.

HENRY MAILLET v. PEOPLE.

Rape—Evidence of compulsion—Disclosures—Error to be affirmatively shown in criminal cases—Unwarranted requests for instructions.

In a prosecution for rape the complaining witness may show that the accused is her father and a man of great strength, and had been abusive to his family and often beaten his wife, and that at the time of the outrage he was in liquor and she in great fear.

In a prosecution for rape, a question to the complaining witness as to whether she had told the priest or any one else of the outrage, is not objectionable.

Whether it would be error to allow the prosecutrix on a charge of rape to state what she had told to others about the affair when she first disclosed it—*Q.*

Error must be affirmatively made out in criminal as well as civil cases; it cannot be based on a misapplication of the judge's remarks that would exclude evidence that they were not intended to affect, particularly if the ambiguity is the fault of counsel in not making their offer of proof explicit.

Where respondent's requests to charge are inconsistent with the theory of the prosecution and the evidence which supports it, and are based on a different hypothesis unsupported by evidence, they are properly refused.

In a rape case an instruction that the time at which the victim made complaint of the outrage is a relevant circumstance "as tending to prove the truth of the charge, for the reason that it is natural for the woman ravished to make complaint as soon as possible," is not open to the objection that it makes the time of complaint a circumstance to corroborate the accusation but not to weigh against it.

Error to Manistee. Submitted Oct. 29. Decided Nov. 29.

RAPE. Respondent was convicted below.

Morris & Nelson for plaintiff in error. The prosecutrix for rape may be asked whether she made complaint of the outrage, and when and to whom, but not what she had stated in making it, *Phillips v. State*, 9 Humph., 246; *People v. McGee*, 1 Den., 18; *Reg. v. Megson*, 9 C. & P., 420; *Rex v. Clarke*, 2 Stark., 241; *Baccio v. People*,

41 N. Y., 265; *Pefferling v. State*, 40 Tex., 486; *People v. Graham*, 21 Cal., 261; *Lacy v. State*, 45 Ala., 80; *Thompson v. State*, 38 Ind., 39; *State v. Richards*, 33 Ia., 420; *State v. Shettleworth*, 18 Minn., 209; 3 Greenl. Ev., § 213; 1 Russ. Crimes, 689, n; 2 Archb. Cr. Pr., 1004, n; Rosc. Crim. Ev. (7th Am. ed.),25.

Louis E. Morris, Prosecuting Attorney for Manistee county, for the People. A prosecutrix for rape can testify to whom she made complaint of the outrage, *McCombs v. State*, 8 Ohio St., 643; the rule that the particulars of her complaint cannot be shown on her direct examination is condemned in *Reg. v. Walker*, 2 Mood. & R., 212; and is overruled by *Laughlin v. State*, 18 Ohio 99; *Johnson v. State*, 17 Ohio, 593; *State v. Dewolf*, 8 Conn., 93; *State v. Peter*, 14 La. Ann., 521.

GRAVES, J. The jury found the plaintiff in error guilty of rape upon Ellen Maillet, a girl between fifteen and sixteen years of age, and he was sentenced by the circuit judge to imprisonment for a term of years. He complains of rulings on his trial.

The girl was allowed to testify that the prisoner was her father; that he was a man of great strength, had been abusive to his family, and had many times beaten her mother; that he was in liquor when he outraged her, and that she was frightened and in great fear of him. Many particulars were given.

The admission of this evidence requires no discussion. The principles justifying such evidence have been fully explained and illustrated in this court. It was proper to lay before the jury the natural and actual relations between the accused and the prosecutrix, and also such other facts as bore fairly upon the accusation. Without such aids the charge could not be intelligently investigated. They were necessary clues to truth. *Strang v. People*, 24 Mich., 1; *People v. Lynch*, 29 Mich., 274, 288; *Turner v. People*, 33 Mich., 363; *Rogers v. People*, 34 Mich., 345.

The prosecutrix was asked if she told the priest or any one else about the affair, and if so, who it was she told, and what she said; and this was objected to as irrelevant and immaterial. In overruling the objection the judge remarked that it was competent to show when she first made complaint, and to whom and what she said. An exception having been taken an argument is now made which is not authorized by the record.

It is assumed that on this ruling being made, the witness proceeded to repeat before the jury the details embraced in her alleged disclosure to the priest and her mother; but this is not so. And whether such a repetition, had it been made in this case, would have justified an exception (*People v. Lynch*, supra, 280, top; *Brown v. People*, 36 Mich., 203), a point upon which we express no opinion, it is quite enough that her answer, as given, went no further than to convey that she informed the priest, and at a later time and after an offer to repeat the injury, her mother also. This evidence was not objected to; neither was it worthy of objection.

During her cross-examination the prosecutrix testified that on her leaving the priest's on the occasion when he told her to make a complaint, she found her mother in front of the lumberman's store waiting to find out what the priest wished in sending for her. The judge interposed by saying that he thought this was entirely immaterial. The prisoner's counsel claimed that it bore on the girl's credibility, and in support of that view added that he intended to prove that the girl did not make the accusation on account of anything the priest had told her, "but on account of what she and her mother made up before." The circuit judge repeated his opinion and the defense took an exception.

After an attentive examination of the record we are not able to construe this ruling as intended to apply to anything beyond the statement which first prompted the judge to interfere: and while we think that that statement might with great propriety have been allowed

to pass without comment, we are not able to hold that the opinion expressed by the judge upon it was erroneous. The defense made no formal offer of evidence, and we infer that the circuit judge did not understand that one was involved in the remark of counsel. The object of attention was the statement of the girl about her mother's waiting to find out what the priest wanted. This it was which called out the interchange of expressions, and the remark of the counsel concerning his purpose to prove a conspiracy was designed to present a reason in favor of the materiality of the girl's statement, which was in question, and was not shaped or apparently meant as a tender of evidence.

Hence, after a careful scrutiny of the record, we cannot say the circuit judge decided, or was understood as deciding, that it would not be competent for the defense to show that the prosecution was the result of a conspiracy between the mother and daughter to make the accusation.

It is no less necessary in criminal than in civil cases that error be made out affirmatively, and it cannot be shown by forcing the scope and application of observations at the trial concerning evidence, where the complaining party is properly responsible for whatever lack of clearness may be discovered. If it was the purpose of the prisoner's counsel to tender evidence to show a conspiracy, it was due to the judge and to the administration of justice to do it in such terms and under such circumstances that with proper attention to the proceedings there could be no reasonable excuse for misapprehension at the trial or any serious question of construction of the record.

The requests on behalf of the accused were properly denied. They exclude an indispensable consideration. The prosecution maintained that owing to the relations of the accused to the prosecutrix, and his ways of violence, and the fact that he was in liquor, together with the other circumstances put in evidence, her ability to offer much physical resistance was paralyzed by terror,

and that she was consequently overcome by the combined operation of the fear he excited and the actual violence he employed. And on this theory the case was strong, and it was the only theory on which a conviction could be fairly urged. These requests, however, ignored it and desired the case to be submitted on a hypothesis which was foreign to it. The giving the requests would have been tantamount to a direction to disregard the case made by the People, and to acquit the prisoner. The ruling in *Strang v. People*, supra, directly applies.

In the course of the charge the judge told the jury that the time of making complaint of such an injury was a circumstance considered relevant "as tending to prove the truth of the charge, for the reason that it is natural for the woman ravished to make complaint as soon as possible thereafter." Complaint is made of this passage as misleading. It is objected that the expression used makes the time of complaint a circumstance to corroborate the charge, but never to militate against it.

This criticism will hardly bear examination. The concluding part of the proposition refutes the construction. In saying that an early complaint would be natural in a true case, the judge said substantially that delay would be an unfavorable circumstance. It would be an imputation on the good sense of the jury to suppose they may have understood the charge as meaning that the time of complaint was of no importance except as evidence in favor of the truth of the accusation. As every person capable of reasoning must see at once the absurdity of such a notion, the case would have to be a strong one to warrant belief that a jury had been led to accept and act upon it.

We find nothing further among the points insisted on worthy of mention. The whole case is really covered by principles laid down in former decisions.

As no error is shown the judgment must be affirmed.

The other Justices concurred.

THE PEOPLE v. JOHN L. KNAPP.

42 267
94 640
42 267
142 581
e142 5582
f142 5584

Adultery—Cross-examination of particeps criminis and of defendant—Presence of officer in jury-room.

Where the *particeps criminis* in adultery testified to the offense, and on cross-examination denied having had a certain obscene conversation with a man named, or having criminal intercourse with another specified person, it was *held* that though the questions might be asked her, other witnesses could not be called to prove her denial false.

A prosecution for adultery is not like a case of seduction, in which the previous chastity of the woman is necessarily in issue.

In a prosecution for adultery the defendant was asked on cross-examination whether his wife had not made a complaint against the other party for the alleged offense, and he replied that he had heard so. *Held* that this answer should not have been received in evidence.

Comp. L., § 7693, which forbids any prosecution for adultery except on complaint of the husband or wife, contemplates that the wife may proceed without her husband's consent.

A verdict in a criminal case may be set aside and a new trial granted if the officer who attended the jury remained in the jury-room during their deliberations.

It is against public policy to allow the deliberations of a *petit* jury to be reported.

Exceptions from Lenawee. Submitted October 29. Decided November 29.

ADULTERY. Respondent was convicted.

Attorney General *Otto Kirchner* for the People. The answer of a witness to a collateral inquiry, is conclusive, 1 Greenl. Ev., § 449; a jury may deliberate in open court or retire for consultation (3 Chitty's Prac., 916; 1 Archb. Q. B. Prac., 197), and their separation after agreement and before the verdict is rendered, does not invalidate it, *Brown v. M'Connel*, 1 Bibb (Ky.), 265; *Cook v. Walters*, 4 Ia., 72; *Horton v. Horton*, 2 Cow., 589; *Sartor v. McJunkin*, 8 Rich. (S. C.), 455; *Stancell v. Kenan*, 32 Ga., 56; nor does the fact that a third person con-

versed with a juror, *Ellis v. Ponton*, 32 Tex., 434; nor sending a bailiff into the jury-room after a paper, *Spencer v. Trafford*, 42 Md., 1, 21; and the party complaining of misconduct in keeping the jury must show that he was injured, *Medler v. State*, 26 Ind., 171; and the objection is not reviewable on error, *Brister v. State*, 26 Ala., 107.

Millard & Bean for defendant. The presence of an officer in the jury-room is a restraint on the jury's deliberations and is ground for a new trial, *State v. Snyder*, 20 Kan., 306.

COOLEY, J. I. The prosecution in this case was for adultery. Harriet Ashdown, the alleged *particeps criminis*, was the only witness testifying to the offense, and she gave positive evidence that it was committed. On cross-examination she was asked whether she had not had a certain obscene conversation with a man named, and whether she had not had criminal intercourse with another person named; and when she denied both, witnesses were called to prove the denial false. The circuit court rejected the evidence, and this rejection presents the first question for our consideration.

The defense had a right to put the questions to Mrs. Ashdown, but when she answered in the negative they could not push the investigation further. The questions related to matters foreign to the issue then being tried, and the witness could not be supposed to come prepared with evidence to disprove such charges. But if the witness were prepared, it would not be conducive to justice to permit the investigation to be gone into. It would necessarily lead the attention of the jury to some extent away from the main controversy, and they would lose sight of the main issue while trying those purely collateral. *Dunn v. Dunn*, 11 Mich., 284; *Wilbur v. Flood*, 16 Mich., 40, 44. The case is not like that of seduction, in which the chastity of the woman previous to the alleged seduction is necessarily in issue. *People v. Clark*, 33 Mich., 113.

II. The defendant having made his statement to the jury, the prosecution was permitted to ask him, on cross-examination, whether his wife had not made a complaint against Mrs. Ashdown for the alleged adultery. He replied under objection, that he had heard so; and this reply was allowed to go to the jury as evidence. If this was admissible, it must be on the assumption that his wife would not prosecute unless he assented, and that his assent would be an admission of his guilt. There is no legal basis for such an assumption. The wife might very properly and justly have instituted prosecution on Mrs. Ashdown's confession, whether her husband was consenting or protesting, and whether she believed the confession or disbelieved it; and the statute which allows to the injured wife and husband the exclusive privilege of prosecuting the guilty parties (Comp. L., § 7693) contemplates that the injured wife will proceed irrespective of the husband's consent, and in spite of him. The evidence should therefore not have been received. If it influenced the jury in any way it must have been injurious to defendant.

III. When the jury retired to consider of their verdict, an officer accompanied them and remained in the room during their deliberations. The attention of the court was called to the fact on a motion for a new trial, but on its being made to appear that the officer did not converse with the jury in their room, the court denied the motion. This was on the assumption that under the circumstances the defendant could not have been injured by the officer's presence in the room.

It is not claimed that the officer can with propriety be allowed to be within hearing when the jury are deliberating. Whether he does or does not converse with them, his presence to some extent must operate as a restraint upon their proper freedom of action and expression. When the jury retire from the presence of the court, it is in order that they may have opportunity for private and confidential discussion, and the necessity for this is assumed in every

case, and the jury sent out as of course, where they do not notify the court that it is not needful. The presence of a single other person in the room is an intrusion upon this privacy and confidence, and tends to defeat the purpose for which they are sent out. And if one may be present, why not several? Why may not the officer bring in his friends to listen to what must often be interesting discussions, and then defend his conduct on proof that they did nothing but listen?

But the circumstances of particular cases may make it specially mischievous. In their private deliberations the jury are likely to have occasion to comment with freedom upon the conduct and motives of parties and witnesses, and to express views and beliefs that they could not express publicly without making bitter enemies. Now the law provides no process for ascertaining whether the officer is indifferent and without prejudice or favor as between the parties; and as it is admitted he has no business in the room, it may turn out that he goes there because of his bias, and in order that he may report to a friendly party what may have been said to his prejudice, or that he may protect him against unfavorable comment through the unwillingness of jurors to criticise freely the conduct and motives of one person in the presence of another who is his known friend. Or the officer may be present with a similar purpose to protect a witness whose testimony was likely to be criticised and condemned by some of the jurors. Suppose some member of the officer's family had given important evidence in the case; what reason can there be for expecting that this evidence would be freely canvassed and carefully considered in his presence? But the case may touch him still more nearly: in criminal cases especially, officers frequently become important witnesses; and no one can have had much to do with such trials without feeling that unusual care and caution is necessary in the examination and sifting of their evidence; in order to guard against a natural tendency to allow the facts to

be colored by their prepossessions, especially in the case of those they have themselves arrested or accused. If, under such circumstances, the officer may be present when his own evidence is to receive its final sifting, the accused may well suspect he is tried and judged unfairly. Nor will it do to leave the case for subsequent investigation in order to ascertain whether the suspicion is well founded: the time of the court cannot be taken up with such inquiries; and if it could be, the result would not always remove the suspicion. The only proper and just course is to insist upon a rigorous observance of the proper practice, in order to prevent all occasion for injurious suspicions.

The public are concerned in this as well as the accused; and the public is also concerned in not having the deliberations of the jury reported for news-gatherers and scandal-mongers outside. Jurors are generally expected to keep their own counsel, because they have an interest in doing so; but the officer is under no corresponding restraint, and it is through him that what takes place in the jury room is most likely to leak out. The courts should see to it that, as far as possible, an officer disposed to do this species of mischief is deprived of the opportunity.

It was held in *Cole v. Swan*, 4 Greene (Iowa), 32, that officers having a jury in charge while they are deliberating on their verdict should never speak to them except to ask them whether they have agreed, and that if an officer violates this rule, any verdict afterwards returned, whether the conversation did or did not have any influence in producing the verdict, should be set aside the moment the fact comes to the knowledge of the court. We have said enough already to show that it is not conversation alone that is mischievous; the mere presence of the officer within the hearing of the jury is often quite as much so. In one case what he would say might influence the verdict; in another, what his presence

might restrain jurors from saying, might accomplish the same result.

It must be certified to the court below that the verdict should be set aside and a new trial granted.

The other Justices concurred.

---

42 272
101 407
42 272
111 535

MARIA REED v. FRANK G. BAKER.

Appeal lies from order determining rights of a third person not before the court or subjecting one to inconclusive litigation—Comp. L., ch. 203.

A assigned a claim which he held against an estate to his wife, but on a proceeding against him in the nature of a creditor's bill, under Comp. L., ch. 203, an order was made declaring the assignment void as against creditors, appointing a receiver, and restraining the transfer to A of the money due to him from the estate, or any interference with it by A or his wife. *Held* that A could appeal from this order, as it would not protect him from proceedings to enforce his liability on the assignment.

One cannot be subjected to litigation except in such a way as will settle the controversy and leave him free from farther litigation for a similar purpose.

One cannot be bound who is not regularly before the court; nor can a decree be rendered against any party before the court, settling any right which can only be lawfully settled by reaching an absent party.

Comp. L., ch. 203, providing for proceedings at law in the nature of a judgment creditor's bill, is criticised as inadequate to reach or protect third persons entitled to due process of law in cases where transactions are attacked for fraud or illegality.

Appeal from the Superior Court of Detroit. Submitted October 29. Decided November 29.

PROCEEDINGS IN THE NATURE OF A JUDGMENT CREDITOR'S BILL. Defendant appeals.

Alex. D. Fowler for plaintiff.

William Jennison for defendant.

CAMPBELL, C. J. Mrs. Reed, the complainant, commenced proceedings against Baker, the defendant, under Chapter 203 of the Compiled Laws relating to Proceedings at Law in the nature of Judgment Creditors' Bills. Baker was the only person brought in, either as party or witness, and his disclosure is the only evidence in the case. The controversy, so far as it now comes up, arises out of the transfer from him to his wife of so much as was due to him for his services in settling the estate of Alonzo Reed, deceased, in which estate his wife was interested. He testified that he assigned this claim for an indebtedness due from him to his wife for her moneys used by him for his own purposes.

The Superior Court of Detroit, in which the proceeding was had, made an order declaring the assignment from Baker to his wife void, as fraudulent against creditors, and that the moneys should be applied on the complainant's judgment, subject to Mrs. Baker's rights. The court appointed William J. Fowler receiver, and ordered that the transfer of the money due from the estate to Baker, or any interference with it by him or his wife, be restrained. It provides further for suit against her by the receiver. From this Baker appeals.

It is objected that he is not injuriously affected by the order and therefore should not be heard. We do not think this objection is well founded. No person can be subjected properly to litigation except under such circumstances and in such a way as will settle the controversy and leave him free from liability to a second suit of similar character, and for a similar purpose. And we are of opinion that he is damnified by this order. It will not protect him from proceedings by Mrs. Baker to enforce her rights under the assignment.

No decree could be of any efficacy in such a suit which does not reach the property effectually, and determine the title directly, or furnish the means of deter-

mining it. If Mrs. Baker had been sued so as to be subjected to an ordinary creditor's bill, the validity of the assignment would be settled, one way or the other, for or against her. But in these proceedings the court cannot find against Baker without also finding against her, and it had no right to undertake such an office, where she is a necessary party. It could not have been the object of the statute to determine questions in this summary way on any different principles from those which would have prevailed in equity. The statute apparently intended to bring in parties and pass upon their rights; and section 11 goes so far as to provide for recording decrees in the county registry, so as to bind lands. But the provisions are defective.

We do not see very clearly by what means this clumsy legislation would reach such results. But we need not consider its legal validity to bind parties before the court. We think it is beyond question that no person can be bound who is not regularly before the court, nor can any party before the court have a decree rendered against him settling any right which can only be lawfully settled by reaching an absent party. We are satisfied that the statute is defective in regard to reaching such interests as those here in controversy. The court has no right to compel Baker to assign to a receiver and create new complications concerning property he has already assigned to a third party not represented. She has a right to manage her own property undisturbed by any order to which she is a stranger. And this disturbance cannot be made indirectly any more than directly.

This statute was found so useless and imperfect that the old law was restored in 1855. Sess. L., 1855, p. 270. There is every reason to suppose the Legislature thought they were repealing the statute entirely, but the compilers have assumed correctly, as it would seem, that only section 16 was repealed, which had forbidden creditors' bills. The proceeding is deficient in so many respects, and so inadequate to either reach or protect third

persons, who are entitled to due process of law, that it is much to be regretted that any one should be misled into resorting to it in cases where dealings are attacked for fraud or illegality.

We do not intimate that fraud is made out in this case. We think the proceedings are not of such a nature as to open that inquiry.

The decree must be reversed with costs, and the proceeding dismissed.

The other Justices concurred.

PAMELA M. FRASER v. ESTATE OF ALEXANDER D. FRASER.

Contract—Evidence to vary terms—Equities.

Where a claim against an estate is based on a written agreement between decedent and claimant, the estate is not entitled to any deduction from it on account of items not specified in the agreement, on the ground that such deduction would be manifestly just and that it must be supposed that the parties understood the contract to provide for it.

A man agreed with his daughter-in-law that certain property should be sold and that she should have what was left of the proceeds after certain deductions were made. When the property was sold, he directed what should be done with the proceeds and she received what he gave her. She afterwards brought a claim against his estate based on the agreement. *Held* that it was not to be inferred from her receipt of the money paid her that she had agreed to take so much in satisfaction of her claim, or that she supposed she was accounting with her father-in-law as strangers would account with each other.

Where a man had a written agreement with his daughter-in-law whereby she was to receive the proceeds of the sale of certain property after specified charges against it had been paid him, the fact that he had afterwards, and before sale, sent her a statement of an account between themselves containing items not covered by the agreement, will not bind her to the deduction of so much from the amount due her under it, in the absence of evidence that she had examined the account or consented to such deduction.

An equitable defense to a claim for money had and received must be one known to the law and recognized on principles which courts of equity administer.

An equity against the words of an express contract, where no want of capacity, illegality, fraud, or mistake in making it, is shown, cannot be recognized.

Where a written agreement is made in express terms for the satisfaction of certain claims held by one party against the other, a letter previously written by the former to the latter and containing a statement of the amount paid out by the former for the benefit of the latter, is not admissible to vary the express terms of the agreement.

Error to Wayne. Submitted Oct. 29. Decided Nov. 29.

APPEAL from an allowance by commmissioners on an estate. The claimant recovered on appeal, and the special administrators assign error.

Ashley Pond for the claimant.

William Jennison for the estate. When a mistake of law is made in the construction of a contract, one who has a knowledge of the facts cannot recover in reliance on the error, 2 Greenl. Ev., § 123; *Detroit v. Martin*, 34 Mich., 174; *Flower v. Lance*, 59 N. Y., 610; *Clarke v. Dutcher*, 9 Cow., 674; *Cook v. Boston*, 9 Allen, 393; *Martin v. Hamlin*, 18 Mich., 364; and if parties contract under a mutual error of fact, they are restored, on discovering it, to their original rights, *Mowatt v. Wright*, 1 Wend., 355; *Norton v. Marden*, 15 Me., 45; but the mistake must have been mutual, *U. N. Bank v. Sixth N. Bank*, 43 N. Y., 454; *Lawrence v. Amer. N. Bank*, 54 N. Y., 432; where money has been received in good faith in satisfaction of an equitable claim, or where it is due in honor and conscience, it cannot be recovered back by the party who paid it even though he had a legal right to it, *Eddy v. Smith*, 13 Wend., 490; *Mayor v. Erben*, 10 Bosw., 189; *Foster v. Kirby*, 31 Mo., 498; the defendant may go into every equitable defense, under the general issue (*Moses v. MacFerlan*, 2 Burr., 1010), and may

introduce parol testimony to explain or vary the contract, *Chambers v. Livermore*, 15 Mich., 389.

COOLEY, J. The claimant presented a demand against the estate of Alexander D. Fraser, who was her father-in-law, the basis of which was the following agreement in writing between them:

"Memorandum of agreement made and entered into by and between Alexander D. Fraser, of the city of Detroit, party of the first part, and Pamela M. Fraser of the same place, party of the second part, on the seventh day of December, A. D. 1872.

Whereas, the late Alexander J. Fraser heretofore in his life-time duly made, executed and delivered to said party of the first part a certain deed of conveyance of lot 'B' on Fraser's plat of a part of the Chene farm, lying on the south side of Jefferson avenue in said city of Detroit, being the same premises upon which he then lived and which are described as follows:

On the north by Jefferson avenue, and on the south by Franklin street, and on the east by the boundary line between said lot and that of Henry N. Walker, and on the west by the boundary line of said lot and the property of said party of the first part, which lot is one hundred and forty (140) feet front; that said deed was duly acknowledged and recorded in the office of the register of deeds for Wayne county, and to which reference is here made for greater certainty.

And whereas, further, the party of the first part has, since the date of said deed, paid, laid out and expended various sums of money for taxes assessed on said premises for city, state and county purposes, special assessments for pavements and for drains, and also for repairs upon said premises up to the present time as will more fully appear by the receipts, documents and vouchers therefor, the greater part of the money so applied being money belonging to Mary Davidson, and the residue from the money of the party of the first part.

And whereas, said party of the first part is desirous and willing that the said party of the second part shall now be entitled to and receive whatever sum or sums of money that shall be derived from the sale of said premises on the following terms:

Therefore it is hereby mutually agreed by and between the said parties respectively, that the said premises shall be sold in such manner as the said Pamela shall desire; that out of the first proceeds of the sale the mortgages affecting said premises shall be paid and discharged;

that then whatever sum or sums of money may have been paid or laid out by the said Alexander D. for taxes, repairs and assessments as aforesaid, and insurance on said premises, with such as he may hereafter pay before such sale with interest thereon at the rate of seven (7) per cent per annum, from the date of such advances respectively, shall be paid and refunded to him; that if any other liens legally affect said premises, the same shall also be discharged in like manner; that after such deductions are made, the whole of the residue of the money to be derived from the sale of said premises, shall be the absolute property of said Pamela, her heirs and assigns, for her own use and purposes; that upon such sale being made (on these provisions being carried out), both the parties hereto will duly make and execute the requisite deeds for the premises. And in order to afford time for making such sale it is the desire of the said Pamela that the said Alexander D. shall pay the State and county taxes that are now due and payable upon the same, and also pay the installment of interest on said mortgages which shall be due upon the first day of January next.

In witness whereof the parties to these presents have hereunto respectively set their hands and seals on the day and year aforesaid.

A. D. FRASER, [L. S.]
PAMELA M. FRASER. [L. S.]

Signed, sealed and delivered in presence of
MARY HERTER,
JULIAN WILLIAMS.

Said agreement was duly acknowledged Dec. 7, 1872."

The agreement was not disputed, but it was claimed on the part of the estate that it was fully satisfied by Mr. Fraser in his life-time. It appeared in evidence that A. J. Fraser, the claimant's husband, on March 1, 1862, executed two mortgages on the premises described in the agreement, to Sullivan Moulton, to secure the payment of $7500 in five years from date, with ten per centum annual interest, and that Mr. A. D. Fraser had paid interest on these mortgages from time to time previous to the execution of the agreement. Also, that the premises were levied upon by virtue of an execution against A. J. Fraser, in favor of one Biddle, which Mr. A. D. Fraser afterwards agreed to pay $1000 to discharge. It was further shown that on March 29, 1875, A. D. Fra-

ser sold the premises to one Grummond for $32,500, which was paid as follows: The Moulton mortgage, $8062; taxes, $284; Biddle levy, $1000; mortgage to A. D. Fraser, $16,000; mortgage and cash to claimant, $6202. The representatives of the estate insist that what was at this time paid to the claimant was all she was entitled to, and this seems to have been conceded, provided Mr. Fraser was entitled to charge, as against her, the interest he had paid on the encumbrances previous to the making of the agreement. In support of the right to this it was urged—

First. That as it was manifestly right and just that Mr. Fraser should be allowed for this interest, it must be supposed that the parties understood their contract to so provide.

Second. That from what took place at the time of the sale to Mrs. Grummond, when the proceeds of the sale were distributed between the parties, we must infer a settlement on that understanding.

Third. What was called an equitable defense was sought to be introduced by showing the previous kindness of Mr. Fraser to the claimant, and his consequent embarrassment; and as bearing upon this a letter given in the margin* was offered in evidence, but rejected by the court as incompetent.

---

*DETROIT, 30 July, '72.

MILLIE: I have delayed as long as possible to make this communication to you, but now necessity compels me to make it, however unpleasant it may be to either of us. I am no longer able to keep up two houses, and you must make some arrangement by which I shall be relieved from the fearful drain upon my almost exhausted means. I have more than once told you that they were very limited for obvious reasons. I have been out of practice for the last sixteen years; I had no income but what was derived from some small investments and these are principally paid up, and have been expended for the most part in paying semi-annual burdens on the property on which you live. For instance glance at the amount of money laid out by me since the 17th of April, '71, the day of your husband's death (a little over 15 months), for taxes, interest on the mortgages, and other charges affecting the real estate, and which amounts to $2,089 32

To which add the money paid to you for servants' wages, fuel, gas, etc., a statement of which you may examine and is at your service, for same period 748 13

Total $2,837 45

The first position is obviously untenable. The written agreement points out with particularity and exactness what Mr. Fraser shall deduct when the premises are sold, and interest previously paid on encumbrances is not among the items.

To support the second, certain evidence of circumstances attending the Grummond sale and the execution of the papers was given. That of William A. Moore, Esq., was most explicit in giving details, but the most that was shown was that Mr. Fraser directed what should be done with the proceeds of the sale, and that the claimant took what was handed over to her. No evidence whatever was given which showed, or had any tendency to show, that she agreed to take what she got in satisfaction of her claims. It might be inferred that she supposed her father-in-law was giving her all she was entitled to, but not that she was accounting with him as strangers or business dealers would account with each other.

—and this does not contain a dollar for furnishing your house with provisions, etc., during the time stated, nor does it embrace any money I have paid for Carrie. You must also remember that I have been subjected to the payment of the same burden annually for about 11 years, besides being subjected to other expenses. It is impossible for me to continue this state of things longer. My reduced means will not admit of it. In addition to all this I have an assessment of $1,400 to pay this fall for the paving of Chene street. It is my necessity that compelled me to make an effort to sell my property on the avenue. I have paid up the interest on the mortgages and the city taxes to first July inst. Under these circumstances it is for yourself to determine what course you will pursue. If a sale cannot be made this summer or fall, you had better procure a tenant with whom you can board. Should you not succeed in this I shall pay Carrie's board in any place I shall approve of. I hope by the first of September you will consummate an arrangement.

It is hardly necessary for me to tell you, that I have for years been compelled to economize my means in every way to enable me to assist your family. I have avoided traveling expenses by remaining at home, and denied myself the luxuries of life to a very great extent.

Yours, A. D. FRASER.

Mrs. A. J. Fraser.

P. S.—You must also keep in mind that embraced in the moneys I have laid out as stated in the within (anterior to your husband's death), was the $12,597 (of which you have an account), the greatest part of which belonged to my sister and which was laid out by me in paying for the pavement of Jefferson avenue, and the taxes and other charges on the real estate and which is still due and the interest of it. F.

It is urged that in view of these facts it is probable that the parties must have met and come to an understanding respecting what each was entitled to previous to that day, and the jury might have so found if the court had not taken the case away from them, as hereafter stated. The jury indeed might have guessed that such was the fact, but the case was bare of any evidence to that effect, and the business of the jury is not to guess, but to draw conclusions of fact from evidence.

A statement of account sent by Mr. Fraser to the claimant was put in evidence, the heading of which was as follows: "Moneys advanced by A. D. Fraser for himself and Mary Davidson on A. J. Fraser's residence on Jefferson avenue, Detroit, and constituting a lien and charge thereon, with interest thereon at seven per cent per annum up to 1st January, '74, in the payment of the public and private burdens on the same, and to preserve the property, etc." In this statement were included payments of interest on the two mortgages, beginning with November 19, 1863. There was evidence that the claimant had this statement previous to the sale, but none that she had examined it, or that it had ever been the subject of discussion or conversation between herself and Mr. Fraser. If, then, it could be evidence that Mr. Fraser understood the payments made by him for interest were to be refunded, it could not bind the claimant, in the absence of any consent to this view.

The idea of a right to make an equitable defense, based upon circumstances appearing in the case, seems to rest upon this: that, as this claim is one for money had and received, any equity which shows that the claimant in justice is not entitled to it, constitutes a good defense. *Moore v. Mandlebaum*, 8 Mich., 434. This is true; but the equity must be one known to the law, and one that can be recognized on the principles which courts of equity administer. An equity against the words of an express contract, where neither want of capacity, illegality, fraud,

nor mistake is shown in the making of it, can never be recognized.

Now, it is a fair deduction from the evidence in the case, and from his letter, that Mr. A. D. Fraser had been very kind to his daughter-in-law, and had expended considerable sums in the support of herself, her husband and their child. But it would be a most violent assumption if we were to conclude from this that he must have intended to charge her with all payments of interest made on the Moulton mortgages, when the written contract fails to express that understanding. It would be much more consistent with reason to infer that he intended those payments as a part of his charitable kindness, and for that reason failed to speak of them in his agreement. But inferences are idle here: the contract entered into by competent parties, without fraud or mistake, is not to be affected, changed or qualified by any such considerations as have been suggested. It must stand as written.

We fail to find in the case any evidence which could justify submitting to the jury any question of whether the understanding between the parties was different from what the written contract showed, or of whether the claimant had not, by settlement or otherwise, deprived herself of the right to demand what apparently is due her by the terms of the contract. The letter which the court rejected was inadmissible. The circuit court directed the jury to return a verdict for the claimant for what apparently was due her under the contract, and this was right. The judgment will therefore be affirmed with costs.

The other Justices concurred.

Folkert C. Folkerts et al. v. Albert L. Power.

Taxes—Illegal enrollment—Injunction—Addition of formal party.

A tax is invalid if it appears only upon a roll to which it does not belong, and is omitted from a roll to which the law authorizing it expressly assigned it.

The charter of Alpena (Act 249 of 1871) provides for two assessment rolls, one of which, called the "city roll," should contain, among other designated taxes, the school taxes assessed for the city, while the other was to contain taxes not assigned to the city roll. *Held* that school taxes enrolled upon the second were invalid.

A tax cannot be collected if not authorized by written law.

Injunction lies to restrain the collection of a tax illegally assessed, if it is made a lien on the land.

Where an invalid tax includes an assessment on personalty as well as on realty, a court which obtains jurisdiction to restrain the collection of the tax on the land may properly give relief from the assessment on personalty.

Where an injunction is asked to restrain the collection of a school tax irregularly assessed, the school district is a necessary party; but where it had been omitted, and the tax was found to be absolutely illegal, it was *held* sufficient to add the district as a formal party before entering final decree.

Appeal from Alpena. Submitted October 29. Decided November 29.

Injunction against the city treasurer of Alpena to restrain him from collecting certain school taxes averred to have been improperly assessed. Defendant appeals.

J. B. Tuttle, J. D. Turnbull, Marston & Hatch and *McDonald & Cobb* for complainants. The Supreme Court has jurisdiction to remove a cloud on title consisting of a tax on land, *Thomas v. Gain*, 35 Mich., 165; where equity has properly obtained jurisdiction of a question in controversy, it will retain it to dispose of the entire controversy, *Miller v. Stepper*, 32 Mich., 204; 3 Waite's Actions, 205; an appellate court will allow an amend-

ment to a bill if the cause was tried as it must have been under such amendment, *Tremaine v. Hitchcock*, 23 Wall., 518; as by the addition of parties, *Lewis v. Darling*, 16 How., 1; *Palmer v. Rich*, 12 Mich., 414; 1 Barb. Ch. Pr., 397; 1 Dan. Ch. Pr., 418.

J. D. Holmes, Chas. Draper and *D. C. Holbrook* for defendant. Demurrer to a bill for want of proper parties is well taken if the defect appears on the face of the bill, *Betton v. Williams*, 4 Fla., 11; *Gilmore v. Johnston*, 14 Ga., 683; the fact that a party will be interested in a decree is a sufficient reason why he should be made a co-defendant, *Jackson v. Waters*, 10 Ga., 546; an injunction will never be granted against persons who are not parties, *Fellows v. Fellows*, 4 Johns. Ch., 25; *Iveson v. Harris*, 7 Ves., 257; equity will not restrain collection of a tax on personalty, *Youngblood v. Sexton*, 32 Mich., 406; *Hagenbuch v. Howard*, 34 Mich., 1; *Mears v. Howarth*, id., 19; *Henry v. Gregory*, 29 Mich., 68; *Lockwood v. St. Louis*, 24 Mo., 20; *Sayre v. Tompkins*, 23 Mo., 443; *Susquehannah Bank v. Supervisors*, 25 N. Y., 312; Cooley on Taxation, 538; Hilliard on Injunctions, 458.

GRAVES, J. The elaborate effort of counsel to vindicate the tax proceedings assailed by this bill has not satisfied the court.

The main question, and that which is certainly decisive, depends on the city charter. In 1867 the Legislature enacted that the school inspectors of the township of Alpena were authorized to organize, according to the provisions of the school laws of the State, the entire township, or so much of it as they deemed necessary, "into a school district, to be known as Union School District number One of said township." The inspectors, acting upon this authority, organized the district over the whole territory of the township. Subsequently, and on the 29th of March, 1871, the Legislature incorporated on a small part of the same territory the city of Alpena. The

act of incorporation took immediate effect, and the creation of the city government carried with it a change of local agency in the assessment and collection of taxes within the city limits, and consequently over so much of the territory of the school district as the city covered.

The powers possessed there by the township authorities previously, at once came to an end, and at the same time the city authorities were vested with such as were thought suitable and necessary. No other agency remained and no tax could be collected without written law. The charter declared that it should not be deemed in any manner to affect or modify the act of 1867 authorizing the organization of the school district, and it seems to be supposed that this was meant to express the sense of the Legislature that the charter should not affect the pre-existing modes and times for collecting taxes for the district. But this is not so. The object was to guard against any inference that the school district corporation was infringed by the charter, and not to exclude alterations in regard to the time and manner of collecting the taxes necessary for it. They were distinct matters which had never been confided to it. The section containing this declaration and other sections closely associated were enacting a change in the agencies and methods of dealing with district taxes, and it would be unreasonable to say that the Legislature was declaring in the same breath that such changes were not intended.

The charter takes notice of the general regulations for the assessment and collection of taxes, and accommodates itself to them, except in so far as special regulations are considered needful. It also recognizes the general school law and adapts itself to it.

In regard to the assessment and collection of all taxes for city purposes, and such taxes for the school district as are leviable within the limits of the city, there are special provisions. These taxes are to be spread upon a distinct roll, denominated the "city roll," and a series of particular regulations isolate and distinguish it.

After confirmation by the board of review it is made the comptroller's duty to spread upon it the city, school and highway taxes, and when this shall have been done, and on the second Monday of July, he is next required to deliver it to the city treasurer, in whose office it is to remain for forty days to enable the tax-payers to make voluntary payment. For the first twenty days there are no allowances for collection services, but those who pay during the next twenty are required to add one per cent for the treasurer. Up to this time the roll in question is retained in the treasurer's office without any warrant to coerce collection. Within ten days after the end of this period of opportunity for voluntary payment of city and school taxes the comptroller is to make a copy of the whole roll except the portions disposed of by payments, and add such percentage for collection, not exceeding four per cent, as shall have been fixed by the common council. He is then to file the original in his office, and attach to this copy a proper collection warrant, directed to the city treasurer, and returnable on the last Saturday of the October following, and this period may be extended or renewed from time to time by the common council.

Such are the chief provisions relative to this "city roll" to which the law in express terms assigns the school tax, and the regulations and references are too various and explicit to allow it to be supposed that it was not really designed to have that tax placed on such roll. Provision is made for the construction of a second roll as a means to collect other taxes than those allotted to the "city roll," and whatever impressions may be felt of the policy of these regulations, or of the fitness of the provisions, there is no ground to contend that the law authorized the setting down of the school tax on the second roll. If raised at all, that tax could be raised only by means of the "city roll." No other vehicle was provided.

The comptroller is ordered to prepare the second roll by making a certified copy of the original roll after its

confirmation by the board of review. And this second roll he is to retain until after equalization by the board of supervisors; and all State and county taxes, and all others not assigned to the "city roll," are required to be placed on it, but no others. The comptroller is required to attach a collection warrant in the same form as prescribed for tax warrants directed to township treasurers. It will be perceived, therefore, that the warrants on the respective rolls must differ widely in sense and operation; but apart from the differences referred to, the law marks another material distinction. The taxes on real estate for city purposes, and the legal charges, are declared to be a charge on the second Monday of July against the person owning the estate, and to be a lien on the fifteenth day of November of the same year. But the taxes and legal charges on the second roll are declared to be a charge on the second Monday of May against the owner of the land, and a lien from the first Monday in December of the same year.

It appears clear to us that the assignment of the tax in question to the second roll was in derogation of law, and that the tax itself so placed was inoperative.

The argument based on the inconvenience consequent on this construction might be entitled to weight if the provisions were at all doubtful on this point, but they are not. Whether the Legislature consciously designed to carry the collection of the school taxes over to a time beyond that prescribed for collecting State and county taxes, may be a question. But according to the evidence they have given us of their purpose and meaning, and which evidence is binding upon us, there is no question at all.

The tax against the personal property was no cause for equitable interference. But the amount of tax charged against the real estate is $178.60, and the imposition itself is of that class which the statute makes a lien, and the case is consequently well brought, accord-

ing to our previous decisions, to relieve the land from the cloud caused by the tax proceedings. And having jurisdiction of the cause on this foundation, we think it would be no less than a sacrifice of justice to a misdirected scruple to refuse relief on that part of the case relating to the personal property.

The school district is a necessary party and should have been brought in. But this suit has been pending nearly eight years, and the contest is one where there is no room for doubt in regard to the result on the merits. We know that the presence of the district as a party could have made no difference. The proceeding assailed could not be successfully defended by any party. This is demonstrable. Ought the court then to throw out the case and leave the controversy unsettled, and deliver over the numerous interests involved, both public and private, to future contention, because the district has not been brought in by name as a defendant? We think not. As no other result upon the merits would be possible, it is our opinion the case is within the principle which allows the addition of a party at the hearing. No one can be prejudiced by such practice. But a rejection of the bill at this time for want of parties would cause great hardship.

The case will be remanded with directions to amend the proceedings by adding the district as a formal party, and for the entry of a final decree for complainants after such amendment, and they will recover their costs of the court below.

CAMPBELL, C. J. and COOLEY, J. concurred: MARSTON, J. did not sit in this case.

42 389
93 51
94 270

42 289
110 243

42 289
S 3NW 954
133 647

THE FARMERS' MUTUAL FIRE INSURANCE COMPANY OF GRATIOT AND ISABELLA COUNTIES v. LOUISA GARGETT.

Fire insurance—Burning insured property—Waiver of conditions—Ownership—Presumption as to instructions to jury.

An assured person being called on to account for the fire by which the insured property was destroyed, suggested that it might have originated in some oiled shavings in a lumber room in the cellar. *Held* that there was no evidence in this suggestion, that the assured had set fire to the property.

Where an attempt was made to remove a piano from a burning house, it was *held* that a suggestion by the person assured 'to let it burn, it was well insured,' would be a significant fact to fix on her the guilt of setting the property on fire, if it were not that it was conceded that the policy did not cover the piano, and there was no evidence that it was insured at all, and that there was evidence that what she did actually say was that 'it might better burn,' the fact being that the by-standers were about to knock its legs off with an axe in order to save it.

A fire insurance company, being sued for the amount of a loss, sought to show that the person assured had burned the property, and the judge charged that the burden of proving that she committed the crime was on the company. The evidence showed, however, that she had made great exertions to save that which was insured. *Held* that such a charge would have been erroneous if there had been evidence on which to ground it, as it would have implied that the evidence of guilt must have been as conclusive as if the assured were on trial for the crime; but that, as it was, the defense were not entitled to any charge on that question, and the instruction was immaterial, the verdict being for the assured.

Where the by-laws of an insurance company provide that there shall be no waiver of the terms of the policy without the concurrence of the Secretary of the company, indorsed or specifically acknowledged, it was *held* that if the Secretary signed orders for payment, on the adjustment of the loss, it should be regarded as a very conclusive waiver in writing, if he knew all the facts.

The by-laws of an insurance company provided that all claims should be forfeited if there was any fraud in making proofs of loss. *Held* that if the person assured, in good faith and with the knowledge of the company's responsible officer included as her own, articles belonging to other members of the family, there was no fraud; and that if the directors, knowing all the facts,

gave orders for payment of the policy, any conditions that might have been insisted on, were waived.

Where it is apparent that the record gives the evidence only in condensed form, the appellate court cannot assume that the trial judge misstated it in charging the jury, even though his charge varies from the evidence as set forth, so long as it does not appear that his attention was called to the alleged misstatement at the time, or the record does not put the fact of misstatement beyond question.

Error to Gratiot. Submitted Oct. 29. Decided Nov. 29.

ASSUMPSIT. Defendant brings error.

Fancher, Dodds & Partridge and *Jas. K. Wright* for plaintiff in error, cited *Security Ins. Co. v. Fay*, 22 Mich., 468; *Van Buren v. St. Joseph County F. Ins. Co.*, 28 Mich., 398; *American Ins. Co. v. Gilbert*, 27 Mich., 429; *Hartford F. Ins. Co. v. Davenport;* 37 Mich., 609; *Hartford F. Ins. Co. v. Reynolds*, 36 Mich., 502, to the point that the Secretary of the company could not verbally waive the conditions of the company's by-laws; where a representation amounts to a warranty, it makes no difference how far knowledge of the insured interest was material to the insurer, *Pierce v. Empire Ins. Co.*, 62 Barb., 636.

T. W. Whitney and *R. C. Dart* for defendant in error. If a general agent of an insurance company knows the real condition of the risk when the contract of insurance is entered into, no misrepresentation of it in the application or policy will avoid it, Wood on Insurance, 279, § 141; *Guardian's Life Ins. Co. v. Hogan*, 80 Ill., 35; *Roberts v. Continental Ins. Co.*, 41 Wis., 321; a statement in the application, that the assured is the owner of the property, is merely a warranty that he has an insurable interest, *Rockford Ins. Co. v. Nelson*, 65 Ill., 415.

COOLEY, J. Defendant in error, who is the wife of James Gargett, brought suit against the insurance company to recover the amount of two drafts drawn by the

company upon its treasurer, one for $1000 and the other for $500, in settlement of a loss which she had suffered under a policy of insurance against fire which the company had issued. The policy bore date February 24, 1875, and the property insured was described therein as "dwelling house on section 34" in Pine River township, and "contents therein." The dwelling was insured at $2000, and the contents at $1000. The insurer was a mutual insurance company, and all who received policies became members. The policy was expressly made subject to all the conditions and regulations specified in the charter and by-laws. Among the provisions of the by-laws was one that if there be any fraud, or false swearing with fraudulent intent in making proofs of loss, the claimant should forfeit all claims.

After the fire, the date of which is not given in the record, the directors of the insurance company met to consider the loss. Proofs were presented to them, and a schedule of the contents of the house, which were destroyed. This, it is conceded, included articles aggregating in value $153 which belonged to Mrs. Gargett's daughter and son-in-law, though described in the sworn statement as her own. Whether the directors of the insurance company were aware, when the adjustment was made, that Mrs. Gargett did not own all the articles, was made a question on the trial, and there was some positive evidence that they did not. In the adjustment a considerable reduction was made from the amount insured, but whether this was by way of compromise or not, was disputed. One of the directors testified that $500 was deducted from the insurance upon the house because it was believed to be over-insured, and from the personal property it seems that items to the amount of sixty or seventy dollars were first deducted, and then one-fifth of the whole taken off. These deductions considerably exceeded the value of the articles Mrs. Gargett did not own. The explanation of the deductions is very meager, and the basis is not satisfactorily shown by either side.

The insurance company seems to have made some effort to fix upon Mrs. Gargett the charge of burning her own house, but we look in vain through the evidence for anything to go to the jury on that branch of the case. When called upon to account for the fire, she suggested that it might have originated in some oiled shavings in a lumber room in the cellar, but there was certainly no evidence of crime on her part in this suggestion. Several persons testified that at the fire, when an attempt was made to remove a piano from the house, Mrs. Gargett told them to let it burn—it was well insured. This would be a very significant fact were it not for the circumstance that it was conceded on both sides the piano was not covered by this policy, and there was no evidence it was insured at all; so that, if the statements had been made as testified, the conclusion of corrupt motive would be far-fetched. On the other hand there was evidence that the removal of the piano was found impossible unless some part of it was first knocked off with axes, and that what Mrs. Gargett actually said was, in substance, that it might better burn. All the evidence of her conduct at the time of the fire went to show that she made great exertions to save the insured property. We do not think that in this state of the evidence the defense had a right to require the judge to charge the jury on any hypothesis which would warrant them in finding that Mrs. Gargett burned her own property, and the charge which the judge made, that "this being a matter set up by the defendant for the purpose of avoiding the payment of the loss, the burden of proof is on it to establish to your entire satisfaction that she is guilty of committing the crime," was in this case immaterial. Had there been evidence calling for a charge on the subject, the one actually given might perhaps have led the jury to infer that they must have the same conclusive evidence of guilt that would be essential if Mrs. Gargett were on trial for the crime; and this would have been erroneous and misleading. But on the case

as it stood, the defense was entitled to no charge on the subject.

The insurance company claimed on the trial that Mrs. Gargett forfeited all right to recover on the policy by including in it and in the proofs of loss, as her own, the property belonging to her daughter and son-in-law. This claim was made under a by-law of the company which provided that "there shall be no waiver or evasion of any of these terms or conditions without the concurrence of the secretary of the company indorsed thereon, or otherwise specifically acknowledged by him." William Yerrington was secretary, and the evidence bearing on any waiver by him previous to the adjustment consisted in that of Mr. Gargett that he asked Yerrington if the policy covered the daughter's property, and Yerrington replied it would cover all that was ordinarily kept in the house. The date of this conversation was not given, but it is assumed in the charge that it was when the policy was issued. The secretary was not called as a witness to deny this. He however signed the orders given on the adjustment, and these should be regarded as a very distinct and conclusive waiver in writing if the secretary then knew all the facts.

Upon this branch of the case the circuit judge charged the jury as follows:

"If Mrs. Gargett included in the policy goods not belonging to her with intent to defraud the insurance company, and purposely concealed who the true owner was, and represented them to be actually her property, and did it with the clear intent to cheat and defraud the company, her policy was void; but if at the time the application was made she said to the secretary of the company that she had these goods and was not the owner, and he informed her that she could include them in the insurance as her property, and she acted on the information relying upon his advice, she cannot be said to have intended in any way to defraud the company, because she got her information from the general agent of the company who represented the company in making the insurance. Any act she may have done in accordance with or in pursuance of that information cannot be said to be an intentional fraud upon the company.

And if acting upon that information at the time of the settlement of the loss, she included these articles in her schedule of property lost, she cannot be said to have intended any fraud upon the company. It would at most do nothing more than to reduce the amount of insurance by the amount of the loss paid on those articles." But "if the plaintiff put these articles in the policy and in the sworn statement of the loss without the knowledge of the company or their agent, knowing that she had no right so to do, and by those means she actually deceived the company, and she did it with that intent, then it operated as a fraud upon the company and rendered the policy void." "And should you find that there was no intentional fraud on the part of Mrs. Gargett, and it was through a mistaken idea that she put these goods belonging to her daughter in the schedule, and she thought she had a right to put them in, and the company did not know it, then the daughter's loss, $153, should be deducted from the face of the orders, and the verdict, if for the plaintiff, should be for the balance and interest."

This charge, it is claimed, conflicts with the views of this court expressed in *Van Buren v. St. Joseph etc. Ins. Co.*, 28 Mich., 398, and other cases previously decided. We think there is no conflict.

It is to be observed that there was no enumeration of the disputed articles in the policy. Mrs. Gargett only insured the "contents" of her dwelling; and the policy in terms, therefore, was not objectionable. The fraud, if any, would be made manifest only when there was an attempt to collect insurance on contents not belonging to the insured. But if she then scheduled articles belonging to other members of her family, in good faith and with the knowledge of the secretary of the company, she was certainly guilty of no fraud in so doing; and under the by-laws it is only fraud that is to avoid the policy. And if the directors settle with knowledge of all the facts, and give orders for the payment, any conditions that might previously have been insisted upon are waived by the most formal act the nature of the case would admit of.

There is in the charge one sentence that perhaps is not well founded. It is this: "Should you find that

the directors knew or had reason to know that some of the things in the house belonged to the daughter or son-in-law, and with that in view made a deduction from the whole amount of $500, partly in consequence of these goods, as I understand Mr. Giddings says his understanding was, then no fraud was practiced on the company." Now Mr. Giddings, who was one of the directors, testified to a deduction of $500 on account of over-insurance on the house, and to a still further deduction; but the record does not show that he said this or any part of it was on account of goods Mrs. Gargett did not own. The record, in its statement of evidence, however, is very meager, and although it is stated that all the evidence bearing on the issue is given, yet it is apparent, we think, that it is given in condensed form, and we do not think we should be justified in setting aside the verdict on an assumption that the judge misstated the evidence to the jury, when it does not appear that his attention was called to his error at the time. This is peculiarly an error that should be promptly mentioned so that it may be corrected before it has done mischief, and if this is not done, the record should put the misrecital beyond question before we should be asked to reverse a judgment upon it. In our opinion we should not be justified in doing so upon this record.

We have not noticed specifically the requests for instructions on the part of the defense, which were refused, because we think what has already been said covers the case. The evidence was submitted to the jury fairly, and we think their verdict for the plaintiff, for the full amount of the orders less certain payments made upon them, must be sustained.

The judgment will therefore be affirmed with costs.

The other Justices concurred.

42 296
79 650
42 296
137 686

JOHN LARKIN v. THE MITCHELL & ROWLAND LUMBER CO.

Action for merchandise forwarded in excess of order and destroyed by accident.

Where dealings between parties consist of separate and distinct transactions, they cannot be referred to as establishing a usage that will govern another independent transaction between them, especially if the latter was carried on under express terms in writing.

Error will not lie on rulings not excepted to, or if excepted to, on which error was not assigned.

Where a motion to strike out testimony is so broad as to cover lawful evidence also, it is properly denied.

It is not material error to strike out evidence if the court afterwards correctly directs a verdict.

A lumber dealer gave an order for a lot of shingles and a larger quantity was forwarded to him than the amount called for. He received and held the excess subject to the consignor's order, advanced the freight charges and notified the consignor, and immediately afterwards they were destroyed by fire without his fault. *Held* that assumpsit would not lie for their value.

Where several car-loads of shingles of the same quality were forwarded to a dealer in excess of his order, and he took a quantity out of one of the cars to fill the order, it is immaterial from what car he took the necessary quantity.

Where an order for merchandise was largely exceeded, and the consignee received the excess to be sold or held subject to the consignor's order, and advanced the freight in good faith and for the consignor's benefit, he could recover the amount so advanced in assumpsit against the consignor as for money paid to his use.

Error to Saginaw. Submitted Oct. 30. Decided Nov. 29.

ASSUMPSIT. Plaintiff brings error.

Camp & Brooks for plaintiff in error.

Benton Hanchett for defendant in error. Where merchandise worth more than $50 is consigned without a written order for it, acceptance is necessary to transfer title, *Alderton v. Buchoz*, 3 Mich., 322; the consignee's

silence is not evidence of acceptance, 1 Pars. Cont. (6th ed.), 484; *Felthouse v. Brindley*, L. J. Ch., 204; one who has paid for the benefit of another, money which the latter was legally bound to pay, and has done so for a reasonable cause and not officiously, can recover the amount in assumpsit against the person for whose benefit it was paid, *Bailey v. Bussing*, 28 Conn., 462; *Jefferys v. Gurr*, 2 B. & Ad., 833; *Pownal v. Ferrand*, 6 B. & C., 438; *Exall v. Partridge*, 8 Term, 309; *Goodridge v. Lord*, 10 Mass., 483; *Robinson v. Green*, 3 Met., 159; *Graham v. Dunnigan*, 6 Duer, 630; *Emery v. Hobson*, 62 Me., 594; *Nichols v. Bucknam*, 117 Mass., 488; *Young v. Dobyns*, 12 B. Mon., 7; *Brittain v. Lloyd*, 14 M. & W., 772.

GRAVES, J. The plaintiff in 1876, and during several years before, was engaged in making lumber and shingles at Midland, and the defendant, an Ohio corporation, was a large dealer and accustomed to buy and sell a great quantity every year, and prior to the transaction out of which the present controversy arose the plaintiff had sold several lots of shingles to the defendant, and so far as appears, the business had been managed with mutual satisfaction.

August 31, 1876, defendant's secretary wrote to plaintiff from Toledo, saying:

"We thought XXX 18-inch at $3.00 here was pretty near bottom, but missed it on the last purchase from you, as they are coming at $2.75, and selling from yards here at corresponding low prices. At what price can you sell us another million or two, and what for a few cars clear butts, 18-inch, and for a few cars best 16-inch? Let us know soon and oblige."

September 2d the plaintiff replied, saying:

"I cannot sell XXX 18-inch for any less than I have sold them to you for, and *will not* contract any amount ahead at that price, as my stock of logs is nearly cut out, and I cannot get logs and make shingles at even the price you have been paying me, $3.00. I will send you a few cars more at $3.00 if *you wish*, and will also send a few cars of clear butts at $1.90 if you wish, but I am not anxious to sell at those prices, as I shall have but few more

to sell this fall, unless prices advance a little. As regards 16-inch, I cannot make them at the prices, and have stopped making them for the present; if you wish ¼ to ½ million best XXX 18-inch *at old* prices, and a few cars of clear butts will send them. Please advise. We load a car for you to-day best 18-inch, *which fills* and *a little* over, the *two million*."

The last sentence had reference to a former transaction.

September 4th the defendant's secretary wrote in reply and said to plaintiff:

"You may send us up to 500 M., or say eight car loads your XXX 18-inch at $3.00 per M. here, and we will meantime look at some of the cheap shingles offered. Send above along promptly."

The car load rated at sixty thousand, and in case of shingles consigned to defendant, the cars were passed by the railroad company into defendant's yard over a side-track connected therewith, in order to be speedily unloaded and not detained, and the defendant advanced the freight charges.

As soon as he received this order of September 4th, the plaintiff commenced shipping, and from the 6th to the 23d of September he sent forward eight car loads. But he did not stop with these. He dispatched three more—one on the 25th, one on the 26th, and another on the 27th; and on the 28th the defendant received bills of lading through the mail, from which it appeared the plaintiff was exceeding the order given him, and it immediately sent him this telegram: "Ship us no more shingles—see letter;" and on the same day the defendant's secretary wrote to him, saying:

"We received bills to-day of more shingles than were ordered, and telegraphed you not to ship any more, having bo't a quantity of shingles at a much less price, we do not now need any more, and cannot afford to take of you at $3.00 any more than *we bo't*. Enclosed you will find a statement of *500 M.* credited as agreed, at $3.00 and freight charges paid, and Chas. C. Doolittle, cashier, 40,242, on Metropolitan National Bank, N. Y., for 501.25, endorsed to order of William Patrick in full."

The letter covered a statement of account which men-

tioned that one car load of sixty thousand and another of forty thousand were held subject to adjustment. At this time it seems the defendant had taken twenty thousand out of one of the cars in order to make up the maximum quantity specified in the order, and therefore leaving forty thousand of that load unappropriated, and that the final car of the eleven sent had not arrived, or at least was not known to have arrived. After the receipt of the telegram the plaintiff sent no more forward.

He had, however, on the day preceding the writing of this last letter by defendant's secretary, namely, on the 27th, himself written, saying:

"I suppose the last order for shingles *is filled* and *perhaps some over*, but I have not tried to sell to any other parties, and will send along a few cars more unless you should otherwise direct. I have about 12 to 15 M. of good 18-inch, shaved shingles. Shall I put them in a car and send to you, and if so, what will you allow me for them there if all right? Can't you use a few cars of 6-inch clear butts 18-inch at, say $1.90 there?"

On the 29th the last of the eleven car loads reached the yard and defendant took out two loads and piled them with the forty thousand from the broken load in a place by themselves, on one side of the yard. On the 5th of October the railroad company presented their account for freight charges in the customary way and defendant paid it. It included the charge for these shingles, which amounted to $76.75.

October 2d the plaintiff sent a reply to defendant's letter of September 28th. He said:

"Yours with draft received; also your telegram. Am sorry you cannot use any more shingles at the old price, $3.00, for certainly it is as low as I can make them, but hope shingles may do better in time; but it will not make much difference, as I have stopped making only with one machine, about 20 M. per day, and shall not run that only a week or two longer, so I shall not have many to sell. *You* have *ere* this *received* car No. 64 bill, but we did not send car 64; it was loaded in the yard when I received your telegram, so I did not send it, but the invoice had been mailed, and that of course went forward. You say there is one car and 40 M. in another

car yet unsettled for. I think also, there is one car more before this, making 240 M. On these you may send me draft for, deducting what you think is right, and it will be all satisfactory. Hoping the time may come that I can supply you again, and should any thing occur that you can use a few cars more at $3.00 would like to send them to you this fall yet, but I shall not have but a few cars more to sell this fall."

It is admitted that the mention of "240 M." in this letter was a mistake, and that the quantity referred to was 159 or 160 M. only.

A short time after this communication was written at Midland City, namely, on the night of the 10th of October, a fire, originating in some way not ascertained, swept over the defendant's yard, consuming the shingles in controversy, together with a quantity belonging to defendant, and some nine million feet of lumber.

The plaintiff's letter of October 2d had not been answered, and in a week after the fire, that is on October 17th, he addressed defendant as follows:

"Under the circumstances, after your serious losses by fire, I had not expected to say a word about the balance on shingles, but I have to raise $1000 this week without fail. Now, is it possible for you to help me to the amount of those shingles? If you have not the money to spare, send me your paper on 30 or 60 days, and I can use that. Only for my actual necessities would not bother you at this time. Don't you want 500 or 600 M. lath? Will deliver them in your city for $1.65 per 1000 pieces. Lath are A No. 1 article; will warrant them."

To this defendant replied on the 19th as follows:

"We have paid you for all shingles purchased of you. Those you sent in excess of our order we regret to say were burned in our recent fire. We are sorry you should make a loss with ourselves. We do not want to buy lath; have a full stock."

Larkin at length brought assumpsit for the value of the shingles in excess of 500 M. which were destroyed by the fire at defendant's yard, and being 159 M. or 160 M., and defendant gave notice with the general issue that the freight charges of $76.75, with interest, would be set off.

The jury were instructed by the circuit judge that the title to those shingles never passed to the defendant and that the plaintiff was not entitled to recover for them, and on the other hand that defendant was entitled to recover, under the notice of set-off, the freight charges and interest, amounting to $86.17, and a verdict was returned accordingly. At the trial several exceptions were taken and they are now urged here.

The plaintiff being on the stand his counsel put this question: "During the time you have had deal with defendant, what has been the custom between yourself and it, when it ordered lumber and shingles, of filling the bill exactly as ordered?" The inquiry was objected to as immaterial, and the plaintiff's counsel then stated in support of the question "that they proposed to show by the witness that the deal between the parties was such that when they sent for a lot of lumber, or a lot of shingles, it was approximately; that a few thousand more or a few thousand less was considered of no account, and paid for what they had." The objection was, however, sustained.

If this ruling, when made, could have been deemed questionable, the subsequent introduction of the correspondence must have removed all doubt of its correctness. But the objection was plainly tenable when made.

The inquiry and explanation indicated that the previous dealings referred to had consisted of separate and distinct operations, and not of a connected course of dealing, and that the transaction in question was likewise one by itself, with its own constituents and its own outline. And certainly the former contracts could furnish no criterion to show that in ordering on this occasion eight car loads, or five hundred thousand, the defendant intended that the plaintiff might exceed the express limit by one hundred and sixty thousand. "There is no principle of law that parties will always make the same terms for their contracts." *Hinman v. Eakins*, 26 Mich., 80, 82.

The second and third charges of error relate to rulings on questions put to Rowland, the defendant's secretary. As these rulings were not excepted to there is no basis for alleging error upon them. According to the record, they were submitted to. A later and different ruling was excepted to, but no error is assigned on it.

In the course of Rowland's direct testimony he stated that it was arranged between the railroad company and defendant that all freight consigned to defendant should be at once taken to defendant's yard, and that defendant should pay the railroad company the accumulated freight charges on four certain days in each month, and he explained the occasion and necessity for such an arrangement, and showed that it was reasonable.

On being cross-examined he said he was not present when the arrangement was made and only knew the fact from Mitchell, defendant's secretary, and from dealing and paying in that way for a long time. Plaintiff's counsel then moved to strike out all the testimony of this witness in reference to any contract made between defendant and the railroad company by which this delivery of cars was made, and on the ground that it appeared he had no personal knowledge on the subject. The court refused and an exception was taken.

The motion was too broad. The court could not grant it without striking out lawful evidence for the defendant. It applied to matters, some of which were pertinent and within the personal knowledge of the witness. Hence in this view the ruling was proper. *Adams v. People*, 63 N. Y., 621. But aside from this, the plaintiff was not prejudiced. The direction given to the jury deprived the point of whatever importance it might have had under any possible construction of the ruling facts.

We come at last to the essential question, and that is whether the plaintiff made out any case for the jury, and it is only necessary to recur to the correspondence as explained by the surrounding facts not liable to objec-

tion, to find an answer. The business was conducted in writing and was not left to inference or implication.

The defendant ordered eight car loads, or at the most 500 M., and the plaintiff, seeing the state of the market, was anxious to crowd the order. The defendant wished to stop with the amount contracted for, and this was mutually understood, and the plaintiff could not force the defendant to become a purchaser by precipitating unauthorized deliveries.

Finally the defendant carried acceptance up to the highest figures in the order, and which was in furtherance of the plaintiff's interest, and refused to go further. But the plaintiff kept up a fire of consignments until the quantity in excess of the maximum number ordered reached 159 or 160 M.

As these extra shipments reached defendant's yard in precise obedience to the impression they had received from the plaintiff, the defendant in good faith and for the plaintiff's benefit took them in charge as goods consigned for sale but not purchased, and advanced the freight charges. It is plain the property in this lot did not pass out of the plaintiff, and his last letter previous to the fire imports sufficient to negative his claim. The shingles were so manipulated by the plaintiff that they stood in defendant's hands awaiting sale or his orders. And the freight charges were so much paid by defendant to the plaintiff's use. Their consignment, as the fact occurred, was tantamount to an order to defendant to pay these charges on plaintiff's account. Whether the odd 20 M. was taken out of the identical car next succeeding the eighth in the order of dispatch, or of departure from the north, or in the order of arrival at Toledo, or in the order of arrival at defendant's yard, or were taken out of that one of the later arrivals which happened to be most convenient, is of no consequence. Eleven car loads were sent.

The defendant took 500 M., the outside quantity contracted for, and paid for them, and expressly refused to

buy any more. The rest were piled up as consigned goods, on which the defendant, as consignee, had paid the freight charges, and they were lying in that shape for sale, or as subject to the plaintiff's orders. They were in the exact position to which the plaintiff's orders and directions had brought them, and were there and in that situation destroyed without any fault of the defendant.

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

The other Justices concurred.

---

42 304
66 179
42 304
78 634
42 304
96 529
42 304
104 272
42 304
111 234
42 304
115 380
42 304
138 465

PHILIP MICKLE v. HIRAM MAXFIELD, AMOS GOULD ET AL.

Bill of review—Practice.

The enrollment of chancery proceedings is not invalidated by omitting bills of costs not theretofore taxed; such bills can be afterwards included among the enrolled papers.

Enforcement of a decree can be demanded only by those to whom it gives affirmative relief; on appeal they are the parties provided for by the appeal bond, and on a bill of review they cannot object that the decree was not performed.

A mere subsequent encumbrancer cannot, on appeal from a decree on a bill of review, raise a question as to the security to be given on obtaining leave to file the bill, nor object that it was not given earlier.

Where a foreclosure decree provides for the sale of land, there is no personal liability to be enforced against defendant until after it is sold and a deficiency reported.

Where a mortgage or other security is set forth and referred to in a bill in chancery, and made a ground of relief, it becomes a necessary part of the record, and if not denied in the answer it needs no formal proof. Chancery Rule 56.

A foreclosure decree cannot be rendered without producing the securities or giving adequate reasons why they cannot be produced.

A bill of review lies where a foreclosure decree has been made contrary to the terms of the mortgage, and an application for the

correction of the error, made within a reasonable time, has been refused.

Subsequent encumbrancers take subject to any explicit provisions of a mortgage as to the order in which the property shall be sold, and that without reference to the considerations on which such preferences were agreed on.

Where a bill of review is filed there is no practice which authorizes rights which accrued after the the decree, to be introduced into the controversy except by some affirmative pleading in the shape of an original or supplemental bill bringing the new parties into court.

When a defendant in chancery is once lawfully impleaded, he cannot, by disposing of his interests, step out of the position of defendant, but he continues, usually for the purposes of the suit, to represent his original interests.

Where a defendant in foreclosure retains part of the property in suit, and is responsible on his covenants for other portions, he is interested in having the mortgage foreclosed according to its terms, and if it is not, he is a proper complainant in a bill to review the decree.

One who files a bill of review does not thereby lose any rights that he would have had on a rehearing; the only distinction is that a rehearing precedes and a bill of review follows enrollment. Neither remedy can be had without leave.

Costs are properly imposed against a subsequent encumbrancer who defends against a bill of review filed by a principal defendant, and maintains the supplemental litigation in opposition to the terms of a mortgage binding his lands.

Appeal from Saginaw. Submitted October 30. Decided November 29.

BILL OF REVIEW. Defendant Gould appeals.

Wisner & Draper for complainant. Errors of law which can be relieved by bill of review must be such as arise rather from obvious mistake or inadvertence appearing on the face of the decree, or at least of record, than of error in the judgment, *Caller v. Shields*, 2 S. & P. (Ala.), 417; and the bill, answer and other pleadings and proceedings aside from the evidence may be examined to determine whether there are any errors on the face of the decree, *Whiting v. U. S. Bank*, 13 Pet., 6; *Saum v. Stingley*, 3 Clark (Ia.), 514; Story's Eq. Pl., §

407; a mortgage referred to in the bill is part of the record, *Swetland v. Swetland*, 3 Mich., 482; 1 Dan. Ch. Pr., 372; and a bond and mortgage may be examined even if not a part of the record, but only included in the commissioner's report, *Johnson v. Shepard*, 35 Mich., 115.

Benton Hanchett for defendant Maxfield. Where an erroneous decree has not been executed, the error may be corrected on bill of review, and the original decree as corrected will be directed to stand, *Forman v. Stickney*, 77 Ill., 579; *Mercer v. Stark*, 1 Am. & M. Ch., 479; *Debell v. Foxworthy*, 9 B. Mon., 228; 2 Dan. Ch. Pr. (4th ed.), 1580; Story's Eq. Pl., § 420.

E. R. Hutchins and *John Moore* for defendant Gould. The taxed bill of costs forms part of the enrollment of chancery proceedings, Comp. L., § 5094; *Thayer v. McGee*, 20 Mich., 195; leave to file a bill of review must be asked for before the time for appealing has expired, Chancery Rule 101; 2 Barb. Ch. Pr., 92; a bill of review cannot rest on a wrong decision of a question of fact, *Webb v. Pell*, 3 Paige, 368; nor on wrong inferences from evidence, *Young v. Henderson*, 4 Hayw., 189; *Wiser v. Blachly*, 2 Johns. Ch., 488; nor on the ground that the evidence did not support the decree, *Dougherty v. Morgan*, 6 Mon., 153; the evidence cannot be examined to see whether the facts were misunderstood, *Dexter v. Arnold*, 5 Mas., 303; 2 Barb. Ch. Pr., 90; *Evans v. Clement*, 14 Ill., 206.

CAMPBELL. C. J. This case comes up on appeal from a decree rendered upon a bill of review filed in pursuance of an order which was before us at the June term, 1878, under the title of *Maxfield v. Freeman et al.*, 39 Mich., 64. The questions in controversy, so far as now material, are as follows:

On February 14, 1872, a mortgage was made by Jared Freeman and wife and complainant and wife to defendant Hiram Maxfield for $2000, payable in five years, with interest semi-annually at the rate of ten per cent

per annum. This mortgage covered certain lands in town 9 north of range 2 east, belonging to Freeman, and certain other lands in town 10 north, ranges 2 and 3 east, belonging to complainant. The debt was an individual debt of Freeman, and complainant gave the mortgage on his lands and joined in the bond for Freeman's accommodation. The mortgage contained at the close of the power of sale, this provision: "The said lands in township nine (9) shall be first charged with the payment of said sum."

On the 10th of July, 1876, Maxfield filed his bill in the circuit court for the county of Saginaw to foreclose this mortgage, making parties as subsequent encumbrancers, Amos Gould and various others, all of whom are defendants to this bill of review. The bill referred to the mortgage in the usual way, and only set up such conditions as concerned complainant, making no express reference to the condition fixing the order of sale.

The bill was taken as confessed against all the defendants except Gould, who answered, setting up tax-titles on all the lands in town 9, and also purchases of the original title of Freeman of a portion. He also averred that the defendant Walter B. Mickle had purchased the other lands in town 9, and as part of the consideration had agreed to pay the entire mortgage. He claimed that the lands in town 10 should be sold first.

On the hearing under the original bill the complainant's proofs were confined to the bond and mortgage. Gould introduced no testimony except the deposition of the register of deeds swearing to the correctness of a certificate which he appended, purporting to show the state of the title of the lands in towns 9 and 10. This certificate stated that the lands in town 10 were still in the mortgagors. It showed title in Lorenzo Wallace of 40 acres, February 1, 1873; Amos Gould, 80 acres, May 27, 1872; and Walter B. Mickle of another part of the lands in town 9, obtained January 10, 1874, and later deeds of the other lands, part to Peter Foster in Decem-

ber, 1874, and to Gould in person and through mesne conveyances of the remainder, all of later dates. No copies of any of the deeds were put in, and there was no proof of tax-titles.

A decree was entered on the 14th day of May, 1877, which required the lands in town 10 to be sold first, and which also was to be without prejudice to Gould's rights derived from tax-sales, under which he was therein stated, without any evidence to that effect, to be in possession.

On the 13th of June, 1877, before the decree was enrolled, a petition for rehearing was filed, which was retained by the court until July 13, and then, for what reason we do not comprehend, was denied. Thereupon, inasmuch as the decree had been enrolled and the time for appealing from it was understood to have expired, a petition was filed for leave to file a bill of review. This petition was granted, and the bill was filed claiming error in not requiring the lands in town 9 to be sold first.

After the bill was filed (the order having been held by this court to be one which could not be appealed from) Gould moved to dismiss on various grounds, including one that the decree had not been performed, and that no security had been given, as required by Rule 101. The court allowed security to be given, and refused to dismiss. The security was ordered to pay complainant any deficiency arising upon sale.

Gould then put in an answer, taking issue on the allegations concerning the origin of the debt, and averring that by certain transactions with Walter Mickle, in which he claimed Philip Mickle was the real party in interest, they had bound themselves to pay the mortgage and lost any right of preference in the order of sale. He also undertook to deny that the proceedings had been enrolled. He also set up his tax-titles.

Gould was subsequently allowed to amend his answer by setting up that Philip Mickle had conveyed away his interest in the lands in town 10.

Testimony was allowed to be received, showing that Philip Mickle had sold a considerable portion of these lands and had given warranty deeds to most of the purchasers. There was also testimony upon the subject of arrangements making him bound to pay the mortgage, but we do not think that point made out by the proofs.

The decree was modified so as to require the property in town ten to be sold last instead of first. Gould appeals. Various objections are made bearing chiefly on questions of practice.

The objection that the proceedings were not enrolled is unfounded. It rests on the claim that certain costs had not been taxed, and the bills were not included in the enrollment. This might have been a good reason for having the bills subsequently included among the enrolled papers, but it could not undo the enrollment actually made.

The objection that the decree had not been performed is not applicable. Without deciding how far Rule 101 abrogates the old practice by substituting security for performance, it is enough in the present case to point out that under the decree as made there was nothing for Mickle to perform. Until the land should be sold and a deficiency reported, there was no personal liability which could be enforced against him. *Johnson v. Shepard*, 35 Mich., 115; *Howe v. Lemon*, 37 Mich., 164; *Gies v. Green*, ante, p. 107.

It is also very questionable how far any one but Maxfield, the complainant in the original bill, could set up any such defect if it existed. He is the only person to whom the decree gave affirmative relief, and the only one, therefore, who could demand its enforcement. If appealed from, he would very clearly have been the party to be provided for by the appeal bond. We have no doubt that Gould cannot raise the question concerning the security under Rule 101, nor object that the security was not given earlier.

Neither have we any doubt that the case is a proper one for a bill of review. Whatever may be the technical rule concerning testimony at large, as open to consideration on such a bill under the English practice, it is very clear in our opinion that a mortgage or other security which is set forth and referred to in the bill and made the ground of relief, is a necessary part of the record. It was not denied in the answer, and therefore needed no formal proof. Rule 56. By reference it was so far incorporated into the bill that a variance in the document itself from the description in the bill would not exclude it when produced and given in evidence. Story Eq. Pl., § 800 *a;* 1 Dan. Ch. Pr., 600. And it was held in *Weld v. Bonham,* 2 S. & S., 91, that such a document was so much a part of the bill that it could be looked into on demurrer. It has been held in the court of chancery and by this court repeatedly that there can be no decree without producing the securities or giving adequate reasons why they cannot be forthcoming. *Bailey v. Gould,* Walk. Ch., 478; *Young v. McKee,* 13 Mich., 552; *Bassett v. Hathaway,* 9 Mich., 28; *Hungerford v. Smith,* 34 Mich., 300.

The defendants in the original suit had a right to suppose that no decree would be made contrary to the terms of the mortgage, and the court was bound on the application of Mickle within a reasonable time to grant him leave to have this error rectified. To deny such an application would have been contrary to equity. *Scriven v. Hursh,* 39 Mich., 98; *Sheldon v. Hawes,* 15 Mich., 519; *Harris v. Deitrich,* 29 Mich., 366; *Johnson v. Shepard,* supra.

The record of the mortgage, showing the order in which the premises were to be sold, would remove any ground of hardship—if there could be any such ground taken under these circumstances—on the part of subsequent encumbrancers or purchasers. They took subject to this provision as part of the contract. And so long as the contract was thus explicit, nothing but a distinct

arrangement to the contrary could authorize any change to be made. It did not depend on implied equities, but upon express agreement, and it could not under such circumstances be important to know what considerations brought it about. It appears from the proofs that it was made because Mickle was an accommodation signer of the securities, but if the proof had failed on this point, it would not have altered the contract by which all parties were bound.

The testimony fails to show any agreement by Mickle to change the preferences. It is insisted, however, that the evidence shows that he has no interest in maintaining them, and therefore no right to complain of the decree. We do not think this is so.

It is to be borne in mind that although complainant in a bill of review his position in the decree both as made and as sought to be corrected is that of a defendant and not complainant. He is not in such a position that parting with all of his rights would put him out of the case, or abate the suit. And whatever may have been done with any of his interests, he is endeavoring to put the decree in the shape it should have been in if rightly decided on the proof and record. There is no practice, so far as we have discovered, which could introduce into the controversy any rights accruing after the decree, except by some affirmative pleading in the shape of a bill, original or supplemental, whereby the new parties should be brought before the court. It cannot generally be necessary to bring in new parties whenever a defendant parts with his interests, nor can he by disposing of them step out of the position of a defendant who when once lawfully impleaded must continue to be a defendant, and to represent usually for the purposes of the suit the interests he originally represented.

But in this case he retains a part of the property, and is responsible on his covenants for other portions, and those to whom he conveyed may fairly expect him to look to the decree in their behalf as well as in his

own. If he continues as a defendant at all, he is interested in having the mortgage foreclosed according to its terms, and the court is bound to adhere to them. As already remarked, the purposes which induced the preferred order of disposal are not important to be discussed, when the contract has expressed the agreement of all the parties to it.

As Mickle has not appealed from the decree made on the bill of review, and as Gould is the only appealing party, the only question is whether the decree has been altered in prejudice of his rights. We think that so far as Gould is concerned the alteration is a proper one, and in accordance with the terms of the mortgage. And inasmuch as the whole supplemental litigation has been maintained by him in opposition to the terms of the mortgage which bound his lands, we think costs were properly imposed against him.

We have considered the case in the light of the evidence introduced on behalf of Gould and in view of the issues he was allowed to raise by his answer. And it is therefore unnecessary for us to decide how far these issues were admissible, since they do not change the result.

But without discussing the practice at length, we deem it proper, in view of our own previous rulings on the subject, to suggest that in adopting the rules concerning bills of review and rehearings, which are much less liberal than the English practice in some respects, it has not been our understanding that a party loses any rights by filing a bill of review, that he would have had under the English practice on a rehearing. We have required leave to be granted in all cases, and we have held that the only distinction between the two is that one precedes and the other follows the enrollment. As an enrollment can always be had very shortly after the decree is entered, if we confine bills of review within narrower limits than rehearings, we should cut off in a very summary way substantial rights. Where relief is sought for error in

the proceedings, we see no reason why the rehearing should be any fuller before than after enrollment, if granted at all. The requirement that leave must be granted, and the settled practice forbidding rehearings without adequate reasons, are a sufficient safeguard against abuse. Under the English practice there were cases where it was a matter of course to open decrees, and the time within which it could be done with leave—and sometimes without—was extended to twenty years and possibly longer. Where either is allowed on newly discovered evidence it stands necessarily on a somewhat different footing than where complaint is made of error confined to the case already made. In addition to the cases before cited it may be convenient to refer to some others, which although not precisely in point here, indicate the general views we have had occasion to express on similar questions. *Clark v. Huron County Circuit Judge*, 40 Mich., 166; *Thompson v. Jarvis*, 40 Mich., 526; *Ryerson v. Eldred*, 18 Mich., 490: 23 Mich., 538; *Taylor v. Boardman*, 24 Mich., 287: 25 Mich., 527; *Case v. Case*, 26 Mich., 495; *Adams v. Field*, 25 Mich., 16; *Moote v. Scriven*, 33 Mich., 500; *Brewer v. Dodge*, 28 Mich., 359; *Maynard v. Pereault*, 30 Mich., 160.

We think that no practice should prevail which will deprive courts of equity of any of the facilities for doing justice which they formerly had; and by placing all these revisory proceedings on the same substantial footing, there is less danger of sacrificing right to technicality.

We think the decree should be affirmed with costs.

The other Justices concurred.

42 314
118 441
42 31[illegible]
s 3NW 92[illegible]
132 151[illegible]
42 314
f152 4 13

DANIEL LYLE AND OTHERS v. WILLIAM K. PALMER, TRUSTEE.

Fixtures—Machinery.

Machinery specially adapted for use in connection with the realty, and put up for use and actually used on it and owned in common with the realty, is a fixture, however the parties may regard it. So *held* where the machinery of a woolen factory, propelled by a water-wheel with shaft and belting, had been included as personal property in a mortgage of the land on which it was placed.

Where the deed of a homestead mentions the house separately, it still remains part of the freehold.

A mortgager of chattels cannot contest the mortgage for the failure to file it, nor can his trustee.

Purchasers on a foreclosure of a chattel mortgage have the rights of mortgagees in possession, and cannot be sued in trover by any one who is precluded from attacking the mortgage or who shows no right to contest the possession.

Error to Cass. Submitted Oct. 30. Decided Nov. 29.

TROVER. Defendants bring error.

Spafford Tryon and *Daniel Blackman* for plaintiffs in error. Machinery set up in a woolen factory for permanent use, and transferred with the building, is a fixture, *Burnside v. Twitchell*, 43 N. H., 390; *McRea v. Cent. Nat. Bank of Troy*, 66 N. Y., 489; *Laflin v. Griffiths*, 35 Barb., 58; *Parsons v. Copeland*, 38 Me., 537; *Union Bank v. Emerson*, 15 Mass., 159; *House v. House*, 10 Paige, 158; *Ege v. Kille*, 84 Penn. St., 333; *Butler v. Page*, 7 Met., 40; *Lawton v. Lawton*, 3 Atk., 13; *Snedeker v. Warring*, 12 N. Y., 170; *Corliss v. McLagin*, 29 Me., 115; *Farrar v. Stackpole*, 6 Greenl., 154; *Symonds v. Harris*, 51 Me., 14; *Deal v. Palmer*, 72 N. C., 582; *Coleman v. Stearns Mfg. Co.*, 38 Mich., 30; *Crippen v. Morrison*, 13 Mich., 32; *Hill v. National Bank*, 97 U. S., 450; *Ottumwa Woolen Mill Company v. Hawley*, 44 Ia., 57: 24 Amer., 719; *Pierce v. George*, 108 Mass., 78; *McConnell v. Blood*, 123 Mass., 47; *Walmsley v. Milne*,

7 C. B. (N. S.), 115; *Cline v. Ward*, L. J. 3 Exch., 257; *Holland v. Hodgson*, L. R. 7 C. P., 328; *Winslow v. Merch. Ins. Co.*, 4 Met., 306; Cooley on Torts, 428; Ewell on Fixtures, 275; Wash. R. P., 15; a mortgager or his trustee is estopped from contesting the mortgage as against the mortgagee, Jones on Mortgages, §§ 682, 734, 1483; *Bush v. Cushman*, 27 N. J., 131; *White v. Patten*, 24 Pick., 324; *Truesdail v. Ward*, 24 Mich., 117; *Faxton v. Faxon*, 28 Mich., 159; it is not the manner but the character of the annexation as to permanence which determines whether anything is a fixture, *Strickland v. Parker*, 54 Me., 263; *Brennan v. Whitaker*, 15 Ohio St., 446; Jones on Mortgages, § 429.

Joseph B. Clarke and *Geo. B. Sullivan* for defendants in error. Looms in a woolen factory were held to be personal property in *Murdock v. Gifford*, 18 N. Y., 28; and see *Potter v. Cromwell*, 40 N. Y., 287; *Voorhees v. McGinnis*, 48 N. Y., 278; *Swift v. Thompson*, 9 Conn., 63; *Gale v. Ward*, 14 Mass., 352; *Sturgis v. Warrer*, 11 Vt., 433; *Taffe v. Warnick*, 3 Blackf., 111; *Parks v. State Bank*, 7 Blackf., 769; *Cresson v. Stout*, 17 Johns., 116; *Waterfall v. Penniston*, 37 E. L. & E., 156; *Goddard v. Gould*, 14 Barb., 662; *Robertson v. Corsett*, 39 Mich., 777; *Wheeler v. Bedell*, 40 Mich., 693; *Ferris v. Quimby*, 41 Mich., 202; *Walker v. Sherman*, 20 Wend., *Vanderpoel v. Van Allen*, 10 Barb., 157; *Stevens v. Buff. & N. Y. R. R.*, 31 Barb., 590; *Heermance v. Vernoy*, 6 Johns., 5; *Burk v. Baxter*, 3 Mo., 207; *Terry v. Robins*, 5 Sm. & M., 291; *Maples v. Millon*, 31 Conn., 598.

Cooley, J. Palmer as trustee in bankruptcy of the estate and effects of George and Jacob J. Van Riper sued the plaintiffs in error in trover to recover the value of certain machinery, consisting of a number of power and hand looms, spinning jacks, card machines, etc., constituting the ordinary machinery of a woolen factory. It appears that in March, 1868, the Van Ripers were the

owners of a woolen factory and the land on which the same was situated, and of this machinery, and that the machinery was put up for use in the factory, and was propelled by a water-wheel, with shaft and belting. While it was so put up for use and in the month aforesaid the Van Ripers mortgaged the real estate to one Kingsbury to secure the payment of five thousand dollars, and in the mortgage described the machinery particularly, and included it. It appears that the parties understood the machinery to be personal estate. The mortgage fell due in March, 1870, and in April of that year Kingsbury filed his bill in chancery to foreclose it. He obtained a decree for a sale of the property, and on April 28, 1871, a sale was made and plaintiffs in error became the purchasers. It seems that the machinery was first offered for sale separately, but no one bidding, it was offered with the realty, and the whole was struck off to plaintiffs in error except two spinning jennies. The sale appears to have been for less than the amount of the decree.

The Van Ripers were adjudged bankrupts June 7, 1870, and Palmer was appointed trustee of their estate and effects the following month. In June, 1872, he demanded of plaintiffs in error the machinery in the woolen mill, and on their refusal to deliver it, he brought this suit.

Palmer claims that all this machinery was personal property, and therefore, conceding the Kingsbury mortgage to be valid, it must as to this machinery be regarded as a chattel mortgage. He then shows that it was never filed as such in the town clerk's office as the statute requires (Comp. L., § 4706), and thereupon claims that it was void as to creditors. He further claims that he, as the representative of the creditors, has a right to take on their behalf all the objections to the mortgage which the creditors themselves might have taken had there been no bankruptcy, and to insist on all their rights.

The circuit judge finds that the machinery was personalty. This finding was no doubt based upon the fact that the parties so believed and considered it. This

may generally be conclusive, but not always, and in this case it is clear the parties were mistaken. The machinery was specially adapted for use in connection with the real estate; it was put up for use and actually used with it; and was not severed from the realty in ownership. The fact that in the mortgage it was specially described was unimportant; a man in selling his homestead may mention his house separately, if he so pleases, but this would not change the fact or the law; it is just as much a part of the freehold as if it had been sold with the land without mention.

But if we were to concede the machinery to be chattels, Palmer would be no better off. Plaintiffs in error purchased the most of it, and obtained possession of all in April, 1871. From that time they had at least the rights of a mortgagee of chattels in possession, and Palmer shows no right to contest that possession. It is not pretended the Van Ripers could have disputed the validity of the mortgage, because of the failure to file it, and Palmer stands in no better position. The foreclosure decree established the validity of the mortgage and the right to have the property sold to satisfy the mortgage debt, and the decree cannot be attacked in this collateral way. A sale of the machinery was specially directed by it, and plaintiffs in error claim its protection.

It was claimed, however, on the part of Palmer that the foreclosure sale was void as to the machinery for reasons of irregularity which we need not specially mention. Concede it and plaintiffs in error are nevertheless, as purchasers, entitled to the rights of mortgagees in possession. *Gilbert v. Cooley*, Wal. Ch., 494. This is sufficient for their protection as against this suit, and if they doubted the validity of their sale, nothing would be in the way of their causing another to be made. The sale, however, appears to have been confirmed by the court, and no appeal has been taken from the confirmation.

There are two articles, however, which the court finds were converted, which apparently the plaintiff below was

entitled to recover for. These were a clock and a pair of scales, worth together twenty-five dollars. Under the views above expressed, the failure to sell the two spinning jennies is immaterial in this suit.

Plaintiffs in error must have judgment on the findings for the costs of both courts. From the costs when taxed must be deducted twenty-five dollars for the value of the clock and scales, and execution may issue for the remainder.

The other Justices concurred.

HENRY KELLOGG AND GEO. W. BAKER v. JACOB SECORD.

Notice of chattel mortgage—Witness.

Where a mortgaged chattel is advertised for sale and sold subject to the mortgage, purchasers have sufficient notice of the mortgage to estop them from contesting it on the ground that it was not duly placed on file.

Where a witness is only temporarily absent from the State, and it does not appear that he has been subpœnaed or that any effort has been made to procure his testimony or personal attendance, his testimony given on a trial in another court between other parties, cannot be introduced.

Error to Jackson. Submitted Oct. 30. Decided Nov. 29.

TROVER by Secord against Kellogg & Baker for the conversion of about 200 bushels of wheat which had been levied upon while in his possession by virtue of an execution against Harley Woodward, and sold to defendants subject to a chattel mortgage in favor of plaintiff. The mortgage was filed in a town where the parties did not live. Upon the trial the defense offered evidence of a statement made by a witness upon a former trial between plaintiff and another defendant, and it was excluded. Plaintiff recovered and defendants bring error.

John D. Conely for plaintiffs in error. The testimony given by a witness upon a former trial of the same issue may be introduced if he is beyond the jurisdiction, *Howard v. Patrick*, 38 Mich., 795, and it is not necessary that the nominal parties to the record be the same, *Osborn v. Bell*, 5 Den., 370; 1 Phil. Ev. (4th Am. ed.), 401, 402, 390, 110, 111; see *Crary v. Sprague*, 12 Wend., 46; 1 Greenl. Ev., § 163; chattel mortgages shall be void as against creditors of the mortgager and subsequent purchasers and mortgagees in good faith, if they are not filed, Comp. L., § 4706; N. Y. Sess. Laws 1833, p. 402; Rev. Stat. 1846, p. 327, § 10; *Benedict v. Smith*, 10 Paige, 128; *Wood v. Lowry*, 17 Wend., 492; *Parshall v. Eggart*, 52 Barb., 372: 54 N. Y., 22; *Ely v. Carnley*, 19 N. Y., 499; *Farmers' L. & T. Co. v. Hendrickson*, 25 Barb., 489; even though notice of an existing mortgage has been given to judgment creditors, *Stevens v. Buff. & N. Y. R. R.*, 31 Barb., 590; *Van Heusen v. Radcliff*, 17 N. Y., 580; *Thompson v. Van Vechten*, 27 N. Y., 568; *Tyler v. Strang*, 21 Barb., 198; *Bank of Leavenworth v. Hunt*, 11 Wal., 391; *Sawyer v. Turpin*, 91 U. S., 119; *Hodgson v. Butts*, 3 Cr., 143; *Menzies v. Dodd*, 19 Wis., 343; *Kane v. Rice*, 10 N. B. Reg., 470.

Austin Blair for defendant in error. The statute requiring the filing of chattel mortgages is not designed to take advantage of mere mistakes, but to give notice to the public and thus prevent secrecy and bad faith, *People v. Bristol*, 35 Mich., 32; *Sheldon v. Warner*, 26 Mich., 408; *Kohl v. Lynn*, 34 Mich., 360; *Hubbardston Lumber Co. v. Covert*, 35 Mich., 259; the mortgagee's possession of wheat mortgaged to him is notice of his rights to execution purchasers, *Grimes v. Rose*, 24 Mich., 421; *Parsell v. Thayer*, 39 Mich., 467; filing is considered as notice, *Montgomery v. Wight*, 8 Mich., 149; *Woodruff v. Phillips*, 10 Mich., 507; *Cragin v. Carmichael*, 11 N. B. Reg., 511.

MARSTON, J. What effect the failure to file the chattel

mortgage might have had in this case we need not determine. The officer advertised it for sale subject to the mortgage, and it was so sold. This was a recognition of the fact that the mortgage was a valid subsisting lien on the property, and a notice to purchasers that they would stand in no better position than the mortgagor. Parties purchasing under such circumstances could not well come into court and deny the validity of such a mortgage because not filed in the township clerk's office.

The court properly rejected the evidence offered to prove what Hutchinson had testified to in the justice's court case. The witness was but temporarily absent from the State, and it did not appear that he had been subpœnaed, or that any effort had been made to procure his testimony or personal attendance at the trial. The rule laid down in *Howard v. Patrick*, 38 Mich., 795, should not be extended to such a case.

The judgment must be affirmed with costs.

The other Justices concurred.

42 320
85 66

42 320
146 546

Clarinda Hiscock v. Morania Norton and Chester Chilson.

Equitable lien on lands for enforcement of bargains affecting it.

The doctrine of vendor's liens on realty rests on the postulate that it is not equitable to absorb another's wealth without recompense.

As between grantor and grantee an estate is bound for the unpaid purchase money, unless (1) there are arrangements between the parties which show that reliance is not placed on any unwritten claim against the land, or (2) such complications in their agreement that a court cannot define with certainty the present amount due, or identify the lien to be enforced.

A woman deeded the west half of a quarter section of land to her brother, and took back a lease of it, and at the same time the parties made an agreement whereby he was to build her a house

on the east half, and she was to let him and his wife occupy a portion of it during their natural lives and was also to let to him the whole quarter section for the term of her own natural life for a certain proportion of the crops. The conditions of the agreement were too indefinite to be estimated at a fixed sum. *Held* that the three transactions must be construed together, and that an equitable lien on the land for the fulfillment of their conditions was not enforceable.

Appeal from Jackson. Submitted October 30. Decided November 29.

BILL to set aside a deed or to enforce an equitable lien on the land granted. Defendant Chilson appeals.

Gibson & Parkinson for complainant.

John D. Conely and *Alfred Lucking* for defendant Chilson. An equitable lien upon land cannot arise unless there has been a sale and conveyance of the land for money, 1 Hilliard on Mortgages, 670; *Sears v. Smith*, 2 Mich., 244; if the consideration is the vendee's agreement to do some collateral thing, the lien is waived, *Brawley v. Catron*, 8 Leigh, 522; *McKillip v. McKillip*, 8 Barb., 552; *Hare v. Van Deusen*, 32 Barb., 95; *Fisk v. Potter*, 2 Keyes, 72; *Patterson v. Edwards*, 7 Cushm. (Miss.), 67; *Parrott v. Sweetland*, 3 Myl. & Keen, 665; *McCandlish v. Keen*, 13 Gratt., 615; *Meigs v. Dimock*, 6 Conn., 458; *Arlin v. Brown*, 44 N. H., 102; *Buckland v. Pocknell*, 13 Sim., 406; the price must be definite and fixed, *Payne v. Avery*, 21 Mich., 524; *Campbell v. Campbell*, 21 Mich., 438; *Swain v. Cato*, 34 Tex., 395; 1 Jones on Mortgages, § 194; waiver of the lien may be implied from the terms of the instrument transferring the realty, *Smith v. City*, 27 La. Ann., 286.

GRAVES, J. For several years before May 23, 1872, the complainant, a married woman, owned the northeast quarter of section fifteen, in the township of Sandstone, in Jackson county, and on that day she gave a deed of the west half to her brother, Amos Hicks, and received

back an instrument specifying that he leased the premises to her for the term of her natural life. The deed expressed a consideration of $1500, and the lease one of $500.

April 11, 1873, and a little less than a year after this transaction, Amos Hicks died intestate, leaving a widow, Mercy Hicks, now Mercy DeForest, and as sole heirs at law eight brothers and sisters, including complainant, and one nephew. Subsequently Mercy, the widow of Amos, and three of the heirs at law quitclaimed to complainant, and Solomon Hicks, another, obtained quitclaims from three of the remaining heirs, and then transferred his interest to his wife, Betsy Hicks, who shortly afterwards quitclaimed to their son-in-law, the defendant Chilson.

The remaining heir of Amos Hicks, the defendant Morania Norton, seems to have made no transfer.

Hence the complainant holds the widow's interest and the interest of four of the nine heirs, and Chilson holds the interest of four others, while the defendant Morania Norton retains the ninth. At the time complainant deeded to her brother and received the lease back, and as part of the same transaction, they also entered into a written agreement in these terms:

"This Indenture, made this twenty-third day of May, one thousand eight hundred and seventy-two, between Clarinda Hiscock, of Mosherville, Michigan, of the first part, and Amos Hicks, of Ann Arbor, of the second part,

Witnesseth, That the party of the second part, agrees for himself, his administrators, and heirs, to build a dwelling house for the party of the first part, on the E. $\frac{1}{2}$, N. E. $\frac{1}{4}$ Sec. 15, T. 2 S., R. 2 W., Michigan, for the sum of fourteen hundred dollars, the receipt whereof is hereby acknowledged in the fee simple of a deed of the W. $\frac{1}{2}$ of the N. E. $\frac{1}{4}$, Sec. 15, T. 2 S., R. 2 W., Michigan, five years from the date thereof. And the party of the first part, for herself and her heirs, agrees to and with the party of the second part that he may peaceably occupy a portion of said dwelling house and work and till the farm for the term of my natural life-time, upon conditions hereinafter stated; and in case of the death of the party of the second part, before the death

of his wife, she is to peaceably occupy a portion of said dwelling house during her natural life-time. The party of the first part agrees to let the farm—the N. E. ¼ of Sec. 15, T. 2 S., R. 2. W., Michigan—to the party of the second part, for the term of her natural lifetime, for one-third of all grain crops delivered in the half bushel, that are not fed to stock raised on the farm; also the hay and fodder, and one-third the avails of all stock raised that is sold in market. The party of the second part is to have his fire-wood and keep the farm in good repair, and farm and work the same in a good and workmanlike manner; the said parties agree to each pay one-half of all taxes—public—on said farm.

"In witness whereof, we have hereunto set our hands and seals the day and year aforesaid.

CLARINDA HISCOCK.
AMOS HICKS."

At his death Amos Hicks had done nothing under this agreement, and no one has done anything since. And it may be here noticed that when he found he was near his death he desired to reconvey to complainant, but the attempt was deferred until his strength and capacity were so impaired that the purpose could not be accomplished.

February 12, 1878, Mrs. Hiscock commenced this suit and constructed her bill with a double aspect.

The two theories are stated by her counsel as follows:

"*First.* That it was never complainant's intention to absolutely part with the title until Hicks should build the house for her as agreed upon; that the form of the several papers between them was due to the justice who drew them, and that complainant supposed they were proper to carry out the parol agreement; that, as a consequence, Hicks never became vested with the title to the west part of the land, never having occupied the same, or done anything towards building the house.

"*Second.* That complainant, at all events, had a lien for the purchase price, in the nature of an equitable mortgage, which she ought to be permitted to foreclose."

The defendant Morania Norton made no defense, and the bill was taken as confessed by her.

Chilson answered and set up that the conveyance to Amos Hicks was complete, and moreover that this had been judicially ascertained and settled in a bill brought by Betsy Hicks against Mrs. Hiscock. The answer also

denied that complainant had any claim in the nature of an equitable mortgage, and averred that Chilson was a *bona fide* purchaser without notice.

The parties having taken such proofs as they desired, the court sustained the complainant's second view and decreed accordingly, and Chilson appealed.

On the hearing in this court complainant's counsel have wisely abstained from pressing their first theory because it is too obviously devoid of force to excuse the consumption of time over it.

As to the second position: There are matters in the record which serve to color the case as a hard one for complainant, and were the court ready to consult the feelings for a rule of decision, and inclined to set an example of disobedience to law, it may be that a result not unfavorable to complainant would be speedily attained. But this cannot be. In the language of our first Chancellor, "this court is bound by the rules of law, and whenever courts shall undertake to judge according to the convenience of parties in each case, there is an end to all fixed and settled rules, and the rights of parties will be left to the caprice of whomsoever may occupy the seats of justice at the time." *Disbrow v. Jones*, Har. Ch., 48–59.

Several questions argued at the bar are practically unimportant. It is only necessary to apply attention to one main consideration, and the inquiry is whether the dealings between complainant and her brother were such as to be consistent with the existence and enforcement of the right of lien contended for.

As preliminary to further inquiry it may be observed that the original transaction out of which the lien is claimed to have arisen was not tainted by any fraud or affected by any mistake of fact. It bears no resemblance to *Merrill v. Allen*, 38 Mich., 487, where the grantee's fraud was not allowed to defeat the grantor's lien. Such cases stand upon their own ground. *Mills v. Bliss*, 55 N. Y., 139; *Frail v. Ellis*, 17 E. L. & E., 457.

The general doctrine relative to what is understood as the vendor's lien upon realty rests on the postulate that it is not equitable for one to absorb another's wealth without recompense; and therefore, as between grantor and grantee the court will intend that the purchased estate was to be held for the unpaid purchase money, unless circumstances are found which repel the presumption. And among the circumstances which will have this effect are reckoned, *first*, the formation of arrangements between the parties, which suffice to make out that reliance was not placed on any unwritten claim against the land; and *second*, the introduction of such schemes by the parties, and their blending of bargainings in such way as to disable the court from ascertaining and defining with any certainty the present amount in money, or from identifying the charge sought to be enforced. Dart's Vendor & Purchaser, ch. 14; *Mackreth v. Symmons*, and notes, 1 L. C. in Eq. 194; *Campbell v. Campbell*, 21 Mich., 438; *Payne v. Avery*, id., 524, 551; *Clark v. Stilson*, 36 Mich., 482; *McKillip v. McKillip*, 8 Barb., 552; *Arlin v. Brown*, 44 N. H., 102; *McCandlish v. Keen*, 13 Gratt., 615; *Buckland v. Pocknell*, 13 Sim., 406; *In re Brentwood Brick and Coal Co.*, 4 Ch. Div., 562: 20 Eng., 758.

The deed to Amos Hicks, and the lease back for complainant's life, and the compound agreement quoted at length, were all parts of the same transaction, and must be viewed together. The case is not one of a simple agreement to sell for $1400, or for any other distinct sum or specific property. Various considerations entered into the scheme, and reciprocal and intersecting interests of influence, and for which there is no standard of estimation, played an important part. What kind of a house was intended does not appear. There is no description. The price was not to exceed $1400. It was to be built on the adjacent lot, and not on that deeded, and five years' time was allowed for doing it. Hicks was to have the right to occupy an undescribed portion of it during his life, and in case his wife should survive him then

she was to have the right to occupy an undescribed portion during her life. No provision was made against this right in case of sale before or after complainant's death, or any provision for change in case of the death of Amos Hicks and the remarriage of his widow. This branch of the transaction contemplated an ill-defined and serious encumbrance in favor of Hicks for two lives, on the lot not deeded.

Again, Hicks was to have the right to work both lots on shares during complainant's life, and this arrangement, which tied up the right of cultivation of the whole quarter section for such term, must have been considered as involving mutual benefits and mutual burdens.

In this intermingling of interests and obligations it is impossible to separate one part from another and assign to it a specific price fixed upon by the parties independent of qualifying incidents. The parties were brother and sister, and the desire for some permanent and reciprocally advantageous arrangement, and their mutual regard and confidence, conduced to lead them into an unhappy snarl. But the authorities which have been referred to are full to show that the court is not able to relieve complainant by declaring an equitable lien.

She bargained away in different forms much more than the special interest in the eighty-acre lot, and accepted in return, not an agreement for a sum in money, or for an amount fixed as the price of the interest in the land, but a medley of promises and obligations, and affording no criterion for finding what money value, if any, was set in this complex affair on the interest in the lot the complainant parted with. And this and the other facts imply that it was not intended that complainant should retain a lien against the interest left after taking out the right to cease at her death.

As the decree below cannot be sustained, it must be reversed and the bill be dismissed. No costs will be given.

The other Justices concurred.

42 327
112 22
42 327
f123 335

HIRAM BURKE v. MARVIN WILBER.

Secondary evidence—Statute of frauds—Declaration.

The objection that documentary rights have been shown by secondary evidence, cannot be reserved for the appellate court if no objection was made to its admission until the point was raised on a request to charge after the evidence was closed.

The Statute of Frauds does not require a vendee's agreement to pay the purchase money for land, to be written to enable him to contract to sell the land again. It is therefore of no consequence, so far as such a contract is concerned, whether the vendee could have enforced his rights in the land as against his vendor, or not; and the vendee's grantee is not concerned in dealings between the vendee and his vendor as to what the former shall receive out of any money to be paid for the land.

A declaration cannot be objected to in the appellate court for insufficiency if it was not demurred to, and if it set forth the facts intelligibly and the proofs made out a sufficient case and furnished ample material for amending it to satisfy the technical rules of pleading.

Error to Iosco. Submitted Oct. 30. Decided Nov. 29.

ASSUMPSIT. Defendant brings error.

Turnbull & McDonald for plaintiff in error. When a declaration in assumpsit does not allege any consideration it shows no cause of action and is bad after verdict and on error, 1 Wait's Actions, 393; *Benden v. Manning*, 2 N. H., 289; *Hemmenway v. Hickes*, 4 Pick., 497; and advantage may be taken of it by an objection to evidence, *Stoflet v. Marker*, 34 Mich., 313; to recover for realty sold, plaintiff must show a conveyance by proper evidence, for the consideration to support the promise to pay the price is the release of his title, *Bowen v. Bell*, 20 Johns., 338; *Whitbeck v. Whitbeck*, 9 Cow., 266; *Macy v. Raymond*, 9 Pick., 286.

W. C. Stevens and *Hatch & Cooley* for defendant in error.

CAMPBELL, C. J. Wilber sued Burke and recovered judgment against him under the following circumstances, the only questions disputed on the trial being the amount of consideration, and the fact of an account stated.

Wilber made a bargain with Burke for the sale to him of certain lands the title whereof was in John Phelps. Wilber's statement, which the jury accepted as the truth, was in substance that Phelps held the title but Wilber had an interest of one-half in it after certain deductions were made for outlays, and that it was agreed between him and Burke that Wilber should have $1500 for his interest,—it having already been ascertained by Wilber from Phelps that the latter would accept $2500 for his own part, but Burke being at liberty to get it cheaper if he could. Burke obtained the land from Phelps according to this understanding, which was established also by Phelps. Burke admits the transaction in the main as stated by Wilber and Phelps, except as to price. Wilber testified to a subsequent comparison and settlement of accounts in which $310 remained due to him. Burke claimed there was no balance due.

The chief defense rested on the statute of frauds; and this we think does not apply. The objection that no deed was proved from Phelps to Burke is of no force, because no objection was made to the parol evidence from which it was to be inferred that Burke had got what he regarded as sufficient assurance of title. Without some objection seasonably made requiring the documentary rights to be proved by primary evidence, it cannot be allowed to parties to keep back such a point for the consideration of an appellate court, on a request to charge presenting the point for the first time after the evidence was closed. Secondary evidence admitted without objection is sufficient.

The statute of frauds, as held in *Holland v. Hoyt*, 14 Mich., 238, does not require the agreement of a vendee to pay purchase money to be in writing. And this being so, it is of no consequence whether Wilber could

or could not have enforced his rights in the land against Phelps. When the parties all agreed that Wilber should have a certain sum out of the price paid, it in no way concerned Burke why this was done, and he cannot inquire into the dealings between Phelps and Wilber.

The charge as given covered all the points in the case which were material, and was in a better form to instruct the jury than the specific requests asked by the plaintiff in error.

As the declaration was not demurred to, its lack of technical accuracy is not important. It sets out the facts so as to be intelligible, and the record shows that there was a sufficient case made by the proofs, which would have furnished ample material for any amendment necessary to satisfy the technical rules of pleading.

We find no error in the record, and the judgment must be affirmed with costs.

The other Justices concurred.

42 329;
78 314

42 329
112 356

MATTHEW J. MOYNAHAN v. JOHN M. HANAFORD, IMPLEADED WITH MARY TRISTRAM, WILLIAM S. WEBBER AND CHARLES LOCKE.

Promissory note—Notice—Joint accommodation makers.

Where any one but the person to whose order a note is made payable writes his name across the back, he is to be regarded as joint maker with the one who signs it.

A debtor gave his creditor the notes of a third party, which the creditor discounted on his own indorsement, but had to take up when they fell due. The debtor then gave him other notes made by the same person, but with the name of a firm to which the maker belonged written across the back. *Held* that they must be supposed to have had the previous debt in view, and that the creditor therefore had notice that the firm name was a mere accommodation, and could not recover on the note against

another partner without whose knowledge or consent it was used.

The fact that an accommodation maker of a note has written his name across the back instead of signing on the face of the note, tends, though not conclusively, to indicate that he did not intend to sign as joint maker but only as surety, and is enough to put the original creditor on inquiry.

Error to the Superior Court of Detroit. Submitted October 30. Decided November 29.

ASSUMPSIT. Defendant Hanaford brings error.

Brennan & Donnelly for plaintiff in error.

Griffin & Dickinson for defendant in error.

COOLEY, J. Moynahan brought suit in the Superior Court of Detroit to recover the amount of four promissory notes, all in the same form. The following is a copy of one:

"$100. DETROIT, May 1, 1877.

Three months after date I promise to pay to the order of M. J. Moynahan one hundred dollars at People's Savings Bank with ten per cent interest.

[Signed] CHARLES LOCKE.

[Across the back] TRISTRAM & WEBBER."

According to the settled doctrine of this court the note, being made payable to the order of another than those writing their names upon the back, the latter must be regarded as joint makers with Locke. *Wetherwax v. Paine*, 2 Mich., 555; *Rothschild v. Grix*, 31 Mich., 150.

Hanaford, who was one of the firm of Tristram & Webber, put in the defense that the firm were parties to the notes only as they had lent their names to Locke for his accommodation, and that Moynahan had notice of this when he took the notes. The facts relied upon to show notice were these: The firm of Griffin & Co. had previously been indebted to Moynahan, and had given to him for their debt the notes of Locke, which Moynahan had procured to be discounted on his own indorsement, but had been obliged to take up on Locke failing to meet

them. The notes now in suit were then obtained by Griffin & Co. and delivered to Moynahan in the place of the others. There was no evidence that Moynahan knew anything further about the facts than is above stated.

It seems to us, however, that on the foregoing statement the presumption must be that Locke alone was primarily indebted on these notes. They were given and received in the place of his pre-existing indebtedness to which the firm of Tristram & Webber was in no manner a party. They were made payable to Moynahan himself, and therefore in their inception must be supposed to have had in view the previous debt. We cannot infer that they were given on new dealings between Locke and Tristram & Webber, when a sufficient occasion for their being given appears, and a consideration moving between Locke and Moynahan is shown. Moreover, the form is not such as would have been likely to be chosen had they been given on business dealings between Locke on the one hand and Tristram & Webber on the other; and while this is not conclusive, it is nevertheless not an unimportant circumstance. It must have had the same tendency as the other facts to impress the mind of Moynahan that Tristram & Webber were mere sureties for Locke.

If it be suggested that Griffin & Co. might be supposed to have taken this paper on dealings on their part with all the makers, the reply is still the same. The form of the paper is not such as joint debtors would be likely to make, and this, taken in connection with the fact that Moynahan knew the previous debtor was Locke alone, was sufficient to put him on inquiry.

To complete his defense Hanaford showed that the firm name was endorsed upon the notes without his consent or knowledge. We think he is not liable upon them, and the judgment must be affirmed with costs.

The other Justices concurred.

42 332
95 376

42 332
109 52

42 332
f 120 464

42 332
f149 e530

42 332
157 s313

EDWARD DOYLE v. THOMAS W. MIZNER, WILLIAM GRAY AND EDWARD E. KANE.

Estoppel by recognition of corporate character—Acknowledgment of articles of association—Certified copies in evidence—Chattel mortgage by grantees of property conditionally transferred and not held in good faith.

The rule that one who recognizes an association as a corporation by dealing with it as such, is estopped from disputing its incorporation, originates in equitable principles and rests on the ground that the act of recognition creates relations and encourages conduct which there may be difficulty in undoing. But it does not apply where no new rights have intervened and the recognition has itself been brought about by fraudulent dealing carried on for the purpose of entrapping a party into the act from which the recognition is inferred.

All private corporations must be organized under general laws and can be valid only when strictly conforming to all the conditions imposed on their completion.

Articles of association of a private corporation are invalid if not acknowledged, and are not entitled to be filed in the Secretary of State's office.

The certificate of the Secretary of State to a legal conclusion is of no validity as evidence. His duty in certifying to copies of instruments on file in his office is purely ministerial, and he must certify to a copy of the entire document. A mere certificate that a paper required to be acknowledged, is accompanied by an acknowledgment in the usual form, is of no effect.

A bill of sale is invalid unless delivered; and where the same persons are grantors and represent the grantees, there must be distinct evidence that the bill was meant to be operative, and the signature is not enough to show this. Under such a transfer no new rights can arise as between the parties, on which to found an estoppel.

A resolution passed by two directors of a corporation in the absence of a third not sufficiently notified, will not authorize the execution of a mortgage whereby the latter's property is taken from his possession.

Where the only authority for mortgaging corporate property was a resolution passed by a majority of the directors, providing for a general mortgage, and that actually given was not general but was given to secure a particular debt, it could not be sustained in the hands of the original holder, and without any extension

of time or other circumstance making out a case of a mortgage in good faith entitled to protection.

D joined in articles of association with M and G, and gave them a bill of sale of certain property, which was not to take effect until the issue of stock by the new corporation. The legal preliminaries to incorporation were not completed, but M and G, who were a majority of the directors, D being the other, mortgaged the property in his absence, and K, the holder of the mortgage, took possession of it. D brought trover against them. *Held* (1) that there was no incorporation; (2) that as between the parties to the transfer there was no estoppel by dealing in a corporate character with one another, as they were bound to know that there was no legal incorporation, and if they did not, a mistake of law on that point would exonerate one party as well as the other; (3) that in testifying as to how he came to take the mortgage, K could not repeat the statements made to him by his co-defendants, as to their previous dealings with D, as they were hearsay and not needed to describe the *res gestæ;* (4) that the admission of testimony of a sale under the mortgage, if erroneous, was cured by an instruction that the measure of damages, if any, would be the value of what was taken with interest from the time of taking it, less the actual amount of the mortgage.

Error to the Superior Court of Detroit. Submitted October 30. Decided November 29.

TROVER. Plaintiff brings error.

Moore & Moore for plaintiff in error.

Ed. E. Kane and *Frank H. Canfield* for defendants in error, Gray and Kane. The taking of converted property by a third party after its conversion, and its application by him to the payment of the owner's legal indebtedness may be shown in mitigation of damages in an action against the tort-feasor, *Irish v. Cloyes,* 8 Vt., 32; *Stewart v. Martin,* 16 Vt., 402; *Stow v. Yarwood,* 14 Ill., 426; *Higgins v. Whitney,* 24 Wend., 379; *Ball v. Liney,* 48 N. Y., 14; *Sherry v. Schuyler,* 2 Hill, 204; *Curtis v. Ward,* 20 Conn., 208; *Pierce v. Benjamin,* 14 Pick., 360; *Kaley v. Shed,* 10 Met., 319; *Squire v. Hollenbeck,* 9 Pick., 552; *Howard v. Cooper,* 45 N. H., 342; *Smith v. Mitchell,* 12

Mich., 191; *Northrup v. McGill*, 27 Mich., 238; Sedgwick on Damages, 428, *n.* 2; damages in trover are the value of the property with interest from the date of conversion, *Ripley v. Davis*, 15 Mich., 80; *Bates v. Stansell*, 19 Mich., 91; in trover defendant may show an outstanding title superior to the plaintiff's, even though he does not connect himself with it, *Rotam v. Fletcher*, 15 Johns., 208; *Schermerhorn v. Van Volkenburgh*, 11 Johns., 529; *Kennedy v. Strong*, 14 Johns., 131; *Aikin v. Buck*, 1 Wend., 469; *Bush v. Lyon*, 9 Cow., 52; *Suroot v. Cook*, 4 W. T., 112; *Glenn v. Garrison*, 17 N. J. L., 4; *White v. Dinkins*, 19 Ga., 286; *Sylvester v. Girard*, 4 Rawle, 185; *Grubb v. Guilford*, 4 Watts, 223; those who seek to incorporate a company, and notwithstanding a defect in the proceeding afterward treat it as regularly incorporated, are estopped from denying the incorporation, *Swartwout v. Mich. A. L. R. R.*, 24 Mich., 389; *Monroe v. Ft. W., J. & S. R. R.*, 28 Mich., 275; *Whipple v. Parker*, 29 Mich., 379; *Merch. & Mfrs. Bank v. Stone*, 38 Mich., 779.

CAMPBELL, C. J. Doyle brought suit to recover for the forcible removal and disposal of certain goods claimed to be his property, and taken from his possession by defendant Kane under color of a chattel mortgage purporting to be made by Mizner and Gray, as president and secretary of the Detroit Chemical Works. This mortgage bore date April 10, 1875, and purported to cover the entire property and credits of the company, which were quite valuable, if owned at all, and all future acquisitions, to secure $312.23, payable on demand to Kane as trustee, to pay certain debts therein named, and authorized him to take possession whenever he should deem himself insecure. He took possession at once against Doyle's protest.

The case was before us at the January term, when we reversed a judgment which had been rendered against Doyle under instructions which took the case from the

jury. We did not therefore consider all the points raised further than to hold that Kane was not on any better footing than his co-defendants, and that Doyle's case, if true, made out a gross fraud. 40 Mich., 160. On a new trial the whole facts were again discussed and a judgment rendered for defendants, of which Doyle again complains. The case as now presented—in addition to various questions and rulings brought up for review—presents a controversy growing out of these circumstances.

In 1874 Doyle, using the name of the Detroit Manufacturing Company, was owner of a considerable business consisting chiefly of manufacturing perfumery and extracts usually sold by grocers. On the 17th of September, 1874, he gave a chattel mortgage to William Frank & Sons for $293.86, payable in three months, which afterwards became the property of Henry Boulter, and was held by him in April, 1875. January 27th, 1875, an agreement was signed by Doyle, Mizner and Gray, to organize a joint stock company to be known as the Detroit Chemical Works with a capital of $50,000, in 2000 shares of $25 each. The paid-in capital was fixed at $14,000; the estimated assets of the Detroit Manufacturing Co., of which $10,000 as paid-up stock was to go to Doyle, and $2000 each to Gray and Mizner, who were therein stated to have purchased that interest. But there is nothing to indicate that they gave or were to give any consideration. The remaining $36,000 was to be sold for working capital, after allowing Doyle $4000 to be sold for Doyle's benefit in payment for certain claims sold to the company, and for which he was to turn in $4000 of his stock. The first $500 raised was to go towards paying the chattel mortgage. Without some further showing it would seem that under this arrangement Doyle furnished the entire original capital, and Gray and Mizner got their share out of him for nothing.

There was a paper introduced which, if genuine and properly dated, showed that on the 1st of February, 1875,

articles were signed by the three, in accordance with the agreement, containing further a provision that there should be three directors and no more, and giving the directors the exclusive right to make and change by-laws. One of these papers was filed with the Secretary of State February 3, and one with the city clerk of Detroit April 6, 1875. It does not appear that any copy was filed with the Wayne county clerk. And no by-laws were shown to have been adopted.

On the 11th of February, 1875, a transfer in writing was signed by the three parties, of all the property of the Detroit Manufacturing Company to the Chemical Works for the expressed consideration of $14,000, "subject to a claim of about $500, held by Kane & Hibbard (or their client), of Detroit, Michigan." This claim was probably the Frank mortgage. Whether this transfer ever became operative is one of the questions in the case.

Doyle's ground of action is based on the claim that he never transferred his rights to any one, and that the paper in question was not to become operative until he received consideration by payment for his goods. His testimony if believed shows that the paper was never delivered in such a way as to belong to the Detroit Chemical Works, or to pass any title until paid for. Upon this a chief part of the controversy turns. But all of the issues are connected with some questions of evidence which require notice. And, inasmuch as it was insisted on the part of Doyle that the whole corporation arrangement was a fraud, and as no one was interested in it or in its existence except the parties to this suit, the regularity of its organization, and the fact of its existence, may become material.

It is claimed for the defense that Doyle, having dealt with it and acted with Gray and Mizner, is estopped from denying its corporate existence. There are certainly many cases in which a recognition of corporate existence by dealing with the corporation, will estop from ques-

tioning it. But this doctrine rests on the ground that such action creates relations and encourages conduct which there may be difficulty in undoing. In ordinary cases such recognitions have been considered as binding.

But this rule is one originating in equitable principles, and cannot be applied universally. There would be no sense in applying it where no new rights have intervened, and where such recognition has itself been brought about by fraudulent dealings carried on for the very purpose of entrapping a party into the action on which such recognition is rested. If there was no corporation in fact, and if there are no facts which make it legally unjust to forbid its denial, it is difficult to understand what room there is for an estoppel. And inasmuch as facts were asserted by plaintiff tending to show good reasons why he should not be estopped, and that testimony was open to the jury, the rulings upon the proof of corporate existence are fairly open to review.

The incorporation was sought to be shown by asking Doyle on cross-examination concerning the signing of a paper purporting to be articles of incorporation, which had been filed in the Detroit city clerk's office, April 6, 1875. This paper was not acknowledged, and was not filed in the county clerk's office. A copy of the same paper was certified by the Secretary of State; but his certificate did not give a copy of any acknowledgment, but merely said the paper was accompanied by an acknowledgment in the usual form. The original paper had an unsigned certificate of acknowledgment.

Under our present Constitution, no charters can be granted, and all private corporations must be organized under general laws, and can only be valid when strictly conforming to all the conditions imposed upon their completion. The statute concerning manufacturing corporations expressly requires that the articles shall be "acknowledged before some person authorized by the laws of this State to take acknowledgments of deeds." Comp. L., § 2839. And the previous section required

that before any such corporation should commence business, the articles should be filed with the Secretary of State and county clerk. § 2838.

Apart from any circumstances which might bind parties by a recognition of an association *de facto*, it is very clear that so long as they refrain from acknowledging their articles these remain inchoate and imperfect. There is no statute which provides—as in case of deeds—for proving them without an acknowledgment, or for compelling their acknowledgment. The articles proved by the cross-examination of Doyle did not comply with the statute.

We have, of course, no means of knowing whether any other paper ever got into the office of the Secretary of State, although the history of the case seems to negative any such fact. But the certificate of the Secretary is of no validity as evidence. A paper without acknowledgment could not lawfully be filed and recorded in his office. When he certifies he must certify to a copy of the entire document. It is not within his province to certify to a legal conclusion as to the character of an acknowledgment. He must give an accurate copy of it. His duty is purely ministerial, and an imperfect copy is no copy. The copy is only evidence as the original, if produced, would be evidence, and must exactly represent it. Comp. L., § 5931.

There was, therefore, no incorporation shown, and therefore for the purposes of this case none exists as a matter of fact. The only way in which under these circumstances any question of corporate action could arise, would be by way of estoppel. And it is important to see how far relations existed which might create it, and whether any one shows a right to rely on it.

By the contract of January 27, 1875, Doyle agreed to transfer his assets to the company as soon as it should become incorporated. The whole consideration of that agreement rested on the creation of stock which was to be in part apportioned, and in part sold as agreed.

Nothing but stock of such a nature as to be lawfully transferable as such could satisfy the agreement. And until provision was made which secured this no consideration existed for the transfer, and there was no promise to make it. This becomes material in another point of view which will be referred to presently.

To what extent, if any, the action of these parties on the assumption there was a corporation would estop them as against third parties dealing with them, can only be decided when such cases arise. As between themselves there can be no such estoppel where Mizner and Gray are not injured by any honest reliance on Doyle's action to their prejudice. Each of them knew what was done, and was bound in law to know there was no incorporation. If a mistake of law would exonerate them from this rule, it would also exonerate Doyle, and would still bind him by no estoppel extending beyond such results as came from an honest reliance on his acts. They could claim no interest in his property for which no consideration passed, and they could claim no rights against him except to the extent of their damage by a justifiable reliance on what had been done to their prejudice by his procurement or encouragement.

If it was understood the bill of sale was not to take immediate effect, then no title could pass to the concern either corporation or unincorporated. And, as already seen, there was no state of things which formed any legal consideration for the transfer under the agreement of January, 1875. We think the court erred in connecting the transfer with that agreement, if there was no actual incorporation. In the absence of an actual incorporation the transfer must be regarded as a new and distinct arrangement, resting on its own consideration. It could not be valid unless delivered, and where the same persons are grantors and representatives of the grantees, there must be distinct evidence that it was intended to be operative, which its signature alone would not give. And if there was no corporate existence, not

only does the consideration of the transfer expressed on its face utterly fail, but the further difficulty arises that there is absolute identity between grantors and grantees, with nothing to distinguish it from any other grant of a party to himself. From such a document no new rights could arise as between the parties.

It is claimed, however, that the title of Kane may be maintained by estoppel, even though as between the parties none would arise. The court below ruled in substance that, inasmuch as the mortgage given him was in favor of creditors who could hold the parties to have been incorporated, that circumstance made him equivalent to a *bona fide* holder. The court held Kane would be protected if he was ignorant of the conditional character of the delivery of the transfer, and if he understood the chattel mortgage was intended for the benefit of creditors.

We see no reason to change the view expressed on the former hearing of this cause, on which we came to a different conclusion. Mr. Kane was not employed by creditors and did not represent them. Had he done so, there was no extension of time or other advantage given which would have made out a case of a mortgage in good faith entitled to be protected. But he was sworn on his own behalf, and testified positively that he was informed by Gray and Mizner that Doyle was in charge as general manager, and that the object of giving the proposed chattel mortgage on property very largely in excess of its face was to get the property out of his hands to pay the claims which they said existed, and Doyle would not pay. The fact that the mortgage was hostile to Doyle was unquestionably prominent. The only authority for its execution was an express resolution passed the same day at a directors' meeting held by Gray and Mizner, at which Doyle was not present, and of which it is not claimed he was lawfully notified; and that resolution shows on its face that the mortgage was made for the express purpose of immediately strip-

ping Doyle of possession. Had there been a regular incorporation, such a resolution, passed by two out of three directors in the absence of a third not regularly and sufficiently notified, would furnish no authority for the execution of such a document. *Covert v. Rogers*, 38 Mich., 363. Moreover, the mortgage executed is not a general one as provided for by the resolution, which was not confined to any specific sum nor to particular creditors, but was to be for all the creditors. It is impossible on any theory to uphold Kane's claim as a *bona fide* mortgagee.

Kane was allowed, in explaining how he came to take the mortgage, to give a long narrative of the statements of his co-defendants concerning their previous dealings with Doyle. This was clearly erroneous. It substituted hearsay of parties interested for legal proof, and was not necessary to describe the *res gestæ*. Gray and Mizner themselves when sworn gave no such full account under oath, and practically obtained the benefit of their own unsworn statements. There is more or less similar hearsay testimony from other witnesses.

Testimony was introduced showing a subsequent sale under the Frank mortgage, and some objection was made to it, as well as to proof of other subsequent transactions. But upon this the court charged that if there was any right of recovery in the plaintiff, he could recover the actual value of what was taken, with interest from the time of taking, less the actual amount of that mortgage. This ruling did away with any mischief which such testimony might otherwise have caused.

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

The other Justices concurred.

JANUARY TERM, 1880.

42	342
69	475
42	342
110	280

JOHN P. CLARK v. MOSES W. FIELD.

Trespass for cutting timber—Evidence of good faith—Treble damages—Pleadings.

It is not error to exclude the opinion of a witness as to the depreciation caused to property by a trespass if it does not appear that he professed to know or had means of judging of the effect on the value of the estate.

It is discretionary for a judge to refuse to allow a witness to give his testimony without questioning.

It is not prejudicial error to have refused offers of evidence to show good faith, where such evidence had already been admitted and the jury have found the fact.

Evidence to show a license from the agent of a land owner to cut timber on the land is not admissible as a defense unless the agent's authority is shown; but it may be received to show that the defendant acted in good faith in cutting it.

The error, if any, of excluding testimony to impeach a witness who seeks to show that defendant did not act in good faith, is cured by a verdict finding that he did act in good faith.

In an action for treble damages for cutting timber, the objection that the declaration does not contain a sufficient averment of plaintiff's ownership to support a finding in his favor, should be raised by demurrer.

Whether a statement of ownership that will support proof of a holding in fee simple is not such an allegation of title as will sustain a finding in favor of the plaintiff in an action for treble damages for trespass on lands—*Q.*

Treble damages in an action of trespass for cutting timber can only be allowed in case single damages are assessed; and if the case falls within the exceptions to the statute (Comp. L., § 6371) single damages will be the measure of recovery; if not, they may be trebled. The claim for damages in the declaration may be the same whether the damages recoverable are treble or single.

Error to Wayne. Submitted October 15, 1879. Decided January 7, 1880.

TRESPASS. Defendant brings error.

Wisner & Speed for plaintiff in error. An inquiry as to the depreciation in the value of land in consequence of cutting timber therefrom calls for the opinion of an expert, *Morehouse v. Mathews*, 2 Comst., 514; *Dewitt v. Barly*, 17 N. Y., 342; *Robertson v. Knapp*, 35 N. Y., 92; *Tucker v. Mass. Cent. R. R.*, 118 Mass., 547; *Beaubien v. Cicotte*, 12 Mich., 507; *Wallace v. Finch*, 24 Mich., 256; *Stone v. Covell*, 29 Mich., 359; but see *Van Deusen v. Young*, 29 N. Y., 28; as to the allegation of ownership of the land in a declaration for trespass, *Wright v. Bennett*, 3 Scam. (Ill.), 258; *Delashman v. Berry*, 21 Mich., 521; one who counts only for treble damages in an action which does not fall within the statute by which they are authorized, cannot recover single damages, *Russell v. Myers*, 32 Mich., 524.

D. C. Holbrook for defendant in error.

GRAVES, J. Clark caused a number of oak trees to be cut on certain premises claimed by Field, adjacent to the city of Detroit, and the latter sued in trespass under Comp. L., ch. 198 for "three times the amount of damages which should be assessed therefor" and the jury found that the act was a trespass against Field and assessed the damage at $1500. They further found, however, that Clark had probable cause to believe, and did believe, that he had a right to cut the trees, and the court thereupon entered judgment for the amount of damages actually assessed. Clark then removed the proceedings here for review.

He was not allowed to give his opinion to the jury relative to the depreciation, if any, caused to the estate by the trespass. We are not dissatisfied with this ruling. He did not profess to know or to have the means of

judging of the effect of the cutting upon the value of the estate. So far as appears, he was not able to afford any assistance to the jury on this subject, and the record shows that no proper inquiry respecting his competency to shed any light on it was excluded.

The refusal to allow him to give his testimony spontaneously and without questioning was a reasonable exercise of discretion. It was regular to require the investigation to proceed by questions and answers, and thereby enable the opposing party to arrest the introduction of matter supposed to be improper, by an objection to the question. Undoubtedly cases occur which justify such indulgence as was sought here. And the trial judge may be expected to decide wisely when to allow it and when not, and the case must be a very unusual and extreme one to warrant interference by an appellate court.

The witness Adams may or may not have had an opinion in regard to the effect upon the value of the land, caused by the trespass. He was not shown, however, to have any, and did not appear to be qualified to form one of any evidentiary value.

The charges of error, based on refusals of evidence to show that Clark acted in good faith and not in a way to render himself liable for treble damages, are of no force. As evidence on the subject—and to the satisfaction of the jury—was actually received, and they found the fact to be as he contended, he was not injured by the rulings shutting out his further offers of evidence on that question.

The rejected evidence had no tendency to prove a license. Whether it could be made out or not that one was created, depended mainly if not wholly upon the production of proper proof of authority from Field to Arkett to grant it, and there was no evidence conducing to prove the existence of such authority. Indeed it was a marked feature of the trial that the defense, whilst strenuously seeking to get evidence before the jury of an

arrangement betwen Clark's agent, Barkune, and the witness Arkett, still steadily declined to produce evidence of any authority from Field to Arkett to make an arrangement. And although the court in the first place, acting upon the idea that it was tendered to prove a license, refused evidence of such arrangement on the ground that there was no showing of authority, the ruling was afterwards changed, and the evidence was allowed to go to the jury on the question of good faith. This was correct, because Clark may have acted in good faith, notwithstanding the want of power in Arkett.

But admitting the offer of the evidence on the claim of license to have been improper, it is still contended that so much of it as went to show what was said between Barkune and Arkett, was receivable to impeach Arkett. This point might perhaps deserve consideration if Arkett's testimony had not been divested of all force against Clark by the verdict. The exclusive tendency of his testimony, as shown by the bill of exceptions, was to negative good faith in Clark, and expose him to treble damages. But the verdict has effectually disposed of that showing by finding against it. No impeaching testimony could accomplish more against Field or in Clark's favor. The jury have dispelled this ground of complaint.

The court declined to charge that the declaration contained no such averment of Field's ownership as would allow a finding in his favor, and the bill of exceptions brings up this ruling and an exception to it. It is enough to say that the declaration contains a statement of ownership sufficient to support proof of a holding by Field in fee simple, and if we admit a failure to allege the title with the directness and certainty dictated by the rules of pleading (*Achey v. Hull*, 7 Mich., 423–430), still the objection is purely technical, and is not well raised. The point should have been made by demurrer. *Aldrich v. Chubb*, 35 Mich., 350; *Jennison v. Haire*, 29 Mich., 207, and cases; *Doivns v. Hawley*, 112 Mass., 237; *State Ins. Co. v. Todd*, 83 Penn. St., 272. Speaking for myself, how-

ever, I am not prepared to say that the declaration is defective in the respect referred to.

The objection that since there was no count demanding other than treble damages, no recovery could therefore be allowed unless the facts authorized one for treble damages, is not a valid one. The count may be the same whether the damages recoverable are single or treble. Treble damages can only be allowed in case single damages are assessed. Hence in any case there must first be single damages, and the demand for treble damages necessarily includes single damages. And whether they can be trebled or not, must depend upon its being made to appear that the trespass was within one of the exceptions in the statute. If it is not made to appear that the trespass was thus qualified, the single damages are allowed to be trebled. On the other hand, if the case is brought within one of the exceptions, the single damages stand as the settled measure of recovery. Neither the statute nor the precedents countenance the objection. Burrill's App., 306; 2 Humphrey's Pr., 829.

This disposes of all the points contended for under the allegations of error, and as a consequence, the judgment must be affirmed with costs.

The other Justices concurred.

JOHN M. BENNETT v. MARY E. BEAM.

42 346
125 255

Breach of promise—Damages for seduction—Tender of performance after beginning of suit.

A declaration for breach of promise averred a promise to marry plaintiff (1) on request; (2) within a reasonable time; and (3) generally. *Held* that evidence was admissible to prove a promise to marry when certain buggies were finished, at all events where this promise was only a part of what had passed between the parties, on which the suit was based.

Where a promise is made to be performed when certain work is completed, but no time is stated for its completion, the law implies a reasonable time.

In a breach of promise suit brought by a woman, evidence of the effect of the alleged refusal to marry, upon her mind and feelings is admissible as bearing on the question of damages. So is evidence of defendant's financial standing, as it is presumed that in contracting marriage property considerations are not ignored. But in an action for the breach of an ordinary contract, such evidence is inadmissible, as it cannot affect damages.

In an action for breach of promise brought by a woman, the fact that she was seduced by defendant under a promise of marriage should have great weight in fixing damages.

Courts will rarely interfere with any damages which a jury may give on account of seduction.

In a suit brought by a woman for breach of promise, evidence of interviews between her father and the defendant in her absence is properly excluded; but where on cross-examination of the plaintiff evidence of an interview between the plaintiff and her counsel was called out, it was *held* proper to refuse to strike out testimony referring to an offer of settlement made by the defendant's brother.

In an action by a woman for breach of promise, it is inadmissible for the mitigation of damages to cross-examine the plaintiff as to whether she is then willing to marry the defendant, or to examine the defendant as to whether he had not notified plaintiff's counsel after the action was begun, that he was then ready to perform his agreement to marry.

Error to Wayne. Submitted October 17, 1879. Decided January 7, 1880.

TRESPASS ON THE CASE for breach of promise. Defendant brings error.

Moore & Moore for plaintiff in error. In a breach of promise suit defendant may show offers of marriage before or after the beginning of suit, in mitigation of damages, *Kelly v. Renfro*, 9 Ala., 329; refusal to proceed with a marriage because of a rumor of misconduct by the other party was considered proper in mitigation of damages, *Baddelly v. Mortlock*, 1 Holt, 151.

Chas. B. Lothrop and *G. V. N. Lothrop* for defendant

in error, as to sufficiency of counts in the declaration cited *Potter v. Deboos*, 1 Stark. N. P., 82; *Phillips v. Crutchley*, 1 M. & P., 239: 17 Eng. C. L., 605; an offer to renew or execute a contract after refusal should be no defense, 2 Pars. Cont., 68; and plaintiff in a breach of promise suit may decline further attentions from defendant, *Southard v Rexford*, 6 Cow., 254; evidence of facts occurring after the beginning of suit cannot be given in aggravation or mitigation of damages, Sedgwick on Damages, 423: *Greenleaf v. McColley*, 14 N. H., 304; *Miller v. Hayes*, 34 Ia., 498.

MARSTON, C. J. The action in this case was brought to recover damages for breach of a contract to marry.

I. It is alleged as error that the plaintiff was allowed to prove a promise to marry when certain buggies, which were in process of manufacture, were finished, while the declaration alleged a promise (1) upon request; (2) within a reasonable time; and (3) generally.

This evidence was properly admitted. It was a part of the entire transaction of what was said by the parties, and it was for the jury to determine, not from any particular sentence or conversation, but from all the facts and circumstances of the case, the actual agreement entered into, if any, and whether the promise alleged in the declaration was proven. A particular conversation, one of several relating to the same subject-matter or a part thereof, may tend to establish an agreement other or different from that set forth in the declaration; but so long as it forms but a part, or one of several, and is otherwise admissible, it cannot be rejected because in apparent conflict with the contract alleged. To reject such evidence would be to so clip and trim the facts as to present to the jury but a meager portion thereof, while they should hear all that was said by, and what took place between the parties, relating to or fairly bearing upon the question of a promise to marry. Expressions used, when considered alone, might have a strong

tendency to prove a promise to marry at a particular time, yet when taken in connection with other facts and circumstances, the tendency might be very different. To so frame a declaration that each expression or distinct promise made would be counted on, would be of no benefit to the defendant, and would, we think, make the pleadings needlessly prolix, uncertain and misleading.

I am not satisfied but that this evidence, standing alone, would tend to support the declaration. It was of a promise to marry when certain buggies then in process of manufacture were finished. No time was then mentioned, nor did it otherwise appear when the buggies were to be finished. The law therefore would imply a reasonable time, and even if the buggies had never been made, the party could not abandon his contract on such a ground, because evidently their completion had no important bearing on the contract.

II. It is alleged as error that the plaintiff and her father were allowed to testify as to the effect of the alleged refusal to marry, upon her mind and feelings. That such evidence was admissible under the general allegations of the declaration we consider too clear to require argument. The effect upon her mind and feelings was one of the usual and natural results of the breach, and had an essential bearing upon the question of damages.

III. That it was not proper to show the financial standing of the defendant.

In this State it is a well settled legal axiom that the just theory of an action for damages, and its primary object, are that the damages recovered shall compensate for the injury sustained. There are exceptions to this rule, but it would not be claimed that this case comes within them. Now the contract for a breach of which this suit was brought, was one for a life association of interests, and it is one of the most obvious facts that the pecuniary circumstances of the defendant, as well as his social position, would largely influence any one's

estimate of the damages suffered. This would be so even if the woman had in no manner taken the man's property into account in engaging herself to him, but the law always supposes that property considerations are not ignored in these cases.

In cases like the present, what loss is it that the plaintiff has sustained by a breach of the contract? To determine this we must look at the surroundings and see what it was to which the defendant invited her. If it was to a home of poverty and a life of probable hardship and misery, the loss would apparently be small; but if it was to a home possessed of and surrounded by all the comforts and even the luxuries of life, and where her social position in the circles in which she would move by right of the marriage would be the very best, the case would be exactly the opposite, because in such case there would be abundant promise of social and domestic happiness. But beyond this the very marriage confers certain rights in the husband's real and personal estate of which she cannot afterwards be deprived except by her own consent, and she would naturally and justly look to them as her security against becoming dependent through the accidents and misfortunes of life. It is all these that the breach of the marriage contract deprives the woman of, and she is allowed to prove them, not to show that he will be able to satisfy a judgment if she obtains one, but to measure the extent of her loss.

For the breach of an ordinary contract, as for the sale and delivery of goods, the wealth of the defendant can and should have no possible bearing in the case, as it could in no way enhance or lessen the damages sustained. In such a case the damages would be ascertained according to well settled rules dependent upon the condition of the market and other circumstances which the defendant's wealth could not to any appreciable degree affect. In this case a prospective participation in the wealth of the defendant is one of those things of which the plaintiff by the breach has been deprived, and goes

therefore to the extent of the injury. *Miller v. Rosier*, 31 Mich., 478; *Kelley v. Riley*, 8 Am., 336: 106 Mass., 339. See also *James v. Biddington*, 6 C. & P., 589; *Berry v. DaCosta*, L. R. 1 C. P., 331.

In this connection it was urged that the alleged seduction of the plaintiff by the defendant was admitted to aggravate the damages, and that the court in charging the jury was too vague and general in saying "that fact [the seduction] should go a great way in estimating the damages."

It certainly would be somewhat difficult for the court to accurately define or prescribe just what effect should be given to such an act. That proof of the fact is admissible and may be considered by the jury in awarding damages in an action like the present, is not questioned. The damages which the jury may give on account of the seduction rest almost wholly with them, the court but seldom interfering because supposed to be excessive.

That the act of seduction, under a promise of marriage, should go a great ways with a jury in estimating the damages, ought to be true both in law and fact. In many cases the loss sustained from a breach of the agreement to marry may be but slight indeed; but never can this be the case where the life-long blight which seduction entails enters into the case. Respectable society inflicts upon the unfortunate female a severe punishment for her too confiding indiscretion, and which the marriage would largely, if not wholly, have relieved her from. The fact of seduction should therefore go a great ways in fixing the damages, as in no other way could amends be made the plaintiff for the injury she sustained, or the defendant be properly punished for his aggravated offense. It would seem also to be in full accord with the sense of justice implanted in the heart of every right, high-minded person, and therefore with the reason of the common law. *Sheahan v. Barry*, 27 Mich., 217.

IV. There was no error committed in rejecting or striking out testimony relating to interviews between the defendant and the father of the plaintiff when she was not present; nor in refusing to strike out the evidence introduced, referring to an offer of settlement made by defendant's brother. This last was called out on re-direct examination as a part of an interview between plaintiff and her counsel, first inquired about and gone into by counsel for defendant, on cross-examination of the witness.

V. On cross-examination of the plaintiff, she was asked if she was then willing to marry the defendant. This was objected to, and the objection sustained. The defendant was called as a witness in his own behalf, and when examined, was asked by his counsel if he had not sent notice to plaintiff's counsel, shortly after the action was commenced, that he was then ready to perform the agreement to marry, on his part. This also was rejected, and upon these error is alleged. It was urged on the argument that this evidence should have been received in mitigation of damages, and we will consider it in this light.

The offer made was not to show that he had or supposed he had good and sufficient reasons for his refusal to marry, and that he had, therefore, acted in entire good faith in so doing.

The contract of marriage is one so dependent upon affection that where this is wanting a union would be more likely to add to than lessen the damages; instead of bringing happiness to the parties, it would be more likely to entail life-long misery on one or both.

The affection which the plaintiff may have had for the defendant, and under the influence of which she may even eagerly have accepted a matrimonial alliance with him, may by his subsequent conduct have been turned into loathing and contempt, so that a marriage which at a certain time would have been to her one of the most desirable of events, would at a subsequent period, even in thought, be repulsive.

A supposed virtuous man of wealth, refinement and respectability, gains the affections of a young lady, and under a promise of marriage accomplishes her ruin, then abandons her and enters upon a life of open and notorious profligacy and debauchery, and when sued he offers to carry out his agreement—offers himself in marriage, when any woman with even a spark of virtue or sensibility would shrink from his polluted touch. To hold that the offer of such a skeleton and refusal to accept, could be considered even in mitigation of damages, would shock the sense of justice and be simply a legal outrage. Such an offer could in no way atone for the past, or have any tendency to show that the defendant had not, and was not acting in a most heartless and outrageous manner; yet the principle which would admit the evidence rejected in this case would admit it also in the one supposed. The evidence was very properly rejected.

We have examined the several requests to charge, and the charge as given, and from the record in this case discover no error.

The judgment must be affirmed with costs.

The other Justices concurred.

42	353
79	538
42	353
91	251
42	353
s4NW	13
130	5274
42	353
153	1138

LAVILLE P. SPERRY v. ESTATE OF FRANKLIN MOORE.

Claim against estate—Statute of limitations—Cross-examination—Open account—Account stated.

The general provisions of the Statute of Limitations apply to claims against the estates of decedents. Comp. L., § 7157.

Testimony by a third party that he had heard a decedent orally admit having bought certain property and become a debtor therefor at some previous time not specified, but which the witness inferred was comparatively recent, did not avail to release from the bar of the Statute of Limitations a claim against his estate upon an open account.

A claimant against an estate sought to free an open account from the bar of the Statute of Limitations by showing that within the statutory period the decedent had orally admitted that the price of a bull bought from a firm of which he was a member was properly credited to him individually; also that by his oral consent an order drawn by the claimant on another firm of which he was a member, was carried to his individual credit. But there was testimony that no one had accounted for the price of the bull, and there was nothing to show decedent's right to apply the price of it as a set-off to any account held by the claimant against him, and the defense also claimed that decedent had not assumed to apply to his benefit the credit arising from the payment of the order. The jury found against the claimant. *Held* that the account was not released from the bar of the statute.

A claim was made against an estate for a balance due on an open account, but an amendment to the demand only claimed a balance struck on an adjustment of mutual accounts by the decedent's oral admission of a specific balance. But the jury found against the claim. *Held* that it could not prevail unless evidence that might have changed the result was improperly excluded.

An account stated may doubtless be worked out without any written undertaking or acknowledgment, and may be proved by unsigned writings; but it cannot overcome the bar of the Statute of Limitations unless it is supported by evidence of some writing signed by the party to be charged.

Testimony is not admissible if the party against whom it is to be used, or those in privity with him, has no opportunity to cross-examine the witness.

Where the assignor of a claim against an estate was called to prove the claim, and his cross-examination was delayed by the claimant to accommodate another witness, and he died before it could be taken, it was *held* proper to exclude his testimony.

Error to Wayne. Submitted October 17, 1879. Decided January 7, 1880.

APPEAL from the disallowance of a claim by commissioners on claims. The claim was also rejected in the court below, and claimant brings error.

Moore & Moore for plaintiff in error. Where a witness dies before he can be cross-examined, his testimony on a former trial of the same issue is admissible, *Gass v. Stinson*, 3 Sumn., 104; contra, *Kissam v. Forrest*, 25

Wend., 650: overruled, 7 Hill, 465; see *Phil. &c. R. R. v. Spearen*, 47 Penn. St., 300.

Beakes & Cutcheon for defendant in error. As to latitude on cross-examination, see *Stewart v. People*, 23 Mich., 75; *Arnold v. Nye*, 23 Mich., 295; *Thompson v. Richards*, 14 Mich., 184; *People v. Morrigan*, 29 Mich., 7; *Hamilton v. People*, 29 Mich., 195; *D. & M. R. R. v. Van Steinburg*, 17 Mich., 109; *Beebe v. Knapp*, 28 Mich., 72; *O'Donnell v. Segar*, 25 Mich., 372; *Jacobson v. Metzger*, 35 Mich., 103; *Wilson v. Wagar*, 26 Mich., 457; *N. Y. Iron Mine v. Negaunee Bank*, 39 Mich., 644; the right of cross-examination is indispensable to the reception of testimony, *Cazenove v. Vaughan*, 1 M. & S., 4; *Brown v. Kimball*, 25 Wend., 259; *People v. Cole*, 43 N. Y., 508; *Fuller v. Rice*, 4 Gray, 345; *Wood v. Keyes*, 14 Allen, 238; a deposition taken by commission cannot be used unless all material cross-interrogatories are answered, *Gilpin v. Consequa*, 3 Wash., 187; *Ketland v. Bissett*, 1 Wash., 144; *Smith v. Griffith*, 3 Hill, 339.

GRAVES, J. Sperry brought this proceeding to establish a claim against the estate of the late Franklin Moore. The matter was contested before the claim commissioners, and there disallowed, and on appeal to the circuit court the jury also rejected it. The claimant then brought the case into this court for revision, and he alleges sixty-one errors. His counsel refers to a portion only, but reminds the court that none are waived. He derives his title to what he seeks to recover by assignment from his father-in-law, William B. Stewart, made March 16, 1876, and when he launched the proceeding he set forth his demand as $40,000, due him as assignee of William B. Stewart from the estate of Franklin Moore, deceased, "upon an open account between said Stewart and said Moore, deceased." The demand so defined and stated was explained in detail by an accompanying bill of particulars. When the investigation was going on before the commissioners the claimant put his assignor upon

the stand, but before the estate had opportunity to cross-examine, the witness was found dead. Following that event the claimant amended his demand by setting up a charge for an amount of $3,900, ascertained and agreed upon in November, 1875, as due from Moore to Stewart on an adjustment of mutual accounts between them, including the account in the bill of particulars.

The assignment from William B. Stewart to claimant, and which is the source of claimant's title and the limit of his right, is confined to specific dates or transactions, and it arranges what it assumes to transfer under two heads:

First. Such balance of account in favor of William B. Stewart and against Franklin Moore, as existed at the date of the assignment, for lumbering by William B. Stewart and for lumbering by Robert Stewart & Co.; and in looking and locating pine lands; in running logs; in tracing trespassers on lands; for cash paid on current expenses; for moneys advanced on Franklin Moore's business, and for interest on accounts due.

Second. All balances due at the date of the assignment for dealings between William B. Stewart and Franklin Moore, from May 1, 1864, to March 16, 1876, and all accounts of dealings between said parties within that interval.

It is not proposed to see how far the claim, as detailed in the bill of particulars, can find proper support in the assignment. But one thing will not escape notice. The assignment excludes all pretense of an assumption to transfer any right accruing for services, except for services furnished by William B. Stewart or by the firm of Robert Stewart & Co., and that the original statement of claim excludes everything not belonging to an open account between William B. Stewart and Franklin Moore, whilst the charge introduced by amendment shuts out all matters except a balance struck on an adjustment of their mutual accounts by their mutual agreement. There is no occasion to trace out the consequences of these considerations.

One of the main objections raised against the claim is that it is barred by the statute of limitations, and this ground of defense is sufficiently serious to warrant an examination of the case, in view of it, before proceeding to any other question. If the objection is as complete and far-reaching as supposed, it must substantially put an end to the case.

We find the record singular in not giving the time of Mr. Moore's death. But there is ground for inferring that it was later than 1876, and as the brief for the defense fixes it on the 17th of January, 1877, we are inclined to consider that as the true time. Certainly the claimant cannot object.

The statute of limitations bars all actions of assumpsit or on the case founded on any contract or liability, express or implied, unless commenced within six years next after the cause of action has accrued (Comp. L., § 7148), and the cause of action is deemed to have accrued in actions to recover the balance due upon a mutual and open account current, at the time of the last item proved in such account (§ 7152), and in case a claim set up against an estate has become barred, the law forbids its allowance. Comp. L., § 4428.

The application of the general provisions of the statute of limitations to cases against estates is obvious and unquestioned. Such cases are distinctly contemplated. § 7157.

The present action must be first considered in that shape which was originally given to it by the claimant. At the outset, as already noticed, he preferred his claim as one for the balance due him as assignee of William B. Stewart, upon an open account between William B. Stewart and Franklin Moore. Now, there is no pretense of any proof of an item of such an account of later date than nine years or more previous to Mr. Moore's death, unless three matters to be noticed presently are considered as exceptions. And if it be contended that during the intervening period Mr. Moore made any promise or

acknowledgment which ought to cut off the defense, the answer is conclusive. The statute is explicit that in such cases no acknowledgment or promise shall be evidence of a continuing contract, whereby to take a case out of the provisions of the chapter, or to deprive any party of the benefit thereof, unless such acknowledgment or promise be made or contained by or in some writing signed by the party to be charged thereby (§ 7160). And there is no claim that Mr. Moore during the time mentioned made any written promise or acknowledgment.

We shall not stop to see whether all the components of the supposed account are properly matters of account, but proceed to notice the three transactions which are claimed to have vitalized the whole series of dealings.

The first consists of a charge for certain cheese said to have been sold to Moore. A witness testified that in 1874 or 1875, and whilst Moore and Stewart were overhauling their accounts, he heard Moore admit to Stewart the previous receipt of the cheese, and saw him itemize it; that it did not appear at what time the cheese had been furnished, but the witness inferred that it "was a comparatively late transaction."

This evidence can be pushed no farther than to show an oral admission by Moore that he became a purchaser of the cheese, and a debtor therefor at some previous and indefinite time. It does not fix or tend to fix a buying and selling at the time of the admission, and it cannot be regarded as proving a dealing at that date so as to affect the application of the bar. The surrounding circumstances would rather incline the mind to look for the transaction at about the time of the occurrence of the other dealings against which the statute had already run.

The other two matters relied on to exempt the account from the operation of the statute require but few words. The claimant contended that his assignor, Stewart, bought a bull of decedent in 1873, and that the latter in 1874 or 1875 orally admitted that the price was rightly set

down to his individual credit by Stewart. It was also contended by the claimant that an order drawn by Stewart in 1874 on Moore, Foote & Co. in favor of Kingsbury for $75, and paid by the drawees, was by Moore's oral assent, carried to his individual credit by Stewart. On the other hand the defense claimed that the bull belonged to the firm of F. & S. Moore; that they sold him to Stewart, and that no one had accounted for the price. The defense further claimed that decedent did not assume to apply to his benefit, as alleged, the credit arising to Moore, Foote & Co. from the payment of the order. There was no showing of any right in Franklin Moore to apply the price of the bull as a set-off to Stewart's account against him, unless, as insisted by the claimant, the former was owner at the time of the sale to Stewart. The controversy in regard to these matters was distinctly submitted to the jury and they found against the claimant. It may be well enough to add that the evidence on both sides shows that Stewart knew that the bull belonged to F. & S. Moore, and that the credit resulting from the payment of the order belonged to the drawees, Moore, Foote & Co. As the case went to the jury it is clear that when Franklin Moore died there was no open account which was not barred by the statute.

The statement of claim introduced by amendment is inconsistent with the other. It regards the account as closed by conversion into an account stated, and the theory is that in 1874 or 1875, and after the account had been long barred, Stewart and Moore came together, and after examination of dealings, agreed upon a specific sum as a balance due from Moore to Stewart. There was evidence of such a transaction and evidence to the contrary; but it was admitted that no writing was made. The claimant's case was that the parties inspected the old accounts, and that Moore orally admitted a specific balance in Stewart's favor. The judge fairly submitted this disputed question of fact, as we think, to the jury, and they found that no settlement took place, and that

Moore did not admit that he was indebted. Therefore, in this aspect, the case failed unless evidence which might have changed the result was improperly excluded.

There is another consideration. No doubt an account stated may be worked out without any written undertaking or written acknowledment by the party against whom the balance is ascertained and established, and may be proved by unsigned writings. But the question is upon the bearing of such a proceeding on the operation of the statute of limitations. After an account has been left standing long enough to be barred, can the production from it of an account stated by an oral process be held sufficient to deprive the party of the benefit of the statute? Or must the account stated be supported by evidence of some writing signed by the party to be charged, in order to hinder the statute from continuing to run against the original matters of account? The Supreme Court of Massachusetts has recently decided that such writing is necessary (*Chace v. Trafford*, 116 Mass., 529), and in our opinion such is the correct view of the subject.

Whilst the claim as originally presented was being heard before the commissioners, the claimant, as we have seen, called as a witness his assignor, William B. Stewart, and he was sworn and examined at some length, and the defense commenced cross-examining. But the claimant interposed and asked the defense to suspend this cross-examination and allow Robert Stewart, who desired to leave, to be then examined. The estate consented and the rest of the day was occupied in the examination of this witness. On the arrival of the hour for adjourning it was agreed that William B. Stewart should be produced for the purpose of having his cross-examination pursued and completed at the adjourned time in the morning. He was sent, however, by the claimant to subpœna witnesses, and failed to return until the afternoon of the next day, and did not appear at all,

and in the succeeding night, and before the defense was given any opportunity to cross-examine, he disappeared and was never afterwards seen alive. A few days later his body was found floating in the river. The circuit judge excluded the offer to show the portion of testimony the deceased witness had given when he was removed from the stand for the claimant's accommodation, and this is now urged as error.

The ruling was regular and is borne out by common justice as well as authority. "The benefit of cross-examination is an essential condition to the reception of direct testimony" (*Heath v. Waters*, 40 Mich., 457, 471) and the virtue of the principle can never be more apparent than in a case where a claimant, in character of assignee, is seeking to establish a claim against an estate by the oath of his assignor. In a great variety of cases the effect of a witness' testimony must remain a matter of complete uncertainty during the continuance of the right of cross-examination, and enough is discovered in this record to suggest that such was probably the fact here.

The doctrine as laid down is that in order to render the testimony taken admissible, it must appear that the party against whom it is to be used, or those in privity, had opportunity to cross-examine. Buller's N. P., 239, 242; 1 Starkie's Ev., 61, 62, 409, 34; Best's Ev. (Wood's ed.), § 496; 1 Greenl. Ev., § 163; 1 Whart. Ev., § 177. There was here no such opportunity, and the want of it was caused by the act of the claimant, and the estate was in no way answerable for it. If the claimant had allowed the examination of the witness to proceed there is every reason to suppose it would have been completed, and the case is therefore stronger than it would be if the interruption had been due exclusively to the witness' death.

We think the case calls for no further discussion. Whatever questions are agitated apart from those dis-

posed of by what we have said do not seem of sufficient merit to justify special notice.

The order is affirmed with costs, and the clerk will certify this determination to the circuit and probate courts.

The other Justices concurred.

Ex rel. John Arno v. Wayne Circuit Judge.

Attorney's authority—Notice of retainer—Act 113 of 1877.

Act 113 of 1877 provides that suits for labor debts may be brought against a corporation and individual stockholders jointly. Such a suit being brought, the corporation counsel gave the plaintiff's attorneys verbal notice of retainer, but certain attorneys retained by the stockholders, without giving any notice of retainer at all, pleaded in abatement *in the name of the corporation* before the corporation counsel had pleaded. The latter afterward pleaded the general issue. Plaintiff's attorneys paid no attention to the plea of abatement, and were defaulted. Mandamus was granted to vacate the default and strike the plea in abatement from the files.

Act 113 of 1877 is severely criticised for limiting to two years the period within which suit may be brought against a stockholder of a manufacturing corporation for a labor debt.

It seems that where counsel appear in the name of a party by whom they have not been retained, and put in a plea different from one that is afterward entered by counsel duly authorized, the opposite party is entitled to relief against their acts.

Mandamus. Motion submitted Oct. 21, 1879. Granted Jan. 7, 1880.

Griffin & Dickinson for the writ.

Atkinson & Atkinson against.

Cooley, J. Stripped of all the circumstances not necessary to an understanding of the legal questions involved, the facts in this case are the following:

The Marquette & Pacific Rolling Mill Company is a manufacturing corporation, having its field of operations and its principal office in Marquette county. Its president resides in the county of Wayne. The relator claims to have a demand against the company for labor performed for it. The Constitution makes the stockholders individually liable for all such debts. Article 15, § 7. By the law, as it existed when the debt was contracted, suit to enforce the liability against the stockholders could only be brought after judgment and execution returned unsatisfied against the corporation (Comp. L., § 2852); but this was so changed by the amendatory act of 1877 as to permit the company and any of its stockholders to be jointly sued, but the act provides that no levy shall be made upon the property of stockholders, under an execution issued upon the joint judgment, until the property of the corporation shall have been exhausted. The same act, while limiting suits against the corporation to six years from the time the right accrued, declares that the liability against the stockholders must be enforced within two years from the time when payment for the labor became due, and not afterwards. Public Acts 1877, p. 95, § 35. It also provides that personal actions against the corporation shall only be commenced in the county where the works of the corporation are situated, or where its business office is located. Id. p. 96, § 37.

The relator brought his suit in the county of Wayne just as the two years from the time his demand accrued was about to expire, and joined as defendant with the corporation Mr. Luther Beecher, who was a principal stockholder, and who is said to be the only stockholder pecuniarily responsible. It is manifest from the papers before us that the suit was brought in Wayne county by either the express or the tacit consent of the corporate officers. The reasons for this are not given, but there were ample reasons of convenience, since not only did the plaintiff's attorneys reside in Wayne county, and the president of the corporation, but so did Messrs. Med-

daugh & Driggs, who had long been the standing counsel for the corporation, and who were relied upon to take charge of its litigation. So it seems did Mr. Beecher and his attorneys. After service of process had been made upon the president, Messrs. Meddaugh & Driggs notified the plaintiff's attorneys verbally of their retainer to defend, and this notice was accepted as sufficient.

After declaration was filed, however, Messrs. Atkinson, who had been employed by Mr. Beecher to defend him, filed and served in the name of the corporation, by themselves as its attorneys, a plea to the jurisdiction of the court. It is conceded that these gentlemen were never employed by the corporation, and that they had no authority whatever to make use of its name, unless their employment for the other defendant would authorize it. It was said, however, that as they actually did assume to appear for the corporation before there was any valid appearance by written notice served by the regular counsel for the corporation, we are bound to treat their appearance as authorized, and to hold it valid. I deem it necessary to spend no time upon this argument. There are cases in which, where third parties have acquired rights in consequence of the unauthorized appearance of attorneys in a cause, the parties, for the protection of these rights, have been held bound by the appearance, and have been turned over to the attorneys for their remedy. But this is the first instance, I presume, in which it was ever claimed that an attorney might appear without authority, take charge of a party's defense against his remonstrance, and, while admitting that he was never employed, insist that the court must conclusively presume that he was. The mere statement of the proposition seems to me sufficient to demonstrate how unfounded it is.

Messrs. Meddaugh & Driggs afterwards filed a plea of the general issue in the case, but the Messrs. Atkinson, taking no notice of the issue thus formed on the merits, entered the default of the plaintiff for want of reply to the plea in abatement. A motion being made to the

court to set aside this default, it was granted on the terms of paying costs. The plaintiff insists that he was entitled to it as a matter of right, and instead of paying costs, applies for the writ of mandamus.

In support of the action of the circuit judge, it is urged that the oral notice of appearance given by Meddaugh & Driggs was wholly inoperative, because the rules of court require all notices to be in writing. The question whether that notice was good or bad is a question exclusively between the attorneys giving and receiving it, and is wholly foreign, so far as I can perceive, to any question now before us. An ineffectual notice by an authorized attorney could give an unemployed attorney no right. When Meddaugh & Driggs filed a plea they were properly in court as attorneys for the corporation, and no one else was, because no one else was employed. This application is to compel the striking of an unauthorized paper from the files, and it is no more and no less unauthorized because other proceedings were irregular or ineffectual. And I trust it is not necessary to show that an unauthorized appearance cannot entitle the party appearing to demand costs.

If it were essential to Mr. Beecher's defense on the merits that he should have a right to make use of the company's name, something might be said in favor of the action of the circuit court. But this is not pretended, and indeed, was denied by this court when this motion was first presented. Mr. Beecher insists on making use of the name of the corporation to abate the suit against it, thereby compelling the plaintiff to bring suits and obtain judgments at the two extremes of the State, and postponing to a future and wholly uncertain period any resort to the property of the stockholder. The merits of the suit may obviously be tried in one suit as well as two, and their investigation can in no manner be aided by defeating the present suit against the corporation.

It is urged, however, as a very strange and suspicious

circumstance, that the corporate officers should object to Mr. Beecher defeating the suit by the plea in abatement, and this objection is thought, with other facts, to prove an understanding between the officers of the corporation and the plaintiff to establish a corporate liability against Mr. Beecher. If this plaintiff is endeavoring to establish an unfounded claim, and the corporate officers are aiding him to do so, there is a dishonest combination which should be defeated; but we have no means of trying on this motion whether there is or is not such a dishonest understanding, for the very obvious reason that we cannot investigate the *bona fides* of the claim. The question arising upon that is one for a jury in the circuit court. If we could look into it here, I am at a loss to understand how the consent of a corporation to be sued in Wayne county is to be deemed by itself a suspicious circumstance. It is, in fact, a circumstance consistent either with honest or dishonest motive. It indeed saves to the plaintiff the necessity of bringing two suits; but it certainly ought not to be corporate honesty that the officers should have made a creditor all the trouble and costs possible. They ought, on the other hand, if they believe his claim honest and fair, to recognize it; and if they dispute its fairness, they should on their own account, as well as on that of the claimant, facilitate a convenient and inexpensive trial. And there may well be cases in which the corporate officers ought to aid, rather than obstruct a suit against a stockholder. Suppose the stockholder to be one who, discovering the venture a losing speculation, undertakes to escape his due proportion of the losses which others have borne, and by dilatory pleas and expensive litigation seeks to defeat a laborer in the recovery of a demand honestly incurred, and how can it be said that the corporate officers are not morally bound to aid the laborer in enforcing the liability which the stockholder voluntarily assumed in taking his stock? It is true that on the papers before us we have no right to infer that the case supposed is

the case a trial on the merits will disclose. But we have just as little right to infer the opposite, and the infirmity of the case for Mr. Beecher on this motion, as it seems to me, consists in this: that it rests exclusively on the assumption that extraordinary and suspicious proceedings are being taken against him, which he must be allowed to defeat by a more extraordinary and wholly unprecedented and unauthorized use of the corporate name. Obviously we cannot allow ourselves to be influenced on this motion by suggestions as to what the real merits are, when we have neither the means nor the right to inquire into them.

In the view I take of the position of the parties on the pleadings, the cases examined by my brother Campbell have no relevancy, and I therefore do not refer to them further. I think the writ should issue.

I cannot refrain, however, from noticing more specifically what seems to me the extraordinary fact that the act of 1877 should have limited the constitutional right of a laborer to enforce his demand against stockholders to two years, when for all similar demands six years are given. If the purpose of this act had been to defeat the constitutional right, it could not have contained a provision more directly calculated to further it. It was held in *Hanson v. Donkersley*, 37 Mich., 184, that the liability of the stockholder was only secondary; but whether primary or secondary, the laborer will naturally look to the corporation first, and, except in cases of corporate bankruptcy, may usually expect, for some considerable period after the labor is performed, to have payment made or provided for by the corporation itself. As stockholders very often reside at a distance, and may not readily be found when the creditor discovers a necessity for resorting to them, this short statute of limitations may almost be said in many cases to give complete immunity, especially as it makes no exception of persons out of the State. The stockholder in a failing Lake

Superior corporation, residing in Detroit or Boston, if he finds laborers likely to pursue him with personal demands, has only to take a pleasure excursion through Europe and he washes his hands of all legal obligation. This is certainly not just, and whether it is or is not competent for the Legislature thus to limit the remedy, there can be no question, as it seems to me, that it never should have been done. It was held in *Pereles v. Watertown*, 6 Biss., 79, that a two-years limitation in the case of municipal bonds, which are usually sold abroad, was unconstitutional, as impairing the obligation of contracts; but it was certainly quite as just a limitation as the one here. I refer to this not because it is involved in this motion, but because of the importance it seems to have had in influencing the action of the parties in this case. If the statute must be construed, as was claimed, in opposition to this motion, I desire that nothing I may say or assent to in this cause shall imply an opinion that it was competent for the Legislature to pass it. Statutes of limitation cut off the remedy because the party has not, within a reasonable time, availed himself of it; and it is certainly a very notable fact that the Legislature should deem it reasonable that the creditor be required to pursue the party secondarily liable with thrice the promptitude and vigor which is demanded in seeking redress against the principal debtor.

A mandamus should issue as prayed.

MARSTON, C. J. I concur in the opinion of my brother Cooley. I think parties should have a voice in the appointment of counsel to represent them in court, and that where counsel appear without authority, the party in whose behalf they assume to act has a clear right to the active assistance of the court in the premises. And so where different counsel assume to and do appear for one and the same defendant, and put in separate pleas, to the embarrassment or delay of the plaintiff, he may come in, where it appears one is acting without authority,

and obtain relief. To say that the parties would have a remedy against the attorney would not be a sufficient protection, and should not be enforced upon a person where a more simple one can be reached, and is applied for seasonably.

GRAVES, J. The corporation is sued as debtor and Beecher is joined because he is a stockholder. They are distinct defendants and have full power to make defense separately. By becoming a member of the corporation Beecher consented to its power to select its own counsel and defend suits in its own way. He agreed that it should act for itself, through its own proper agencies, in regard to such things, and independently of any control by strangers or others not vested with the power, even though they should be stockholders. The making of an attorney requires two things, neither of which can be done by a third party, where there is no question of capacity: *first*, an agreement by the attorney to be attorney for the party; *second*, an agreement by the party to have him for attorney.

Now, this corporation is in law a person capable of making an attorney to represent it; and Mr. Beecher cannot make one for it, or step into its place of client when he is made, in order to control him. Mr. Beecher is not the corporation, nor the agent of the corporation, for any purpose of the kind. He can make an attorney for himself in the suit, and defend on any ground open to him, whether it be one which has no relation to the mode of proceeding in the action between the plaintiff and the corporation, or one which concerns the effect, or supposed effect, upon him of such mode of proceeding. I do not pause to inquire about the limits within which he would have to be confined in grounding a defense upon the manner and regularity of the litigation between those parties. A suggestion is, however, ventured that if he has any right at all to say that the suit, as brought against the corporation, cannot bind him—that the con-

trolling corporate agencies, whatever the motives, cannot as to him, waive objections to the bringing of the action here—he can make use of the right as cause of personal defense, and has no occasion to try and force it into the mouth of the co-defendant.

I do not see how the court, at his instance, can compel the corporation, either by direct or indirect measures, to file this or that plea, and that, in short, appears to be the gist of the contention.

I prefer to reserve my opinion on the other matters referred to, but I concur in the opinion that the mandamus should issue, on the grounds I have indicated.

CAMPBELL, J., dissenting. Relator sued the Marquette & Pacific Rolling Mill Company and Luther Beecher, one of its stockholders, upon a claim set up as a labor debt, under Act No. 113 of the Public Laws of 1877, revising the statutes concerning mining and manufacturing companies. This statute, which enables the holders of labor debts to enforce them against stockholders in the same action in which the corporation is sued, requires the joint action to be brought within two years; and it also declares that personal actions against the corporation "shall be commenced only in the county where the mine, or smelting or other manufacturing works are situated, or in the county where the business office in this State is located." Sec. 37, p. 96.

The suit was brought just before it would have been otherwise barred by the statutory limitation. It was begun in Wayne county, where Beecher lives, and where the president was also found. The company, however, appears to have neither mine, factory nor business office, within the statute, except in Marquette county.

On the 23d of June, 1879, declaration was filed. On the 9th day of July, 1879, a plea was filed by Atkinson & Atkinson, as attorneys for the corporation, verified by the oath of Beecher, setting up the fact that the company's business and offices were not in Wayne, but in Marquette, and claiming that the suit was wrongly brought

in Wayne. This plea the plaintiff's attorneys refused to accept, on the ground that they had already received notice of retainer from Meddaugh & Driggs, and on inquiry agreeing that they had no other objection. Beecher himself appeared by J. P. Whittemore and set up the same defense under his notice attached to the plea of the general issue.

On the motion to be presently referred to, before the circuit judge of Wayne county, there were affidavits that on the 23d of June Meddaugh & Driggs informed plaintiff's attorneys, through one of their clerks, that they were retained, and plaintiff's attorneys served a copy of declaration on them. No written notice of retainer and no written acceptance of declaration was given until after the plea was served by Messrs. Atkinson. Then a written notice of retainer was made out and dated back to June 23d.

Messrs. Atkinson were employed by Beecher to appear for his co-defendant, the corporation, and set up this defense to the jurisdiction of the Wayne circuit. Meddaugh & Driggs had been engaged in previous litigation for the corporation, but on this occasion were employed by William W. Wheaton, who had been and continued, so far as appears, general agent and manager. The corporation had quit business, and he resides in Detroit. There were affidavits indicating that his interests in the present controversy were adverse to those of the company, and that he was desirous of enforcing the claim.

Upon the refusal of plaintiff's attorneys to accept their plea, Messrs. Atkinson applied to Meddaugh & Driggs to induce them to concur in setting up the defense referred to, offering indemnity for costs, and stating their willingness to have the appearance for that purpose made in the name of whichever firm of attorneys those gentlemen saw fit to designate. Meddaugh & Driggs refused to concur in that defense, and put in a plea of the general issue alone.

Atkinson & Atkinson in due time entered default of

plaintiff for not answering their plea, and the default was made absolute. Plaintiff applied to the Wayne Circuit Court to open the default and set aside the plea upon the facts before stated. The court found that there had been no written notice of retainer or acceptance of declaration before the Atkinsons pleaded, and refused to open the default except on payment of ten dollars as costs of motion.

Application is now made for a mandamus to compel the action applied for as matter or right.

Upon a former application, made to us *ex parte*, we declined to interfere, on the ground that Mr. Beecher was entitled to this defense, and that the company could not deprive him of it. We allowed a further application to be made, on the claim that he had waived the defense. We have now heard all that the parties on either side have to present on the subject, and may dispose of it advisedly.

I think the circuit judge was right in holding that when Messrs. Atkinson appeared there had been no such appearance by any one else as could have been made the foundation of legal action to be had under it. Rule 6 requires all notices to be in writing. Rule 12 requires all agreements between parties or their attorneys to be in writing. Rule 11 declares that a defendant shall be considered as appearing when written notice of retainer is served or when he pleads in any way. And service may be accepted by a defendant himself, but there must be sworn proof of the genuineness of the acceptance, which plainly contemplates written acceptance. These rules do not contemplate that any party can be bound by action of himself or his attorneys in subjecting him to liability in the suit, where proof of the fact can only be made by the uncertain means of parol evidence.

When the Atkinsons appeared there was nothing to authorize their action to be treated as a nullity. The plaintiff had no right to assume they were acting with-

out authority. The authority of attorneys in good standing is presumably valid, and if there is any appearance which is not authorized, there must be an application to the court by some one who has a right to make it before it can be disregarded.

But inasmuch as all the facts are substantially admitted, it will not be improper to consider the questions raised, without, however, assuming to question any matter legitimately within the discretion of the circuit judge.

The statute of 1877 is one relied upon by the plaintiff himself as his only authority for bringing the present action in such a way as to reach stockholders in the same proceeding with the company. It cannot be doubted that the Legislature may make regulations concerning the venue of personal actions, and courts must respect their wishes. There are manifest reasons in such cases as this why debts for labor may have been subjected to peculiar provisions. It is certainly much cheaper to bring one suit than two, and to reach a judgment at one time against not only the company, but any or all of its corporators. It is also not unlikely that the evidence on one side or the other, if not on both sides, can be found on the spot where work is done, or in the company's office, and that delay and expense are usually to be saved by having the suit tried where the evidence is to be found. The statute is much more explicit than most statutes fixing a venue, and contains a positive prohibition against suing elsewhere. We need not inquire as to what may be done to waive such a right by the consent of all parties. No doubt a judgment would be good where no such point is raised, because the pleadings would not indicate necessarily where the proper place of suit is. The questions we are now considering do not involve this general subject. We are to see in what position these litigants are placed.

Beginning with the fact that the plea filed by Messrs. Atkinson is presumptively authorized, the application to get rid of it does not come from the corporation, but

from the plaintiff. The defense is one of which it is too plain for argument the corporation cannot justly or lawfully deprive Beecher. There is evidence not overcome that he is the only responsible stockholder, and that the company is not solvent. If this is so,—and whether so in fact, the circuit judge might have been so impressed,—Beecher is the only substantial defendant, and the company is rather a formal than substantial co-defendant. Whether Beecher in this position had or had not a strict legal right to employ attorneys to represent the company, he had at least a right to expect honest co-operation in saving him from unlawful vexation. We cannot determine the fact whether the company's agent is or is not really interested against the company, and instructing attorneys for it to waive its right to be sued only in Marquette. But it is very certain a stockholder sued in this way may justly complain of any attempt in the name of the company to compromise his interests. *Philipson v. Earl of Egremont*, 6 Q. B., 587; *Edwards v. Kilkenny & Great S. & W. Ry. Co.*, 2 C. B. (N. S.), 397: 40 E. L. & Eq., 316. Having offered to allow the substitution of the attorneys whom the plaintiff desires to have substituted, if they would not give away this defense, he makes out a strong equity against any interference, and the circuit court was right in refusing to disturb the case, unless there is some legal rule depriving that court of any discretion in the matter.

If Mr. Beecher has waived any personal right by the form he has adopted in pleading, that is only an additional reason why any advantage obtained by the other plea should not be taken from him. But we think counsel for plaintiff are entirely in error in so claiming. The remedy given by this statute is a special one, and cannot be governed altogether by the more nice than just rules which, according to some lines of decision, might belong to other cases. The right of a party to object to a suit brought in the wrong forum is a substantial right, and the plea or other form of objection setting it

up is not regarded as strictly a plea in abatement, or as subject to the same minute criticism. We held in *Haywood v. Johnson*, 41 Mich., 598, that such a ground could be taken upon motion. We held it sufficient ground for prohibition in garnishee proceedings in *McCloskey v. Judge of Wayne*, 26 Mich., 100. In England the objection, where the proceedings are in any way under statutory limitation, has been permitted in various ways, not only by preliminary plea but otherwise. In *Parker v. Elding*, 1 East, 352, a statute nearly in terms like the one before us, requiring that no suits for certain debts should be brought elsewhere than in the court of requests of Ely, was held to authorize the defense to be relied on at the trial, because the law being a general one, the plaintiff was bound to know he could not sue elsewhere. And Lord Kenyon carefully discriminates between cases where the law requires the objection to jurisdiction to be taken in a certain way, and those where it does not. The case of *The Dundalk Western Ry. Co. v. Tapster*, 1 Q. B., 667, in some respects resembles the present. There a railway charter provided that suits for delinquent stock subscriptions might be brought in any of the Queen's courts in Dublin. A suit being brought in an English court the objection was pleaded, and the question came up directly in regard to the judgment on demurrer whether it was in abatement or in bar. The court held that it was in substance though not in form a plea in bar, and that the defense was complete. Lord Denman remarked: "The right and remedy are both created by the legislature, and the company are bound to pursue the remedy provided by it." In *Bank of Australasia v. Nias*, 16 Q. B., 717, it was held that a remedy very much like the present, created in Australia, could only be pursued in the Australian courts.

A somewhat similar question of privilege has been up in the case of attorneys sued in other courts than those where they belong, and it was held by the Common Pleas that such a plea was properly put in by attorney, and

not in person. *Hunter v. Neck*, 3 M. & G. 181; *Groom v. Wortham*, 5 Scott N. R., 799.

It is familiar practice to discharge from arrest on mesne process in such cases on motion. *Secor v. Bell*, 18 Johns., 52; *Watson v. Judge of Superior Court*, 40 Mich., 729.

Such questions come up frequently in regard to the jurisdiction of municipal courts, and a prohibition has been allowed where a motion for nonsuit on the trial was refused, and after verdict,—it being held there was no waiver. *Jackson v. Beaumont*, 24 L. J. Exch., 301: 32 E. L. & Eq., 587. And in *Le Tailleur v. S. E. Railway Co.*, 3 C. P. Div., 18, where the liability to suit depended, as here, upon the place of carrying on business, the prohibition was granted on affidavits. In *Watts v. Kinney*, 23 Wend., 484, the earlier cases are discussed.

It would not be wise,—as was intimated in *Haywood v. Johnson*,—to make such an important right dependent on any mere technicality of procedure. All that a plaintiff can ask is notice in some intelligible way that the defense is relied on. He is bound to know he cannot sue these parties out of the proper forum without their consent, and he cannot complain if they do not give it. The plea to the jurisdiction in such cases is substantial, and under the decisions referred to it should be so treated.

I think the defendant Beecher had a right to rely on the defense by his notice. I think also that the plea of the company was sufficient to raise the same question, and that no reason is shown why the circuit judge had not a right to refuse to disturb it, except on the terms he saw fit to grant. And I also think that under the facts, not seriously disputed, it would do no good to plaintiffs to have a mandamus, when Beecher's defense is not cut off.

There is no ground in my opinion for the writ.

42 377
109 398

FRANCIS G. RUSSELL v. WILLIAM PHELPS AND WM. H. BRACE.

Action against assignee in bankruptcy for willful neglect of duty to the injury of a particular creditor.

An assignee in bankruptcy is liable in damages to creditors of the bankrupt, if he willfully omits or improperly performs official duties that are clearly prescribed and do not involve the exercise of discretion or judicial powers, and does so with intent to injure such creditors; and *it seems* that the State courts have jurisdiction of the action against him.

Notice of meetings of a bankrupt's creditors must be given by the assignee to all known creditors, and he has no discretion to exercise except as to the mode of giving it.

In an action against a bankrupt's assignee for willful injury to creditors from his omission or improper performance of his duties as to notifying them of meetings, or retaining sufficient funds to provide for their known but undetermined claims, the plaintiffs must prove the bankruptcy proceeding and the appointment and qualification of the assignee and his entry on the discharge of his duties, and show that plaintiffs were creditors and that defendant knew it and wilfully and with intent to injure them omitted or improperly performed the duties referred to as alleged.

The fact that any essential element of a case has been sufficiently proved does not make it erroneous to admit farther competent testimony tending in the same direction even though the tendency is slight; the weight and effect of the evidence are for the jury.

Unpleasant relations between a bankrupt's assignee and the attorney of a creditor may be shown in an action by the latter against the assignee for damages arising from his willful omission to notify the creditor of meetings in bankruptcy or to secure his claim as required by the Bankrupt Act.

Where a memorandum upon a deed was admissible in evidence, and referred to the land described in it, the deed was *held* admissible.

In an action against an assignee in bankruptcy for willful negligence, it is admissible to show the custom in respect to those proceedings wherein he was at fault, if it tends to show that a uniform practice existed in conformity with the legal construction of the Bankrupt Law.

In an action against a bankrupt's assignee for willful neglect to notify creditors of meetings in bankruptcy, it was shown that the second meeting of creditors had been adjourned. *Held* that

although the Bankrupt Law does not provide for such adjournment, it was not error to call the jury's attention to the want of any notice of the adjourned meeting in connection with the evidence as to whether notice was given of the regular meeting.

Portions of a charge will not be considered as if standing alone, but will be construed in connection with the rest and in the light of the pleadings and evidence.

The Bankrupt Law (Rev. Stat. U. S., § 5092) provides that at the second meeting of creditors, it shall be determined what part of the net proceeds of the estate shall be divided after reserving a sum to provide for all known undetermined claims. *Held* that the assignee cannot divide all the proceeds then in his hands, but only so much as remains after reserving the fund for undetermined claims.

In an action against an assignee in bankruptcy for willful neglect to give notice by mail of creditors' meetings, it is for the jury to determine whether notice had been mailed; if so, it is unimportant whether it was received.

Jurisdiction in a Federal court, so long as it is not exercised, does not necessarily deprive a State court of the right to proceed in the same matter.

Whether, at common law, an issue could be framed and trial had in the Federal courts in an action for damages against a bankrupt's assignee for willful neglect of duty to the injury of creditors—*Q.*

Where a declaration against an assignee in bankruptcy set forth facts constituting a breach of duty, and alleged that the plaintiffs as creditors of the bankrupt were thereby deprived of their claim against his estate, and that by means thereof the estate had been exhausted and the plaintiffs wholly deprived of their rights therein, the allegation of damage was held to be sufficiently specific to admit evidence showing whether the entire claim, and if not, what part of it, was lost because of the facts of which complaint was made.

Error to the Superior Court of Detroit. Submitted October 30, 1879. Decided January 7, 1880.

TRESPASS ON THE CASE. Defendant brings error.

Ashley Pond for plaintiff in error.

Alfred Russell for defendants in error.

MARSTON, C. J. This was an action of trespass on the case brought to recover damages for an alleged fail-

ure of duty as an assignee in certain bankruptcy proceedings. In the first count it was, amongst other things, alleged that although the defendant well knew plaintiffs were creditors of the bankrupts, holding the largest valid, subsisting and provable claim against the estate, yet he having assumed to call a second meeting of the creditors for the purpose of declaring a dividend, willfully and wrongfully intending to hurt and injure the plaintiffs and to deprive them of their just share of the estate, willfully refused and neglected to send them notice, by reason of which they were prevented from being present, and the power of determining what amount of the proceeds should be divided was shifted from the creditors to the assignee, by means whereof, etc.

In the second count, that well knowing plaintiffs' claim, and that it had not been proven at the time of calling the meeting aforesaid, he did not retain a sum sufficient to provide for all undetermined claims, but disregarding his duty and willfully and wrongfully intending to hurt and injure the plaintiffs, and to deprive them of their just claim against the estate, did make and declare out of the proceeds of said estate a dividend of about one hundred cents on the dollar, and pay the same to the creditors who had proved their claims at the time of calling the said meeting, and did not reserve a sum sufficient to pay plaintiffs' claim, as by law he was bound to do, by reason, etc.

If the person appointed, and who was acting as assignee of the bankrupt estate, with the intention of injuring the plaintiffs, who were creditors, willfully and wrongfully omitted the performance of, violated or improperly performed, any clearly prescribed official duty to the plaintiffs, which was not discretionary, or did not involve the exercise of judicial powers, he would be liable to them for the damages sustained in consequence thereof. Cooley on Torts, 377–9.

The alleged duty violated was, *first*, in omitting to give plaintiffs notice of a second meeting of creditors

which had been called; and *secondly*, in improperly declaring and paying a certain dividend without retaining sufficient to provide for known undetermined claims. We will first inquire what his duty was in these respects.

The Act of Congress, in providing for a distribution of the bankrupt's estate, requires a *pro rata* division to be made among the creditors without priority or preference, except in certain matters not necessary to be here specified. Rev. Stat. U. S., § 5091. The court, upon request of the assignee, is required to call a general meeting of the creditors, *of which due notice shall be given*. At this meeting the assignee is to report and exhibit to the court and creditors just and true accounts of his receipts and payments, and a statement of the whole estate of the bankrupt as then ascertained; of the property recovered and the property outstanding; what debts and claims are yet undetermined, and what sum remains in his hands. The majority in value of the creditors then present are given power to determine whether any and what part of the net proceeds of the estate, after deducting and retaining a sum sufficient to provide for all undetermined claims, which have not been proved, shall be divided among the creditors. If at least one-half in value of the creditors do not attend the meeting, either in person or by attorney, it then becomes the duty of the assignee to so determine what part shall be divided. § 5092. "The assignee shall give *such notice to all known creditors*, by mail or otherwise, of all meetings, after the first." § 5094. The meeting in these sections provided for, is not a first meeting.

The clear language of these provisions would seem to leave no room for doubt or construction as to the question of notice. If a meeting was called it was the duty of the assignee to give notice thereof to all known creditors, and upon this subject he had no judgment or discretion to exercise, except in the method of giving it. The creditors, where known, were entitled to this notice, in order that they might be present, if they so desired,

to ascertain the condition of the estate, and determine, subject to the rights of the creditors holding the undetermined claims, what part of the net proceeds should be divided. This was a valuable and important right of which the creditors—more especially those holding one-half in value of the debts,—could not rightfully be deprived without their consent.

It is equally clear that if one-half in value of the creditors did not attend a meeting properly called, and of which due notice was given, it then devolved upon and became the duty of the assignee to determine what otherwise was the duty of the creditors to do, viz., what part of the net proceeds should be divided, deducting and retaining a sum sufficient to provide for the undetermined claims. We will have occasion to refer to this matter again when we come to consider the charge.

Thus far the duty of the defendant was clear and imperative. In view thereof, and of the allegations of the declaration, it was incumbent on the plaintiffs to prove the bankruptcy proceedings, and that the defendant was appointed assignee; that he qualified and entered upon the discharge of the duties of his office; that plaintiffs were creditors as alleged, and that the assignee had knowledge thereof; that a second meeting of the creditors was called, and that the assignee did not give them notice thereof; that at such meeting a majority in value of the creditors were not present; that the assignee did thereupon determine the amount of the proceeds which should be divided, and did not retain sufficient to provide for the known undetermined claims, and the damage which they suffered thereby; and that the assignee, in not giving the notice, and in not retaining sufficient to meet their claims, acted willfully and wrongfully, with intention to injure them. Evidence having a tendency, however slight, to establish one or more of the above essential facts, would be admissible. And the fact that any one of the propositions necessary to be established had already been sufficiently proven by other testimony, or

even admitted, would not render erroneous the admission of farther competent testimony tending in the same direction. In view thereof and of what has already been said as to the duty of the assignee, and the facts necessary for plaintiffs to establish in order to recover, we think the exceptions taken to the admissibility of certain evidence may very easily be disposed of. We do not deem it necessary to consider each exception separately. A careful examination of the exceptions and evidence satisfies us that it was admissible. Some of it was strongly criticised, as having no proper tendency to sustain certain propositions. After giving due and proper consideration to all that was urged against it, yet we are of opinion that it did have a fair tendency to establish the issue; and although as to some portions the tendency was but slight, yet still that did not render it inadmissible, the weight and effect to be given it being proper questions for the jury. Indeed, in the trial of such a case it is very difficult to exclude any part of the whole history of the proceedings in the bankrupt matter, and of the relations existing between the parties, so far as known to the defendant.

The state of feelings existing between the defendant and the attorneys of the plaintiffs was competent. It may be true that "men do not usually injure one man to spite another," and that the motive of defendant would not furnish a ground of liability. The motive which prompts the proper performance of official duty is not of the slightest legal importance, while in the improper performance thereof it may be of the utmost importance. The facts and circumstances that might prove a sufficient motive to influence one man to disregard the proper performance of duty, or to commit a positive wrong, might with another, and indeed with a majority of men, have no sort of influence. What might or would not be considered sufficient cannot be determined as matter of law, but must be submitted to the jury, to be by them considered in the light of all the evidence in the case.

The deed, and memorandum thereon, referred to in the eleventh assignment of error,[1] does not appear in the record. It is apparent that the deed was offered because of the memorandum thereon, and in connection with the oral evidence relating thereto. In this view it was admissible.

We do not understand that the evidence as to custom given by Mr. Dickinson, as referred to in the twelfth and thirteenth assignments,[2] in any way tended to show

[1] 11. That said court erred in overruling the objection of plaintiff in error to the reception in evidence of a paper purporting to be a copy of a deed dated the 7th day of January, 1876, from George N. Dean to Mason Dean, and a memorandum in the handwriting of plaintiff in error, containing a statement of facts in regard to the transactions of Dean & Young with reference to their property, and the conveyance by Dean of the land described in said deed; and in permitting said paper and memorandum to be received in evidence.

The foregoing assignment was based on the following testimony of Don M. Dickinson, of the firm of Griffin & Dickinson, attorneys for defendants in error in the bankruptcy proceedings, and on the admission of documents in connection therewith:

Q. State whether you received instructions in writing from F. G. Russell, and also a copy of the deed, with reference to carrying on a suit to collect in the assets of Young & Dean,—instructions in writing, and in the personal handwriting of F. G. Russell?

A. I received a memorandum of facts for examination, added to my own memorandum, for the examination of the bankrupts; also a memorandum upon which to bring suit.

Q. In other words he gave you such memoranda as would enable you to carry on the suit?

A. Yes, sir.

Counsel for plaintiffs here exhibited to the witness a paper purporting to be a copy of a deed dated the 7th day of January, 1876, from George N. Dean to Mason Dean, and a memorandum in the handwriting of the defendant, containing a statement of facts in regard to the transactions of Dean and Young & Dean with reference to their property, and the conveyance by Dean of the land described in the deed mentioned; and the witness identified them as the memoranda referred to in the last above question and answer; and the same were thereupon offered in evidence by the plaintiffs. Defendant objected to their admission as irrelevant. The objection was overruled, and defendant excepted.

[2] 12. That said court erred in overruling the objection of plaintiff in error to the question put to the witness Don M. Dickinson, to wit: "State what the custom was and has been since the Bankrupt Law of 1867,—the custom and practice before the Register in reference to proving the claims of creditors at the first meeting, or at any period before the second meeting,"—and in permitting said witness to answer said question.

13. That said court erred in overruling the objection of plaintiff in error to the question put to the witness Don M. Dickinson, to wit: "What has been the practice from 1867 down to the repeal of the Bankrupt Law as to giving notice to creditors other than those who had proved their claims, of the calling of the second meeting?" —and in permitting said witness to answer said question.

that a custom had grown up other or different than what the statute required in reference to the proof of claims or the giving of notice. Such evidence could not be admitted to create a liability for a failure to comply therewith, contrary to the statute, or perhaps in the absence of statutory requirements. But for the purpose of showing a uniform construction and practice, in accordance with the legal construction, with other facts from which the jury might infer the knowledge of such custom on the part of the defendant, we think such evidence would be admissible as an aid to the jury in finding a willful violation by the defendant. A man may, through ignorance in fact, in good faith omit the performance of even a clear statutory duty, but he would not be quite so likely to where a knowledge of the statute and a uniform custom in conformity therewith, was brought to his attention.

In reference to what the court said about an adjournment of the creditors' meeting and the fact that notice thereof was not brought to plaintiffs' knowledge.[1] No ad-

[1] The judge charged as follows: "And in this connection I charge as requested by the defendant 'that if defendant mailed, or caused to be mailed notice of the meeting of creditors of Young & Dean, called to be held on the 15th of May, 1877, to plaintiffs, it is of no consequence whether or not plaintiffs received it; and the verdict must be for defendant.' But you are to remember, gentlemen, in this connection, that the plaintiffs were not present at the meeting on the 15th of May, and the meeting was adjourned; and there is no evidence here tending to show that the plaintiffs had any notice or any knowledge of the adjourned meeting, or were notified to be present upon that occasion. I charge you, too, as requested by the defendant, 'that the defendant was not required to see that the creditors received notice of the second or any other meeting, but only to cause notice of such meeting to be published and enclosed in an envelope addressed to the creditor, deposited in the post-office with postage prepaid, in accordance with the order of the Register.' In connection with that, I further charge you, gentlemen of the jury, that the meeting being adjourned from the 15th to the 23d, and no notice of that adjournment being brought to the knowledge of the plaintiffs in this case, that you are to consider that, as a fact in connection with the others, as bearing upon the question of whether any notice was ever given to the plaintiffs of this second meeting of creditors to be held on the 15th, and which was adjourned to the 23d.

I also charge you that I find no warrant in the law whatever for the adjournment of the second meeting from the 15th to the 23d, for the law contemplates that where a sufficient number of creditors are not present, the assignee shall proceed to act upon the subject matter of the meeting with regard to the dividend, with regard to

journment is in terms authorized by the Bankrupt Act. Usually a power to adjourn for a limited period is expressly given, and must be strictly pursued. A continuance from day to day may in many cases be a matter of necessity, and therefore within the implied powers, in order to carry out those expressly given. The same necessity does not exist for an adjournment like that in the present case. If the power to adjourn, as was done, exists, then it is limited only by the discretion of the officer, and this in many cases might be considered a somewhat dangerous power. The section referred to[1] evidently contemplates action by the assignee instead of an adjournment. If instead of acting, the officer does adjourn to give the creditors an opportunity to act, then it would seem highly proper that some notice of such adjournment should be given those not present, in order that they might avail themselves of the opportunity thus sought to be afforded them. In the limited and guarded way in which the court per-

reserving funds for the payment of undetermined claims, and, in fact, act as if the meeting was held by a sufficient number of creditors under the law, he to act in their place."

[1] Section 27 of the Bankrupt Law (U. S. Rev. Stat., § 5092) provides as follows:

At the expiration of three months from the date of the adjudication of bankruptcy in any case, or as much earlier as the court may direct, the court, upon request of the assignee, shall call a general meeting of the creditors, of which due notice shall be given, and the assignee shall then report, and exhibit to the court and to the creditors just and true accounts of all his receipts and payments, verified by his oath, and he shall also produce and file vouchers for all payments for which vouchers are required by any rule of the court; he shall also submit the schedule of the bankrupt's creditors and property as amended, duly verified by the bankrupt, and a statement of the whole estate of the bankrupt as then ascertained, of the property recovered and of the property outstanding, specifying the cause of its being outstanding, and showing what debts or claims are yet undetermined, and what sum remains in his hands. The majority in value of the creditors present shall determine whether any and what part of the net proceeds of the estate, after deducting and retaining a sum sufficient to provide for all undetermined claims which, by reason of the distant residence of the creditor, or for other sufficient reason, have not been proved, and for other expenses and contingencies, shall be divided among the creditors; but unless at least one-half in value of the creditors attend the meeting, either in person or by attorney, it shall be the duty of the assignee so to determine.

mitted the jury to consider such want of notice, we think there was no error. *Stadler v. Moors*, 9 Mich., 264.

The instruction given as contained in the 27th assignment of error[1] is complained of.

We have repeatedly said that we cannot consider portions of the charge standing alone. We must look at all that was said, and ascertain therefrom, in view of the pleadings and evidence, whether taken as a whole, erroneous instructions likely to mislead the jury, were given.

Certainly the court could not have intended, nor could the jury have understood, that defendant's unaccomplished designs would render him liable. The court had previously instructed them that the omission to notify the plaintiffs of the meeting and to reserve sufficient of the assets to provide for their claim, if done wrongfully and willfully intending to injure and hurt the plaintiffs, would render him liable. We do not understand that any other claim than the two here mentioned was made as a basis for a liability, so that the general language of the court must have been understood throughout as applying to the omissions mentioned. There was nothing else in the case to which they could be applied.

Under the 28th assignment it was urged that the court erred in instructing the jury as follows: "I shall hold for the purpose of this case, that the sum to be retained must be out of the fund actually on hand, or proceeds actually then held."

It was insisted that if the assignee has property on hand which in good faith he believes sufficient to meet undetermined claims, that he may divide all the money actually in his hands at the time of making any dividend.

[1] 27. That said court erred in instructing the jury as follows: "If the jury believe the defendant had feelings of malice towards the plaintiffs or their attorney, in the bankruptcy case of Young & Dean, and on that account willfully designed to so frame and conduct his official proceedings as assignee as to purposely prevent plaintiffs from realizing any dividend at all out of the estate of Young & Dean, the jury should render a verdict for the plaintiff; provided that they conclude that he did not reserve a sufficient sum from the funds then on hand for the payment of undetermined claims at the time of this second meeting."

Such is not in our opinion the correct view. At the meeting referred to, the assignee is required to exhibit to the court and creditors an account of his receipts and payments, a statement of the whole estate then ascertained, of the property recovered and of the property outstanding, specifying the cause of its being outstanding, and showing what debts or claims are yet undetermined, and what sum remains in his hands. It is then to be determined what part of the net proceeds of the estate, after deducting and retaining a sum sufficient to provide for all undetermined claims, shall be divided. It is that part of the net proceeds remaining in his hands, after *deducting* and *retaining* sufficient thereof to meet the undetermined claims, that is to be divided. Any other construction would place the undetermined claims subject to so many uncertainties, which we cannot believe Congress ever so intended from the language used. Rev. Stat. § 5092.

It was a question of fact for the jury whether notice of the meeting had been mailed to the plaintiffs. If it was, whether they received it or not would be unimportant.

It is farther urged that the court below had no jurisdiction in the premises.

No question of jurisdiction is raised by the pleadings in this case. That the Superior Court has general jurisdiction, except as to the residence of the parties, in actions like the present, for a wrong done or breach of duty, is not questioned. It is not claimed nor does it appear, that the United States court in the bankruptcy proceedings has taken any action whatever in this matter, or that it has ever been requested to or its attention called thereto. It is also worthy of notice that the proceedings or result in the present case in no way interferes with the property of the bankrupts, or causes or can cause any delay or embarrassment in the progress or settlement of the bankruptcy matters, or injuriously affects the other creditors of the bankrupts.

The subject matter of this complaint would not ordi-

narily arise in the proper progress of the proceedings in the bankrupt court, and the fact that it might be there raised and disposed of upon a special showing—a matter upon which we express no opinion—would not, we think, oust the Superior Court of its jurisdiction, when once acquired, to proceed to hear and determine the matter. The existence of jurisdiction in the United States court, while unexercised, would not necessarily deprive the Superior Court of its right to proceed. *Ives v. Tregent*, 29 Mich., 390.

It may to say the least admit of very grave doubt whether, admitting that the question here put in issue could be disposed of in the United States court as claimed under Sec. 5091, there is any provision or way in which an issue could be formed and a trial had in accordance with the course of the common law.

Whether any wrong was done the plaintiffs by which they were deprived of a right, and in consequence suffered damages, and the extent thereof, ordinarily would be matters which they would have a right to have put in issue and submitted to a jury. This they clearly could obtain in the Superior Court, and to deprive them thereof and compel them to proceed in some other court where such right might be denied them, should only be done in the clearest cases.

Objection was made to the sufficiency of the declaration to enable plaintiffs to recover, if at all, beyond nominal damages.

The facts constituting the breach of duty are sufficiently set forth, by means whereof it is in the first count alleged the plaintiffs *were deprived of their claim against said estate*, to their damage, etc.; and in the second count, that by means thereof the estate had been *exhausted*, and the plaintiffs *wholly deprived of their rights therein*. Now, while it may be that a loss of the entire claim would not ordinarily be inferred as a necessary result of the acts complained of, yet it is evident that more than mere nominal damages may have been sustained as a

natural though not a necessary consequence, hence requiring a special allegation of damages. In this case the loss of the plaintiffs' claim is alleged as the damage sustained, and this was a sufficiently specific allegation to permit evidence to be given showing whether the entire claim, and if not, what part, was lost on account of the acts complained of. *Gilbert v. Kennedy*, 22 Mich., 117; *Allison v. Chandler*, 11 Mich., 542; *Burrell v. N. Y. etc. Salt Co.*, 14 Mich., 38.

We find no legal error in the record, and the judgment must therefore be affirmed with costs.

The other Justices concurred.

---

42 389
69 268
42 389
70 441
42 389
91 412
42 389
e138 s 85

ROBERT H. MORRISON AND PARMELIA L. MORRISON v. JOSEPH H. BERRY ET AL.

Fixtures—Trover does not lie for fixtures placed by the husband on the wife's property.

A married woman is not personally responsible, and her land is not bound, for improvements and expenditures made on it by her husband where no credit has been given to her and he has contracted on her behalf.

One who makes improvements on the land of a person who has not been in fault about it, does it at the risk of losing both his property and his labor.

Trover as for conversion of personal property does not lie on the refusal to surrender property which the defendant had himself annexed to the freehold intending it to be a fixture. So *held* where a dealer in gas manufacturing machines had caused one to be placed in a house which he afterwards found belonged to the wife of the man who contracted that the machine should be placed there.

Where permanent annexation to the freehold is intended, an article lawfully annexed becomes a fixture and part of the realty whether its removal would injure the freehold or not.

Error to St. Joseph. Submitted October 8, 1879. Decided January 13, 1880.

TROVER. Defendants bring error.

C. W. W. Clarke and *T. C. Carpenter* for plaintiffs in error. Trover will not lie for articles that have been converted into fixtures at the time the action is begun, *Mackintosh v. Trotter*, 3 M. & W., 184; Ferrard on Fixtures [2d ed.], 232; 2 Saund. Pl. & Ev., 1155; and if they are put up on the wife's premises but on the credit of the husband, she is not liable for their conversion, *West v. Laraway*, 28 Mich., 464; *Ainsley v. Mead*, 3 Lans., 116; *Corning v. Lewis*, 36 How. Pr., 425.

D. E. Thomas and *Ward & Palmer* for defendants in error.

CAMPBELL, J. This was an action of trover, brought against defendants below, who are plaintiffs in error, for the conversion of a gas machine and various auxiliary articles contained on a lot and in a house owned and occupied by defendant Parmelia Morrison, wife of defendant Robert H. Morrison. The alleged conversion consisted in a refusal to deliver back to the plaintiffs below those articles which had been furnished by them to Robert H. Morrison under a sale, which they claimed to have rescinded for fraud. The facts on which recovery was allowed below were substantially these:

In the spring of 1877 Robert H. Morrison was building five dwellings in the village of Sturgis, one of them being on property belonging to his wife, and the rest on property the precise ownership of which does not appear, but which does not seem to have been in him. An agent of Berry Brothers, who were interested in putting up machines for making gas, hearing from a third person that Morrison was building these houses, and without making any search or inquiry into the condition of the title, or whether it was good or clear, sought to induce Morrison to put in one of the machines in his residence, or two machines, one for four houses and the other for one house, and made him a written offer on

such basis. In case the larger proposition was accepted, they agreed to do the excavating and filling and furnish all the work necessary to complete the job.

In October a somewhat different contract was entered into in writing, for a single machine, at a different price, and Morrison was to be at the expense of excavating and filling and wood and mason work, which, however, was all to be done under the supervision of the gas-fitter. Payments were to be made in notes at four, five, six and eight months from November 1, 1877. The work was delayed by Berry Brothers, and not put in until January, 1878, and when completed, notes were given and received running from February 1, 1878. A small amount of money was also received.

On the 12th of March, 1878, the manager of Berry Brothers, who had gone to Sturgis to look after this claim, and who when there ascertained about the title, saw Mrs. Morrison (Mr. Morrison being absent), and offered to take back the property and cancel the indebtedness on the ground, as represented to her, that she would not be able to pay for it as things then stood, and made a demand to have it turned over to him. At a subsequent time, on the 29th of April, 1878, a demand was made of both the Morrisons, with a tender back of the notes and $25 cash which had been received. There is no evidence that Mrs. Morrison knew anything about the terms of the contract or of its existence, or that she did any act whatever out of which any ground of action or complaint could arise, except in not complying with this demand.

The court instructed the jury that if Morrison represented that the houses were his when they were not, and if Berry Brothers relied on that representation, they could rescind the contract of sale, and hold both parties liable in trover for the refusal to deliver the property back.

Upon an examination of this case it is very far from

being clear that there was evidence of fraud to avoid the contract, and if the case were to turn upon that question alone, it would be at least worthy of serious consideration. No questions seem to have been asked concerning the title, and Morrison's attention does not appear to have been called to the subject. If the ownership of the premises had any important bearing on the conduct of the parties, it was certainly as important to know whether they were encumbered, as in whom the title stood, and inasmuch as the application was made to Morrison and did not come from him, and no inquiry was made of him, and inasmuch as he was in fact building the houses, it is not easy to see why he should necessarily assume or suppose that anything was looked to beyond his general credit. It seems quite apparent that the desire of Berry Brothers to protect themselves did not arise at all out of any supposition that they had been defrauded by misrepresentations concerning the title to the property. Their manager went out to Sturgis for that purpose before he knew anything about the title, and did not, after discovering how it stood, make any complaint to Mrs. Morrison that there was any deceit in the matter, and made no demand on that basis. It was evidently the fact that Morrison had been otherwise involved that led to this application to Mrs. Morrison, which was based, not on fraud but on her inability to pay. And when the steps were taken to rescind the contract, no reference whatever was made to the condition of the title, or to any fraud in that regard, as the reason for rescinding. It was not until two months or thereabouts after this second demand that the agent who had conducted the business when the contract was made, was informed by Mr. Mason, the manager, who made the first demand, that the title was not in Morrison. He does not testify, and no one testifies that the contract was actually rescinded on that ground.

But however this may be, and assuming the contract

was lawfully capable of rescission, so far as Morrison is concerned, it seems to me very clear that no right of action exists against Mrs. Morrison. It has been decided on several occasions by this court that a married woman is not responsible in person, and that her land is not bound, for improvements and expenditures made on it by her husband, where no credit has been given to her, and where he has contracted on her behalf. *Newcomb v. Andrews*, 41 Mich., 518; *Emery v. Lord*, 26 Mich., 431; *Willard v. Magoon*, 30 Mich., 273.

It is also elementary doctrine that a person who makes improvements on the land of another, where the landowner has not been in fault about it, does so at the risk of losing both his property and his labor.

In the present case the annexation of the articles in question to the freehold was not a wrongful annexation of the property of the Berry Brothers, done without their authority. The contract made by them with Morrison not only contemplated the permanent annexation to the freehold of this property, but that it should be made under the direction and supervision of their own agent. It is not a question here whether articles of ambiguous character, not intended for permanent annexation, have become a part of the freehold. Here the intention was explicit and not open to any controversy. The case in no way differs from a contract to build a house on the lot, or to make repairs on it. The equities would be as strong in the one case as in the other, and the law is certainly identical in both cases. The amount of injury to the freehold which would be caused by the removal is not the question. If it is a part of the freehold, it cannot be taken away. The removal of locks from doors, or doors from their hinges, or windows from their frames, or fences and gates from the ground, may generally be made without doing any serious harm to the rest of the building beyond the inconvenience of doing without them, but no one has ever supposed they could be so removed without taking away what is a part of the freehold. See

further *Fryatt v. The Sullivan Co.*, 5 Hill, 116: affirmed, 7 Hill, 529.

A refusal to allow the removal of what has become, by the act and intervention of the demandant, a part of the freehold, cannot, in my opinion, be treated as a conversion of personal property.

I think the judgment should be reversed with costs, and a new trial granted.

MARSTON, C. J., and GRAVES, J., concurred.

COOLEY, J. (dissenting). The defendants in error, composing the firm of Berry Brothers of the city of Detroit, brought suit in trover to recover of Robert H. Morrison and Parmelia L. Morrison, his wife, the value of a certain machine for lighting dwellings with gas, and of the connected pipe, fixtures etc., which had been sold by Berry Brothers to Robert H. Morrison, and located and put for use in certain dwellings in the village of Sturgis. The contract of purchase was made October 30, 1877, and the machine was put in and everything ready for use before the first day of February, 1878. The machine itself was buried in the ground, and the pipes ran from it into and through five dwelling-houses. Three of these it appears belonged at the time to Mrs. Morrison. No explanation is made by the record respecting the title to the others. The machine was on a lot belonging to Mrs. Morrison. It was claimed by the plaintiffs below—and the finding of the jury affirms the fact—that they sold to Mr. Morrison in reliance on his statements that he owned the houses, and that they would not otherwise have dealt with him. Their bill under the contract amounted to $1,056.27. Mr. Morrison paid them $25, and on February 1, 1878, executed and delivered to them his four notes of $225 each, payable respectively in four, five, six and eight months from date, with interest. For the balance he gave a draft on a bank at Sturgis. It is not claimed on either side that Mr. Morrison acted as his wife's agent in making the purchase, or that she was

in any manner privy to his representations. She however lived at the time with him in one of the three houses, and knew what was being done; and there was evidence in the case that she expressed her satisfaction with the working of the machine, and said that no injury had been done in putting in the pipes. How the pipes were put in—whether inside or outside the walls—does not appear.

In March, 1878, the vendors seem for the first time to have learned that Mr. Morrison did not own the property, and that he had no pecuniary responsibility. An agent then went to see the defendants, but found only Mrs. Morrison; the husband being then absent and his whereabouts unknown. Some attempt was made to negotiate with Mrs. Morrison, and the agent offered to cancel Mr. Morrison's indebtedness under the contract if she would give up what had been obtained under it, but she declined to do anything about it in the absence of her husband. In the following month a formal tender was made to Mr. and Mrs. Morrison severally, of the notes and draft given by him, and of the $25 he had paid, and the machine, pipe, etc., were demanded of them; but they refused to receive what was tendered or to surrender what they had got. This action was then brought. It was conceded on the trial that the value of that portion of the articles purchased, which was upon the premises owned by Mrs. Morrison, was $833.16, and for this sum the plaintiffs, under the charge of the court, obtained a verdict.

The defense which is relied upon is that, by annexation to the freehold all the articles sued for became a part of the realty, and therefore trover would not lie for their conversion. The fraud was indeed denied in the court below, but as that was found by the verdict, we have no concern with the facts by which it was made out, and upon this record must assume its existence. The question now is whether, the fraud being assumed, the purchase and the annexation to the realty constituted the articles permanent fixtures.

The general rule is not disputed that when property is obtained through fraud, under color of a purchase, the vendor may rescind, and is entitled to demand and receive back the property on returning within a reasonable time what he has received and placing the vendee in *statu quo*. *Martin v. Ash*, 20 Mich., 166; *Wilbur v. Flood*, 16 Mich., 40. But this case differs from ordinary contracts of purchase in the fact that the party to whom the property has been delivered, and who now appropriates it, was in no manner connected with the fraud in the purchase; and as personal dishonesty is not charged upon her, the case must be decided upon the assumption that she has been guilty of none, and that the wrong has been on the part of her husband exclusively.

On the other hand there is no pretense that Mrs. Morrison has dealt with her husband in any capacity in respect to the articles in controversy. He was not her agent in buying them, nor did he buy and then sell to her. Had she purchased them from him in good faith, without knowledge of his fraud, she would beyond doubt have been entitled to retain them, and the original vendors must incur all the risks of investing their vendee with the evidences of title to their property. But she has bought nothing; she has simply been quiescent while her husband has been making these improvements upon her premises.

Neither was there any claim in the court below that the machine, pipe and fixtures could not be removed without injury to the premises. The hole in the ground would necessarily be opened, but any injury from this would be insignificant, and as the pipe was put into the houses without injury, it would presumptively be taken out without injury. If the method in which it was put up rendered this impracticable, it would fairly devolve on the party proposing on this ground to appropriate the property of others, to make out the fact very clearly. No attempt was made to do so.

The case then is this: The plaintiffs parted with

their goods under circumstances which entitle them to rescind the sale and recover them back or their value. The purchaser who obtained the goods from them by fraud, has affixed them to the realty of a third person, but under such circumstances that, had the realty been his, he could not have retained them. The third person, without a shadow of equity, now seeks to retain them on the purely technical ground that, by being affixed to her realty, their legal nature has been changed and they have become an inseparable part of her own property. This technical claim constitutes the sole defense in the case.

It was said in *Adams v. Lee*, 31 Mich., 440, that unity of title in the freehold and in that which is annexed to it, is essential in order that the latter may become a part of the realty. It is not pretended that there was any such unity of title here, unless the annexation itself brought it about; and to give to mere annexation that effect would leave to the case of *Adams v. Lee* no support whatever. The old notion that physical annexation should have this extraordinary effect was said in *Meigs's Appeal*, 62 Penn. St., 28, to be exploded, and that the question of fixture or no fixture must depend upon the intention of the parties. "There is," says the Chief Justice in *Wheeler v. Bedell*, 40 Mich., 693-696, "no universal test whereby the character of what is claimed to be a fixture can be determined in the abstract. Neither the mode of annexation nor the manner of use is in all cases conclusive. It must usually depend on the express or implied understanding of the parties concerned." To this effect are cited *Crippen v. Morrison*, 13 Mich., 23, and *Robertson v. Corsett*, 39 Mich., 777, among other cases. But who are the parties whose consent or understanding must control? It was said by Mr. Justice Ladd in *Cochran v. Flint*, 57 N. H., 514-547, that if it were held that if A, having in his possession the movable thing of B, annexes it without consent of the owner to the real estate of C, it would thereupon, and by force of

that act alone, become the property of C, such a decision, so far as his investigations had extended, would stand alone, and would be so manifestly contrary to reason and justice, as well as the fundamental principles of law relating to the acquisition and ownership of property, that he could only follow it from a sense of duty that would amount to moral compulsion. We have been as much unable as that learned judge was to find any such decision. One man cannot give away the property of another in this manner. The consent of parties that shall convert a chattel into an inseparable part of realty is the consent of the parties owning the chattel and the realty respectively. *D'Eyncourt v. Gregory*, L. R. 3 Eq. Cas., 382-397: *Reese v. Jared*, 15 Ind., 142.

No doubt in this case Mrs. Morrison must be deemed to have assented to the things annexed becoming a part of the freehold. But the consent of the plaintiffs was obtained by fraud, and therefore, unless they saw fit to affirm it afterwards, was no consent at all. They do not affirm, but withdraw it, and therefore as between themselves and Mr. Morrison, it is as if it had never been given. Now unless some equities in favor of Mrs. Morrison are found to have intervened between the time when the purchase was made and the time when consent was withdrawn, it is impossible that she should occupy any position more favorable than does her husband. When she has paid nothing, done nothing, and suffered nothing whereby she is to lose in the event that the articles are withdrawn, she must stand in his shoes, and has no footing otherwise.

The equities in this case are all against Mrs. Morrison. It was a part of the fraudulent purpose of her husband that the machine and its conveniences should be attached to her estate in order that she might hold and enjoy it as her own. When she refuses to restore what he thus fraudulently obtained, she is seeking to appropriate the fruits of his fraud. Had she bought the articles from her husband, and paid for them, the

husband's vendors might now be estopped from claiming them; but the elements of estoppel are wholly wanting. It appears to me to be a plain case in which the defrauded parties demand their property, and no one is claiming any adverse right to it except such as the fraud itself can give.

The judgment, I think, should be affirmed with costs.

JAMES S. DEWEY v. THE CENTRAL CAR AND MANUFACTURING COMPANY.

Corporations—Source of powers—Service of process on corporations—Superior Court.

Where corporations are organized under a general incorporation law, their powers and privileges depend on the law and on their articles of association, much as they would depend upon their charter if created by special act.

Where an incorporation law contains provisions regulating the bringing of actions against corporations organized under it, they must be regarded as exceptions to earlier general provisions on the same subject, if inconsistent.

Service of process on a manufacturing corporation under Comp. L., § 2857 (amended, Act 187 of 1875, sec. 31) can only be made within the county where its business office is fixed.

Process from the Superior Court of Detroit cannot be served outside of the county.

Error to Superior Court of Detroit. Submitted October 16, 1879. Decided January 13, 1880.

ASSUMPSIT. Plaintiff brings error.

J. S. Dewey and *Griffin & Dickinson* for plaintiff in error.

John D. Conely for defendant in error. The general provision for service on corporations is in Rev. Stat. 1846, ch. 116, § 3; Comp. L. 1857, § 4835: Comp. L. 1871, § 6544; service cannot be made on a domestic corporation unless some one of the proper officers is found

within the county where it is established, *Newell v. Gt. Western Ry.*, 19 Mich., 336; *Det. F. & M. Ins. Co. v. Saginaw Circ. Judge*, 23 Mich., 492; *Speer v. Atlanta & West Point R. R.*, 30 Ga., 135; *Nash v. Rector*, 1 Miles, 78; *Probst v. Bank of Pennsylvania*, 5 W. & S., 379; the Legislature has specially provided for service on bridge companies, Comp. L., § 2650; institutions of learning, § 3143; plank road companies, §§ 2541, 2596; telegraph companies, § 2636; tram railways, § 2447; booming companies, § 2790; fine art companies, § 3205; manufacturing corporations are localized by statute, Comp. L., § 2839: Act 187 of 1875, §§ 12, 13; process from a municipal court cannot be served outside the county in which it has jurisdiction, *Jones v. Kent Circ. Judge*, 35 Mich., 494.

GRAVES, J. The defendant is a domestic manufacturing corporation formed under the General Law of February 5, 1853 (Comp. L. ch. 95), and has its office for the transaction of business located in the city of Jackson. The plaintiff resides in the city of Detroit.

John B. Sutherland, who is defendant's president, though a resident of Canada, being found in Detroit, the plaintiff commenced this action of assumpsit against the defendant in the Superior Court by declaration served on Sutherland within the limits of the city.

The defendant pleaded to the jurisdiction, and the plea being followed by replication and rejoinder, the plaintiff demurred and the court sustained the defense and quashed the declaration.

The merits of the case are within narrow limits. It will be sufficient to examine these points: *first*, whether the case is governed by the Revised Statutes of 1846; or, on the other hand, by either the General Incorporating Act of 1853 or that of 1875, and if not governed by the Revised Statutes but by one of the acts last named: then, *second*, whether upon a correct construction any binding service could be effected on the corporation out-

side of Jackson county. The provision in the Revised Statutes of 1846, to which reference is made, is section 3 of ch. 116, being Comp. L., § 6544. It was amended in 1877 (Pub. Acts 1877, p. 112), but the amendment does not affect the present question. The section is a general regulation respecting the manner of commencing suits against corporations in courts of law. The 22d section of the act of 1853 (Comp. L., § 2857), and the corresponding section in the act of 1875, being § 31 (Pub. Acts 1875, p. 214), comprise provisions for the commencement of suits against such corporations as are formed under these acts respectively. Corporations formed under the first act are allowed to be reorganized or reformed under the later one of 1875 (§ 35,pp. 220, 221), and it is not entirely certain that the defendant corporation has not made the change.

However, the respective sections in these acts respecting the commencement of suits are almost identical, and so far as concerns the present case there is no distinction. Hence it is immaterial whether the proceeding is technically subject to one or the other of these statutes, if subject to either.

Corporate capacity and corporate immunity depend on the organic law and articles of association in much the same way as they depend on the charter where the corporation is created by special act. *Van Etten v. Eaton*, 19 Mich., 187. And the particular provisions for bringing suits against manufacturing corporations formed under the general statute, must apply and operate in the same manner as would the like provisions in a special charter.

In identifying and prescribing what rights and franchises the corporation should possess, and what conditions should exist and what limits attach, the Legislature decided what should be the properties of the corporation and how it should be suable, and particularly within what locality it should be subjected to process; and at the same time, and as part of the same exertion of

legislative will, it determined to leave and did leave all existing general regulations not compatible with the others, to operate elsewhere.

In placing the particular provisions in the organic act, the Legislature designed to liquidate and establish, so far as they extended and for the time being, the law of the corporation on the subject. But they are not only specific portions of the organic law, and which would remain and operate in case the general provision of the Revised Statutes was repealed. They are the later and more precise expression of the will of the Legislature, and aimed at the very object, and they come within the principle which requires the specially directed and more recent provision to be taken as an exception to the earlier general one. *Miller v. Grandy*, 13 Mich., 540; *Van Alstine v. The People*, 37 Mich., 523-524; *Cooper v. Skinner*, 124 Mass., 183; *Nichols v. Bertram*, 3 Pick., 342; *Matter of D. & H. Canal Co.*, 69 N. Y., 209; *In re Commissioners of Central Park*, 50 N. Y., 493; *People v. Quigg*, 59 N. Y., 83; *State v. Stoll*, 17 Wall., 425; *Stockett v. Bird*, 18 Md., 484; *Pearce v. Bank of Mobile*, 33 Ala., 693; *McFarland v. State Bank*, 4 Pike, 410; *Brown v. The County Com'rs*, 21 Penn. St., 37; *Fosdick v. Perrysburg*, 14 Ohio St., 472; *Ottawa v. Lasalle*, 12 Ill., 339; *State v. Rackley*, 2 Blackf., 249.

We must therefore hold that the provision of the Revised Statutes had no bearing, and that the result must depend on the somewhat different regulation in the fundamental act.

In regard to the second point, only a few words are required. The provision on which the right depended to subject the defendant corporation to the action in the Superior Court is in these terms: "Service of any legal process against any corporation formed under this act, may be made on the president, secretary, or agent, or if neither of them can be found in the county in which, by their articles of association, they are to do busi-

ness, then such service may be made by posting a true copy thereof on some conspicuous place at the business office of the company in said county."

Now only two modes of service are here authorized: *first*, on the president, secretary or agent, if found within the county where the business office is located, and if they are not found within that county, then *second*, by posting at the business office within such county.

There is no middle course. The method by posting is absolute and exclusive if those upon whom the law authorizes service are out of the county. No service can be made in a foreign county. Whether it is effected on the president, secretary or agent, or by means of posting, it must be done in the county where the business office is fixed, and the effect is to exclude courts which are not empowered to have their process served in the county containing the office.

The defendant's office was located in Jackson county, and hence if all the officers and agents had been found in the city bounds of Detroit, the authority of the court would have been no greater than if they had stayed in Jackson. Finding them in Detroit would not be finding them in Jackson county, and the not finding them in Jackson county would authorize the alternative mode of service by posting in Jackson county and exclude all others. There is no provision for making the right of service and jurisdiction follow the persons of the officers and agents of the corporation wherever they may go. In short, the organic act confines the service to a locality in which this process of the Superior Court cannot be served.

The ruling against the jurisdiction was therefore correct, and the judgment must be affirmed with costs.

The other Justices concurred.

42 404
70 595
42 404
84 574
42 404
89 452
42 404
f151 648

HERMAN F. EBERTS, WILLIAM H. EBERTS, MARIE LOUISE EBERTS AND JOHN MELDRUM EBERTS BY MATILDA J. EBERTS, HIS NEXT FRIEND v. CHARLES H. EBERTS, WILLIAM EBERTS, NANCY WADDELL, HENRY EBERTS, FRANCES SMITH, AARON C. FISHER, AND AARON C. FISHER AND JOHN H. VAN SCHAICK, EXECUTORS, JOSEPH M. EBERTS, JAMES J. ROBERTSON, ALEXANDER R. ROBERTSON, ELIZABETH E. MORRISON, MARGARET H. BROWN AND MARY ELLEN ROBERTSON.

Wills—Construction.

A testator devised property "to the surviving children of [her] brothers." *Held* that she meant those surviving at her death, and not those who were alive when the will was made.

Parol evidence of the circumstances in view of which a will was made, is admissible as tending to show the testator's intent; but general rules of construction should not be set aside on extrinsic evidence unless it proves that they do not express his intent.

Appeal from Wayne. Submitted October 22, 1879. Decided January 13, 1880.

BILL to obtain a judicial construction of a will. The case is stated in the dissenting opinion of Mr. Justice GRAVES. Complainants appeal.

Alfred Russell for complainant. A will speaks from the death of the testator, and its language must be regarded as used with reference thereto, 1 Redf. Wills, 379, 386; *Cresson's Appeal*, 76 Penn. St., 19; *Kinney v. Kinney*, 34 Mich., 255; and when a class of persons is pointed out to receive a legacy, those take who constitute the class when the will takes effect (1 Redf. Wills, 356, n.: 2 id., 10; 1 Jarman on Wills, 306-7; *Campbell v. Rawdon*, 18 N. Y., 412) unless a contrary intent appears in the language as applied to the subject matter and the circumstances, 1 Redf. Wills, 433; words of survivorship are to be referred to the testator's death or the period

of demise or enjoyment, unless the contrary intent is specially indicated, 2 Redf. Wills, 372; *Shoppert v. Gillam*, 6 Rich. Eq., 83; *Martin v. Kirby*, 11 Gratt, 67; *Sinton v. Boyd*, 19 Ohio St., 30; *Shotts v. Poe*, 47 Md., 513; *Brown v. Bigg*, 7 Ves., 279; *Long v. Prigg*, 8 B. & C., 231; *Hansford v. Elliott*, 9 Leigh, 79; *Whitney v. Whitney*, 45 N. H., 311; plain and unambiguous words must govern in construction and are not to be controlled by conjectural constructions growing out of the situation of the testator, his property or family, *Chrystie v. Phyfe*, 19 N. Y., 344; the words used must have their legal meaning unless it is clear that they were used differently, *Myers v. Eddy*, 47 Barb., 263; *Hone v. Van Schaick*, 3 N. Y., 538; *Roosevelt v. Thurman*, 1 Johns. Ch., 220; *Grandy v. Sawyer*, Phill. Eq. (N. C.), 8; *Clark v. Mosely*, 1 Rich. Eq. (S. C.), 396; the intention must be gathered from the will, *Brownfield v. Wilson*, 78 Ill., 467; *Asay v. Hoover*, 5 Penn. St., 21, and parol evidence is admissible to prove it, *Gilliam v. Brown*, 43 Miss., 641.

John H. Bissell and *Sidney D. Miller* for defendant Joseph M. Eberts, and *William E. Baubie* and *J. Logan Chipman* for defendants Robertson, Morrison and Brown. The words "or the survivor of them," in naming legatees, have been held overcome by the addition of "their heirs and assigns forever," the policy of the law being against the *jus accrescendi*, *Branson v. Hill*, 31 Md., 181; and the words "in equal proportions" negative the idea of survivorship as between those named, *Mowatt v. Carow*, 7 Paige, 340; Comp. L., § 4349 provides that children of a devisee related to the testator, and who dies before him, shall take the estate unless the will provides otherwise; this statute is substantially the same as that of Massachusetts, Gen. Stats., ch. 92, § 28, which is construed by *Fisher v. Hill*, 7 Mass., 86; *Ballard v. Ballard*, 18 Pick., 41; *Prescott v. Prescott*, 7 Met., 141; *Paine v. Prentiss*, 5 Met., 396; *Hooper v. Hooper*, 9 Cush., 122; *Esty v. Clark*, 101 Mass., 36; *Moore v. Weaver*, 16 Gray,

305; *Kimball v. Story*, 108 Mass., 382; see *Moore v. Dimond*, 5 R. I., 121; the word "children" will not be converted into a word of limitation except to carry out the testator's express intent, *Murphy v. Harvey*, 4 Edw. Ch., 131.

COOLEY, J. It is conceded by counsel for defendant Joseph M. Eberts that the general rule of construction of wills requires the words "surviving children" to be interpreted as intending only those who were surviving at the death of the testatrix. Indeed the cases of *Hansford v. Elliott*, 9 Leigh, 79, and *Martin v. Kirby*, 11 Gratt., 67, upon opinions in which some reliance is placed by them, fully recognize this rule, and it is not questioned anywhere.

But it is said that this is merely a general rule, and in any particular case parol evidence of the circumstances under which the will was executed may be received to show that such was not the testatrix's intent. We concede that the surrounding circumstances may be shown, and that sometimes they are very conclusive that the intent was different from what might be inferred from the language of the will interpreted without the aid of any extrinsic evidence.

But in this case the parol evidence merely showed that there was a class of persons answering the description of surviving children of her brothers at the time the will was made, and also a class answering the same description, but less numerous at the time of the testatrix's death. But whether she intended the one or the other, was left on the evidence wholly to conjecture. We may guess that she meant those who answered the description when the will was made; but the extraneous evidence brings into the case no element of certainty whatever, and a construction to that effect must be based upon inference and conjecture.

We are not at all inclined to follow arbitrary rules of construction to the overturning of a testator's real

intent; but the rule that makes a will speak from the testator's death is neither arbitrary nor unreasonable; and there cannot be the least doubt that in the large majority of cases it corresponds to the actual intent. It thus becomes a rule of property, and should not be set aside on extrinsic evidence in any case unless the court, on placing itself in the position occupied by the testator at the time he made the will, can clearly see that such was not his meaning. We cannot say that such is the case here.

The statute (Comp. L., § 4349), on which some reliance is placed, cannot help this defendant. When we find that the will only makes the gift to persons who survived the testatrix, there is nothing to go to the issue of others who died before she did.

The decree must be modified to conform to this view.

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

GRAVES, J. (dissenting). This case comes up on appeal from a decree in chancery given to declare the meaning of a devise contained in the will of Phillis Eberts, late of Chatham, in Canada. The devise in question, which is preceded by a number of gifts, is in these terms:

"The property situated in the city of Detroit, State of Michigan, under lease to Messrs. Fisher, I give and bequeath to the *surviving* children of my brothers Robert M. Eberts, Joseph Eberts, and Richard Eberts, in equal proportions."

At the date of the will the brothers of the testatrix had been dead many years, but a son of Richard and several children of each of the other two were living. In the interval of a little less than two years between the making of the will and the testatrix's death, Walter Eberts and Effie Robertson, two of the children of the testatrix's brother Joseph, also died, the former leaving a son, Joseph M., and the latter several children.

The validity of the devise is not in question, but the controversy arises on the meaning of the word "surviving," which cannot be set aside and must be interpreted.

Notwithstanding the ability with which the case has been presented, my mind has fluctuated as I have examined and re-examined the record and explored the authorities. At length, however, I have reached a conclusion, and feel satisfied it accords with what the testatrix actually intended.

It must ever be the aim to ascertain what mind the author of the will had at the time of executing it, and in order to secure safe guides and methods in prosecuting the inquiry, the law has suggested various rules and recognized certain maxims and principles of reasoning to be resorted to and applied according to the nature of the case. In view of their facility, it is reasonable to exercise caution to avoid their possible misuse. A given rule may be applied in the wrong place, or it may be applied beyond its reason.

Formerly the court of chancery, finding no other period to which the term could be applied, and wishing to favor the vesting of the interest on the ceasing of the testator to hold it, was inclined to the view that the word "surviving" should be referred to the testator's death. But the rule was never universal, and the modern tendency of judicial opinion is to pay less attention to it, and with or without the light of admissible extrinsic facts, examine the whole will in order to lay bare the true intent. Undoubtedly the word must have some meaning and hence must be referred to some date, and in the absence of anything to fix the expression and apply it in some other sense equally good or better, it must be held to signify surviving at the death of the testatrix. The result follows as a necessary one. But this signification is not one which in this case satisfies the mind. It is not the sense which spontaneously occurs, or which impresses one as the sense intended by the testatrix. It is impossible to avoid feeling that it is merely an imputed sense—an artificial meaning which the testatrix never conceived.

Every testamentary gift necessarily implies that the

donee is to take after and not before the donor's death; and hence, that the donee is to survive the donor. And the effect cannot be increased by saying in the will that it shall only operate from the testator's death, and shall transfer interests to those only who shall survive him. Unless therefore the case imperatively demands it, there is strong reason for declining to hold that the testatrix, in using the words "surviving children" intended children surviving herself. Still if no other period is legitimately pointed out to which the expression can be referred, then the principle must prevail that all the words of the testatrix are to be taken as having some meaning, and the language must be applied to her death. But there is sufficient to relieve the case from this extreme resort. Another time is denoted fully and positively, and the effect is to enable the language to have real efficacy, and to secure an application qualified to satisfy all requirements. It is brought out by evidence, and against which there is no valid ground of objection. The proof alluded to is of changes which had occurred before the making of the will, in the families of the three brothers, and of which changes the testatrix was cognizant, and with reference to which she is to be taken to have framed the will. Wharton's Ev., § 998 and notes; see also *Neathway v. Reed*, 3 De Gex, M. & G., 18: 17 E. L. & E., 150.

The fact is conclusively shown that prior to the will the three brothers and a number of their children had died, and that the testatrix knew it. The devise must be read in the light of this state of things, and so reading it a perfect occasion is supplied for the word "surviving." The testatrix is mentally discriminating the objects of her bounty, and apportioning among them the bounty itself. She comes to this lot in Detroit and decides to bestow it in the interest, as she regards it, of her three brothers. She takes account that they are dead, and then that several of their children are dead likewise, and thereupon, speaking in the present tense, she says: "I give this property to the 'surviving children' of

my brothers Robert M. Eberts, Joseph Eberts and Richard Eberts, in equal proportion." Had she introduced into the will these outlying facts to which she had reference—had she said there, in substance, "my brothers Robert M. Eberts, Joseph Eberts and Richard Eberts, being dead, and a portion of their children having died, I give to the 'surviving children' of my said brothers," etc.—it must have had effect as a controlling explanation. The court must have held that the testatrix was referring to the state of things existing at the time, and that she meant those of her brothers' children who were then their "surviving children," and not those who might be their surviving children at an indefinite future time. *Wordsworth v. Wood,* 1 H. L. Cases, 129.

Now the difference between the case here supposed and the case presented is not a difference of principle. The only distinction is that in one case the surrounding explanatory facts are found written in the instrument, and in the other are shown by extrinsic evidence. And since the law allows these facts to be brought forward by outside evidence, and for the very purpose of enabling the court to read the expression "surviving children" in the sense in which the testatrix used it, the effect upon construction must be exactly what it would be if the will itself contained the evidence. In reaching this conclusion the proof of declarations by the testatrix, and the hearsay and traditionary account concerning the ownership of the lot, are wholly excluded.

The remaining point may be disposed of briefly. The opinion already expressed goes far to dispose of it. The question is whether the devise as respects the two children of Joseph, Walter and Effie, who died in the testatrix's life-time, became wholly ineffective, or whether the interest the testatrix carved out for them by it passed to their issue by force of the statute at her death.

The general rule of law is admitted that in case the devisee dies in the testator's life-time the devise lapses

and affords no ground in which an interest can take root. But the statute creates an exception, and the final inquiry is whether the case comes within it.

The section is as follows:

"When a devise or legacy shall be made to any child or other relation of the testator, and the devisee or legatee shall die before the testator, leaving issue who shall survive the testator, such issue shall take the estate so given by the will, in the same manner as the devisee or legatee would have done if he had survived the testator; unless a different disposition shall be made or directed by the will." Comp. L., § 4349.

As I view it the case is covered by this provision. Walter Eberts and Effie Robertson were relations of the testatrix, and they left issue who survived her. All the required conditions are present. The word "children" is a proper term by which to designate persons who are to take as devisees, and the word "surviving" which the testatrix joined with it, caused no obscurity or want of certainty when read in the sense in which she used it. The effect was to denote at once the respective objects of the gift, and to exclude the idea of a bounty floating to await the ascertainment of its individual recipients.

The very persons intended were as certainly identified as they would have been had the testatrix supplemented her description by the mention of the respective names, and Walter Eberts and Effie Robertson were included. She did not leave the exact cast of the individuals she willed to be takers, to the accidents of life or to any future time or contingency. It was not in her mind to so shape her will in regard to this lot that at her death the whole might go to any very small number of the children of her brothers, or possibly to one alone, or in a given contingency fall to others, however distant, who might be her lawful heirs. The persons to be devisees were pointed out when the will was made. Hence the case is not analogous to one where the objects are left uncertain, as for example where the gift is to such mem-

bers of a class as shall be living at the death of the donor. Then the gift is a float until the arrival of the specified event, and it is not previously known in whose favor it can have effect. No given individual is devisee or legatee as yet.

The mere circumstance that those mentioned as devisees composed a numerous body, is not perceived to be of any importance. The statute seems to be just as applicable in terms and spirit to such a case as to one where the gift is to a single individual, and such I gather from the report is the opinion of the Supreme Court of Massachusetts in *Ballard v. Ballard*, 18 Pick., 41.

The result, upon the view here taken, is that the decree below should be affirmed; but this is only my own judgment. My brethren apply a principle which leads to an opposite determination, and one that defeats, as I believe, the real intent of the testatrix. I think the case is fairly exempt from the rule relied on, and that lawful means are given for ascertaining and respecting the actual meaning of the testatrix, apart from a mere artificial construction of a single expression.

I accordingly dissent from the judgment of the court.

Peter L. Rynearson v. Sylvester Fredenburg, adm'r of the estate of Benjamin Atwood.

Bond conditioned on consent to dissolution of injunction—Right of administrator to sue on bond to his intestate.

A bond given by the defendant in foreclosure to the complainant, and conditioned to pay any decree that might be obtained, if complainant would consent to the dissolution of a preliminary injunction issued in the case, is valid.

A bond conditioned to pay any decree obtained in a specified suit, applies to the final decree obtained in the appellate court, and is not avoided by an appeal, nor superseded by an appeal bond designed merely to cover costs.

A bond conditioned on paying any decree that may be obtained in a foreclosure proceeding is not discharged by a sale of the mortgaged premises for less than the amount of the decree.

Where a bond is drawn to the obligee, "his heirs and assigns," his administrator can bring suit upon it, and the bond need not contain formal words giving him the right to sue.

Where an obligor in a bond conditioned to pay any decree that might be obtained in foreclosure proceedings, was not fraudulently induced to sign it by the obligee, he cannot be released on the ground that he did not know of prior incumbrances when he signed it, nor by the fact that it remained undischarged and that the obligee refused to indemnify him against it in case he bid upon the premises in suit.

Error to Kalamazoo. Submitted October 29, 1879. Decided January 13, 1880.

ASSUMPSIT on a bond. Declaration was filed under the statute, setting forth the conditions of the bond and assigning a breach according to the facts. Plaintiff recovered judgment, and the defendant brings error.

Dallas Boudeman for plaintiff in error. Injunctions must be dissolved unconditionally if they ought not to have been granted, *Moser v. Polhamus*, 4 Abb. Pr. (N. S.), 442, and if a bond is required as a condition thereto, it is void, *Benedict v. Bray*, 2 Cal., 251; a bond conditioned upon a trial differing from ordinary modes of judicial proceeding, is void and without consideration, *Gittings v. Baker*, 2 Ohio St., 21; but if a bond conditioned to pay a certain decree is valid, it cannot be enforced if the party entitled to rely on it elects to pursue his remedy on the decree, *Porteous v. Snipes*, 1 Bay (S. C.), 215; it would be superseded by an appeal bond and the extension of time of payment would release the sureties, *Winston v. Rives*, 4 Stew. & Por. (Ala.), 269; *Justices v. Selman*, 6 Ga., 432; *Lewis v. Armstrong*, 47 Ga., 289; *Barnes v. Mott*, 64 N. Y., 397; Brandt on Suretyship, § 421; and if on appeal the amount of the decree is reduced, it shows that there was never any right to an injunction for the purpose of enforcing it, and that a

bond conditioned for the dissolution of the injunction would be void, *Palfrey v. Portland etc. R. R.*, 4 Allen, 55.

J. M. Edwards and *Thos. R. Sherwood* for defendants in error, as to the sufficiency of the consideration of the bond, cited *St. Joseph County Supervisors v. Coffenbury*, 1 Mich., 355; *Johnson v. Laserre*, 2 Raym., 1459; *U. S. v. Tingey*, 5 Pet., 115.

MARSTON, C. J. Benjamin Atwood conveyed by warranty deed to Jesse Turner certain premises upon which there was a water-power, a saw and grist mill, and received back a mortgage thereon to secure the purchase price thereof. He afterwards commenced proceedings in chancery for the foreclosure of this mortgage, and upon certain charges made in the bill, as to the manner in which the property was being used to the impairment of his security, obtained an injunction restraining the defendants from the use and occupation of said mill.

On the 5th day of December following, the defendants in said cause, with Rynearson and others, executed a bond, being the one sued upon and here in question, to the complainant, his heirs and assigns, in the sum of $5,000, reciting therein the pendency of such foreclosure proceedings, and the issuing of said injunction, and reciting that "the said Atwood agrees to consent to the dissolution of said injunction, and to the use and operation of said mill and premises in the same manner as before said injunction by said Turners, upon delivery to him of this bond." The condition of the bond was that if the obligors should pay Atwood the amount of any decree he might recover in such chancery suit, the bond should be void.

On the 12th day of December an order was entered in said chancery case, in open court, reciting that a motion was made to dissolve the injunction, based upon an answer and certain affidavits, together with this bond, and the counsel for the respective parties being present

and consenting, it was ordered that on delivery of this bond the injunction be dissolved.

A decree was afterwards obtained by the complainant, the defendants Turner appealed, and in this court the amount of the decree was very materially reduced, and the cause remanded to the court below, where a decree was entered in conformity with the order of this court. Under this decree the mortgaged premises were sold for a sum less than the amount of the decree, and the administrator of Atwood afterwards brought an action upon this bond to recover the deficiency, and recovered a judgment. Rynearson assigns error.

It has been urged that there was no evidence that the bond was ever delivered or that Atwood consented to the dissolution; that the bond was not one required either by the practice of the court or by statute, and that it could not be considered a voluntary common law bond; that the court must have dissolved the injunction or refused so to do, irrespective of this bond, and could not grant an order dissolving the injunction on delivery of this bond.

No question is made but that the injunction stood dissolved in fact, and that the Turners used and operated the mill thereafter. The bond recites that Atwood had agreed to consent to the dissolution of the injunction upon delivery to him of the bond, and the order of the court in connection therewith does show that Atwood did consent to dissolution because of this bond. Whether this bond was one required by the statute or practice of the court or not, it would seem clear that the parties could agree to give and receive such security. No rule of law or of public policy forbids it. The defendants had been enjoined from using the mills. This, we must assume, was a benefit to the complainant and a corresponding injury to the defendants. This advantage the complainant was willing to forego if the defendants would secure him from loss on account of their use and opera-

tion of the property. Whether the court would have dissolved the injunction upon the answer and affidavits was then, at least, a question of some doubt, and so the parties doubtless understood. At all events the defendants were not willing to risk the matter, but preferred to make the matter certain by giving the bond. This we think they could legally do, and there was a sufficient consideration to support it. *Supervisors v. Coffenbury*, 1 Mich., 355.

It is next claimed that the bond was conditioned to pay a certain decree, and that it could not be held applicable to a decree of the Supreme Court, or one rendered in accordance with the order of such court.

The bond was conditioned to pay "any decree which may be recovered by said Atwood in said suit." It was well known to all the parties, including the sureties, at the time of the execution of this bond, that the decree of the circuit court would not be final, but that either party might appeal therefrom to the Supreme Court. On appeal the case is the same, and is heard upon pleadings and proofs in the same manner as it had been in the court below. On such hearing the decree made or ordered is such an one as should have been made in the court below. If an appeal and a change in the decree, either or both, would destroy the force and effect of such a bond, the defendants and obligors by an appeal could thereby defeat it. In *Dunn v. Sutliff*, 1 Mich., 24, a surety for costs in a justice's court, where the case was appealed, was held liable for the costs in the appellate court. We think the principle is the same, and that the bond must be held as applicable to any final decree rendered in the case.

It was also claimed that the appeal bond superseded this one, and that the complainant abandoned his remedy upon this bond by making a sale of the mortgaged premises under his decree.

The appeal bond, which in this case was designed merely to cover costs in this court, would not supersede

the bond in suit. Nor could the fact that the mortgaged premises were sold discharge the obligors in the bond. The condition of their bond was to pay the decree. If they did not do this, and the complainant, by a sale of the premises, reduced their liability, they should not complain.

The objection that the administrator could not sue upon this bond, because not named therein, is not well taken. In this respect he had the same right the deceased had. He in this action represented the deceased, and no formal words were necessary in the bond to give this right, nor could the omission of the word "representative" exclude it.

The want of knowledge by the defendant of the prior encumbrance, at the time he signed this bond, would not avail him. It is not pretended that he was fraudulently induced to sign the bond by any act or word of the obligee, nor would the fact that this prior mortgage remained undischarged at the date of the sale, and that because thereof and of the administrator's refusal to indemnify Rynearson against the same, in case he bid upon the property, release him or reduce his liability in an action on the bond.

We discover no error, and the judgment must be affirmed with costs.

The other Justices concurred.

WINSLOW P. BURHANS v. ELIZA MITCHELL, SPENCER L. SHAW AND STEPHEN M. CRAWFORD.

Priority of lien as between assignees under a mortgage.

Where the assignee of certain notes secured by mortgage is induced to postpone foreclosure by representations made by an assignee of other notes maturing earlier and also secured by the mort-

gage, he does not become entitled to any advantages over the latter, if at all, if he has not been damaged by relying on his statements.

Appeal from Ionia. Submitted October 29, 1879. Decided January 13, 1880.

FORECLOSURE. The bill sets forth that the mortgage was given to one Baker by the defendant Mitchell to secure four notes payable at intervals; that Baker assigned the last two payments and part of the second to Mary L. Kelley, who assigned the same amount to the complainant; that Baker assigned the remainder of the second payment to defendant Shaw, who assigned it to defendant Crawford and turned over to him the note therefor and the mortgage; that complainant has been informed that the first two notes have been paid, and that the defendant Crawford refuses to give up to him the note and mortgage, but pretends to have some claim on them. The bill makes Shaw and Crawford parties defendant, although complainant avers that he cannot ascertain what interest they have or claim to have. Shaw and Crawford answer separately, the former disclaiming any interest whatever in the mortgage. Crawford sets forth that he had paid complainant, at defendant Mitchell's request, $250 to apply on his claim under the mortgage, and that at the same time he had paid Shaw a certain sum in consideration of which Shaw had assigned to him all of his interest in the note; that the assignment had been made on the back of the mortgage, and that complainant had also indorsed on the note the following words: "Received the payment of five hundred dollars due Jan'y 10, '77, and interest on the nine hundred dollars to Jan'y 14, '77. Spencer L. Shaw, W. P. Burhans;" that complainant had signed this receipt and also caused Shaw to sign it, Crawford supposing that complainant was only indorsing the amount which Crawford had paid to him on his interest; that complainant had then demanded possession of the note and

mortgage, but that Crawford had refused to give them to him, stating that Shaw's interest had not been paid, but only assigned to him. Complainant's theory seems to have been that the payment made by Crawford was in satisfaction of the second note, and not as consideration for an assignment of the note and mortgage. It was claimed on behalf of complainant that he had delayed foreclosing on the repeated assurances of the mortgager, or persons in her interest, that arrangements had been made with Crawford for taking up the entire indebtedness, and he introduced in evidence the following correspondence: *Shaw to Burhans*—"Saranac, January 23, 1877. I saw Mr. Mitchell yesterday for the first time since his return home. He says he has made arrangements to have that matter all paid within a few weeks, and that he will go to Ionia this week and see you." *Crawford to Burhans*—"Saranac, Mich., January 27. Dear Sir—Having about made arrangements with Mr. Mitchell to take up the indebtedness on his property here some time between the middle of April and 1st of May, and concluding that that would be satisfactory to you, he wished me to write to you to that effect. Yours, &c." *Shaw to Burhans*—"Saranac, January 29, 1877. Mr. Burhans, Dear Sir—I saw Mr. Crawford on Saturday, and he assured me that he had made arrangements to take up that matter as he stated to you, and that he would write you as he did." *Mitchell to Burhans*—"Saranac, January 29. Dear Sir—I do not as yet see how I can do any better than April 1st, as I told you; but at that time will take up the whole mortgage if you can possibly bear with me until then." *Shaw to Burhans*—"Saranac, April 18, 1877. I saw Mr. Crawford yesterday; he says about the first of May he will be able to meet that matter of ours. Yours." *Shaw to Burhans*—"Saranac, May 21, 1877. Mr. Burhans—I have seen Mr. Mitchell and also Mr. Crawford; they both assure me the matter should be attended to this week." The court below held the indorsment on the note of so much as was claimed to have

been assigned to Crawford by Shaw, to be, as to complainant, a payment *pro tanto*, and decreed that Crawford should hold no interest in the note or mortgage that should be equal or superior to that of complainant, and ordered a sale. Defendants appeal.

Mitchel & Pratt for complainants.

F. D. M. Davis and *A. B. Morse* for defendants. The assignee of an instalment due on a mortgage does not lose any rights possessed by the assignor as to priority of lien, *English v. Carney*, 25 Mich., 179; *Cooper v. Ulmann*, Walk. Ch., 251; *McCurdy v. Clark*, 27 Mich., 445; Comp. L., § 6913; even though no formal assignment is made, he is entitled to be subrogated to the rights of the assignor without consulting any one having a later claim, Jones on Mortgages, §§ 776, 878, 970; *White v. Hampton*, 13 Ia., 259; *Bruce v. Bonney*, 12 Gray, 107; *Barnes v. Mott*, 64 N. Y., 397.

MARSTON, C. J. This case as submitted might be said to raise a question of fact only. In our opinion the weight of evidence shows that a payment in the strict sense, and satisfaction of the indebtedness to that extent, was not intended as between Crawford and Shaw, but rather that the latter was, on receipt of the amount of his claim from Crawford, to assign to him. The probabilities point in the same direction. Why Crawford should pay Shaw, when he was under no obligation to do so, and had no possible interest in the matter, without receiving some sort of security from, or promise of re-payment by the mortgagor, it is difficult to perceive. We can place but very little reliance upon the correspondence in this case. The language used would not certainly preclude Shaw from making or Crawford from taking an assignment. The receipt indorsed upon the note would suggest the payment of a joint indebtedness to Shaw and Burhans, yet clearly such was not the fact. The receipt does not upon its face give a correct state-

ment of what took place, and in so far as it attempts to, is incorrect and misleading. The complainant claims that he understood and believed from what was said and done that there was not to be an assignment made to Crawford; that the payment made to Shaw was a discharge of the mortgage indebtedness to that amount; that in reliance thereon he delayed taking steps to foreclose for the amount due him, and that his security because of such delay has been impaired, and he asks therefore that his claim be given priority over that of Crawford if an assignment is found to have been made by Shaw to Crawford.

Admitting that complainant was by Crawford induced to and did believe that there should be no assignment, but an absolute payment in satisfaction of Shaw's claim, and that in reliance thereon he delayed foreclosure proceedings, yet we are not very clearly informed how long he delayed, or how much the mortgaged property depreciated during such delay. Would the delay of a few days and a depreciation of a few dollars during that time entitle the complainant to the relief sought by him? This to say the least may be very questionable, yet we are given no sufficient facts upon which we can estimate the damage occasioned by the delay. The complainant is not entitled to be placed in the same position he would have been in had what he was led to believe to be true been so in fact, unless in relying thereon he was damaged to that extent.

Upon the showing made in this case, we are of opinion the complainant is not entitled to have his claim take precedence over that of Crawford, and the decree must be modified accordingly, with costs of this court to defendant Crawford.

The other Justices concurred.

42 422
81 127
42 422
93 5
42 422
126 347
42 422
128 502
42 422
f155 10643
42 422
156 7388
42 422
j157 8447

People ex rel. Charles N. Ayres v. Board of State Auditors and W. S. George & Co., State Printers.

Mandamus to State Auditors—Private relator in mandamus proceeding to enforce public laws—State Reporter—Printing and publishing State Reports.

Mandamus lies to compel the Board of State Auditors to perform mandatory duties imposed on them by the Legislature outside of the exclusive powers vested in them by the Constitution. Art. viii., §§ 4, 5.

The Supreme Court will not interfere with the discretion of the Governor, nor subordinate him to its process; nor will it review the exercise of political and executory functions when they are not ministerial and would require the court to act outside of judicial authority. But State officers inferior to the Governor have many duties which the courts will compel them to perform.

The State of Michigan has never allowed itself to be sued in its own courts, and no officer of the State could lawfully subject it to suit.

A State contract that is not made as the Constitution requires, is not within the protection of the constitutional provision which forbids it to be varied.

It is within the discretion of the Legislature to decide whether it will publish the Supreme Court Reports at the expense of the State, but its decision will not bind its successors; if so published, it should be done by contract.

The published notice for bids for printing and publishing the Supreme Court Reports should inform bidders at what time the bids will be opened, so that the latter may be present and see that the contract is awarded to the lowest bidder as the law provides.

Remedy by mandamus is not precluded by the fact that the respondent may be liable as for a misdemeanor in wilfully neglecting his duty; a criminal prosecution will not secure its performance and specific compliance can be enforced only by mandamus.

A private person who would be a competent bidder under a State law for letting a contract may appear as relator by his own counsel in a proceeding by mandamus to compel State officers to carry out the law, if the public interest requires prompt action and the Attorney General declines to appear for him.

The rule rejecting the intervention of private complainants against public grievances is one of discretion and not of law.

Judicial discretion is always involved in mandamus cases, concerning the relief as well as other questions.

History of the office of State Reporter and of the mode of publishing the Supreme Court Reports.

The printing of the Supreme Court Reports is not, under the laws of Michigan, printing for the judicial department, and until 1871 it was not included in the "State printing" contract, nor classed as printing "ordered by the Legislature." Const., Art. iv., § 22.

In advertising for bids for printing and publishing the State reports under Act 168 of 1879, it is not lawful to impose the condition that the work shall be done at the capital.

MANDAMUS to require the Board of State Auditors to take action under Act 168 of 1879. This motion was first submitted October 28, 1879, and on November 30 the Supreme Court ordered that W. S. George & Co., State printers, should be included as respondents and required to show cause why the writ should not issue. The motion was again argued January 6, 1880. Mandamus granted January 13.

Moore & Moore and *F. A. Baker* for relator.

Attorney General *Otto Kirchner* for respondent Board of Auditors, and *N. F. Handy* and *Ashley Pond* for the State printers. A statute is not binding until it takes effect, *Rice v. Ruddiman*, 10 Mich., 125; *Price v. Hopkin*, 13 Mich., 318; a private citizen has no right to apply for mandamus to compel a public body to perform a duty, if he is not directly injured by their failure to do so, *People v. Regents*, 4 Mich., 98; mandamus does not lie against the Board of State Auditors, *Dewey v. Auditors*, 32 Mich., 191; *Ambler v. Auditor General*, 38 Mich., 746.

CAMPBELL, J. By Act No. 168 of the Laws of 1879, the Legislature repealed the former laws under which the Supreme Court reports were published by the State at its own expense and for its exclusive benefit, and provided for selling the use of the copyright for periods of eight years to the person who should agree to publish and sell them at the lowest rate per volume, such bidder being also required to deliver a certain number of copies to the State, and to furnish the State with sets of the

stereotype plates, and give security for his adherence to the conditions of the contract.

The statute required the Board of State Auditors in the first week of September, 1879, or as soon thereafter as the law should take effect, and every eight years thereafter, or as often as any contract should be forfeited, to advertise in six different newspapers, two of which should be published in Detroit, for six weeks, that proposals would be received and opened at the end of the advertisement, for the publication, stereotyping, printing, binding and sale of the reports, at a rate per volume to be mentioned in such proposals, not exceeding two dollars per volume. Each volume was to contain not less than 700 pages, and to be of the same style and quality as volume 38 of the Michigan reports in the State Library at Lansing. The stereotype plates were to belong to the State, subject to the use of the contractor. The first contract was not to take effect until January 1, 1880. As a separate part of the contract, the Auditors were to let the publication of reports from the stereotype plates of former volumes owned by the State. In 1877 provision had been made for stereotyping the reports in case the Auditors saw fit to do so. Laws 1877, p. 150. To what extent this has been done does not appear from this record, and is not important now to be considered. Other parts of the statute of 1879 are also of no special pertinency to the present case.

The statute of 1879 was not given immediate effect. The Legislature adjourned on the 31st of May, 1879, and the statute therefore did not become operative until the expiration of ninety days from that time.

The Board of Auditors failed to advertise or take any steps to carry out the statute, which in terms repealed the old law providing for publication by the State. The reason for this neglect is claimed to have been an objection to the validity of the statute, to be hereafter referred to, which we have no doubt was taken in good faith.

The relator obtained an order to show cause why

they should not be set in motion by mandamus, and cause was shown. He set forth among other things in his petition that he is engaged in publishing and selling law books, and was and is anxious and prepared to make bids and give security for the publication and other matters contemplated by the statute. He also refers to the statute as repealing all other acts providing for the publication of the reports, and claims that unless complied with, no reports can be published after January 1, 1880. He avers that they base their refusal on a contract made by them under the old law, and running two years.

The answer of the respondents objects to the jurisdiction to reach them by mandamus, and also to the right of the relator to appear for the People. The answer, which was presented on their behalf by the Attorney General, sets forth that on the 13th day of June, 1879, they published notices in the *Lansing Republican* and in two Detroit papers which are not named, specifying the time and place for receiving proposals for the various items of State printing, including the reports, and that these notices were published once a week for six weeks before the time specified for examining the proposals. A copy of the notice was appended to the answer. They further averred that they received no proposals after 9 o'clock in the forenoon of the fourth Wednesday of July, 1879; that they received before that time several proposals, including one from relator and one from W. S. George & Co.; that W. S. George & Co. were the lowest responsible bidders for the printing and binding, and that on the last Wednesday of August they made a contract with George & Co., a copy of which is appended to the answer, running two years from December 1, 1879 (which is a clerical error for the last day of December), at which time a former contract with the same parties runs out. The fourth Wednesday of July, 1879, was the 23d day of the month; and the last Wednesday of August was the 27th day of August.

The answer of the Board does not show when the bids were opened and contract awarded, and the notice fixed no time for their examination, and the contract appended to their answer does not cover some matters, including the binding, which would be necessary to complete the reports. It is averred, however, that on both printing and binding George & Co. were the lowest responsible bidders. The answer of George & Co., however, shows that the bids were opened on the 23d of July, 1879, and also sets out both contracts.

The answers claim that it was the duty of the Board to make the contract, and it is claimed that having been made, any action to the contrary, under the statute of 1879, would be a violation of constitutional obligations.

It is claimed on behalf of the relator that the statute of 1879 creates a duty which is imperative, and that the contract does not stand in the way.

Two important questions are presented in the outset: *First*, does mandamus lie against the respondents for failing to perform such a duty as that laid on them by the statute, in case the statute applies and is valid; and *second*, have we a proper relator before us?

It is claimed that the Board of State Auditors is a constitutional body, exercising original prerogative functions which the courts cannot interfere with, and in support of this view reference is made to the case of *Dewey v. The Board of State Auditors*, 32 Mich., 191. That was an application for an order to show cause why they should not consider a claim against the State for extra work done by the relator in compiling the statutes. This court refused it on the ground that in the action of the Board in such matters its jurisdiction was exclusive and original, and that it was not, when exercising such functions, to be regarded as an inferior tribunal, subject to our supervision. It has also been held that we cannot interfere with the discretion of the chief executive of the State or subordinate him to our process.

People ex rel. Sutherland v. The Governor, 29 Mich., 320. We have also held that political and executive functions cannot be subject to judicial review when not ministerial, and when that review would require this court to act outside of judicial authority. *People ex rel. Ambler v. Auditor General*, 38 Mich., 746; *Auditor General v. Pullman Palace Car Co.*, 34 Mich., 59; *Supervisors of Midland v. Auditor General*, 27 Mich., 165. We also held in *Royce v. Goodwin*, 22 Mich., 496, that the decision of this same body, acting as a board of State canvassers, was binding on the judiciary, and could only be inquired into by the Legislature in the cases provided for by the Constitution. But it has been held repeatedly that State officers inferior to the Governor have many duties which courts can compel them to perform; and our reports present very many such cases.

The question then arises whether this board stands on a different footing in such cases as the present from the State officers acting separately.

The Constitution vests this board with only two functions: that of determining claims against the State, and that of canvassing the votes for certain officers. Article 8, §§ 4, 5. In the latter case, as shown in *Royce v. Goodwin*, the language of the Constitution as to the finality of their action is entirely clear and free from doubt or ambiguity. In case of State accounts the ground of their authority is equally clear. Except in regard to those ordinary claims against the State which became fixed by the action of various auditing officers, and involved no important inquiry, no claim against the State could, under the old Constitution, be allowed except by the Legislature. The State has never, before or since, allowed itself to be sued in its own courts, and no officer could lawfully subject it to suit. *Michigan State Bank v. Hastings*, 1 Doug. (Mich.), 225; *People ex rel. Ambler v. Auditor General*, supra; *U. S. v. Clarke*, 8 Pet., 436; *Reeside v. Walker*, 11 How., 272; *Bonner v. U. S.*, 9 Wal., 156; *Case v. Terrell*, 11 Wal., 199; *Avery v. U. S.*, 12 Wal., 304.

We had no Petition of Right and no court of claims. The policy of the State, (as at that time of the United States also), left the sole power to allow claims against the State to the Legislature. In providing for a different method of determining claims against the State, it was not deemed proper to include it within the judicial power; and the inquiry not being subject to judicial action, any interference by this court with the auditing body in the exercise of its constitutional functions, would have been practically entertaining a suit against the State to compel the disposition of a claim which they had already rejected as not a claim entitled to consideration, and which we had no right to pass upon in one stage more than another.

When the Legislature sees fit to impose new duties on such a board, the agency thus created cannot be distinguished from any other State agency, and is subject to the same rules. The judicial power is the only means of enforcing obligations in ordinary cases, and where, as under the Act of 1879, the duties to be performed are laid down by mandate and not in any sense discretionary, the courts can inquire into the conduct of the State agents, and compel their action, unless the supposed obligation is in violation of some paramount right or duty which will excuse its non-performance.

We have no doubt the questions presented to us may be properly raised upon application for mandamus.

The question next arises whether the court will allow a private relator to complain of the alleged omission of duty. It is claimed by respondents that if they have done wrong they are guilty of a public and not a private wrong, and therefore that only the representative of the State can complain of their misconduct in this way.

The fact that for a willful omission of a statutory duty a public officer may be held for a misdemeanor (Comp. L., § 7677) does not preclude the specific remedy of mandamus. *Rex v. Severn & Wye Railway Co.*, 2 Barn. & Ald., 646. A criminal prosecution will not

secure the performance of the duty, which is the main purpose of the law, and which cannot properly be left to the option of any one. The only way to enforce specific compliance with the statute is by mandamus.

In the present case the officer whose duty it usually is to enforce the rights of the State, in this court, has, in the performance of his official functions as adviser of the State officers, placed himself in an adverse position, and appears for the respondents on this application. Inasmuch, then, as the Attorney General refuses to appear and seek the enforcement of the statutory provision, does his refusal preclude its enforcement? And if not, is the relator authorized to bring the matter before this court?

There may perhaps be others who have interests that would justify their appearance, but there is no one else whose duty it is to appear where the Attorney General declines to do so. It cannot be said that relator has any greater legal interest than other citizens, if the application must be made by an interested party. But if any party not actually interested may become relator or informer, then the fact that he is engaged in a business which would make him a competent bidder, and that he desires to become a bidder if the interest is set up for competition, removes him from the position of an officious interloper, and gives sufficient assurance that the controversy is genuine and in good faith.

The rule which rejects the intervention of private complainants against public grievances is one of discretion and not of law. There are serious objections against allowing mere interlopers to meddle with the affairs of the State, and it is not usually allowed unless under circumstances where the public injury by its refusal will be serious. In the cases of *People ex rel. Drake v. Regents of the University*, 4 Mich., 98, and *People ex rel. Russell v. Inspectors of the State Prison*, id., 187, the court took pains to guard against any decision that would prevent complaint by a private relator, where the public interests

require prompt action, and where the public prosecutors will not interfere. There is, as there shown, more liberality in some States than in others. But we find no reason to consider the matter as one lying outside of judicial discretion, which is always involved in mandamus cases concerning the relief as well as other questions.

Of the importance of the controversy there can be no doubt. It is claimed by the relator that if the statute of 1879 is valid as against the action set forth in the answer, the reports of the decisions of this court cannot be published until the statute is complied with. The law imposes duties on the State Reporter and on the Judges of this court, and changes their duties as existing under the former laws. It is evident, therefore, that sooner or later it will be necessary to pass upon these questions, and it is equally evident that it may better be done before new complications come into existence out of the uncertainty.

The controversy is principally based on the claim that the publication of the reports comes within the scope of certain constitutional provisions, which require contracts to be made, and which do not allow them to be varied with or without consent. There is also another important question whether if the board had power to bind the State at the time the contract referred to in the answer was made, it was made in conformity with existing law.

The constitutional provision chiefly relied on is section 22 of Article 4, which is as follows:

"The Legislature shall provide by law that the furnishing of fuel and stationery for the use of the State, the printing and binding the laws and journals, all blanks, paper and printing for the executive departments, and all other printing ordered by the Legislature, shall be let by contract to the lowest bidder or bidders, who shall give adequate and satisfactory security for the performance thereof. The Legislature shall prescribe by law the manner in which the State printing shall be executed and the accounts rendered therefor; and shall prohibit

all charges for constructive labor. They shall not rescind nor alter such contract, nor release the person or persons taking the same, or his or their sureties, from the performance of any of the conditions of the contract. No member of the Legislature, nor officer of the State, shall be interested directly or indirectly in any such contract."

Section 36 of the same article provides:

"The Legislature shall provide for the speedy publication of all statute laws of a public nature, and of such judicial decisions as it may deem expedient. All laws and judicial decisions shall be free for publication by any person."

The Schedule, by section 12, abolished the office of State Printer after the expiration of the existing term. And by section 13 it was made the duty of the Legislature, at its first session, to adapt existing laws to the provisions of the new Constitution as far as may be.

The office of State Reporter as originally created was one which left the Reporter entirely independent of State assistance beyond his salary, and he published at his own expense and account. Rev. Stat. 1838, p. 414. At that time his duties included reporting for the Court of Chancery, and the Supreme Court. In 1842, when only part of Harrington's Chancery Reports had been published, this salary, with many other expenses, was suspended. Laws 1842, p. 168. In 1844 a new act was passed, under which the State was to advance the cost of publication, and be reimbursed out of the sales. Laws 1844, p. 19. This law with slight modifications was embodied in the Revised Statutes of 1846, and continued in force, with no important changes until 1871. Comp. L. 1871, p. 1649. Up to that time the Reporter published where he pleased, and not under the State printing contract. He could employ the State printer or any other printer at his option. Previous to 1871 the work was, except as to three volumes, in fact done elsewhere, and those volumes were not published under the State contract.

In adapting the statutes to the new Constitution, full provision was made for letting the State printing con-

tracts as required by the clause of the Constitution already referred to. But no notice was taken of the reports, which were not included or provided for in any law governing those contracts. They had not been reckoned a part of the State printing before the Constitution of 1850, and they were not so regarded for twenty years thereafter. The constitutional requirement as to what kind of printing should be let by contract, so far as it went into details, did not embrace anything but the laws and journals, and such documents as were printed for the executive departments. It is only by adding "all other printing ordered by the Legislature," that a considerable class of reports and legislative documents and manuals are covered at all. And there are certain kinds of printing in the shape of notices and similar publications which could not be thus provided for. Whatever may be the meaning of the clause "ordered by the Legislature," it did not cover the reports at that time. And although they have since 1871 been published on the sole account of the State, the statutes have kept up a distinction indicating that this work is considered as differing in some respects in management from the other State work.

Although the law of 1871 made provision for having the reports printed by the person having the general printing contract, there was no provision then made, and no provision has been made since which refers to them, complying with the constitutional provision touching the manner of publication of State work. That expressly requires the Legislature itself to designate the manner in which the printing is to be executed. This has been done uniformly in regard to the other printing. The law of 1851, which was not changed by amendment until 1873, required the work of State printing to conform to the similar work done in 1847. Comp. L., § 294. In 1873 this section was changed so as to leave the direction as to manner and style of publishing the laws, journals and documents to the Board of State

Auditors, or such other officers as had the matters in charge. Laws 1873, p. 71. But this was corrected by a subsequent act of the same session, which made a new and full provision for the future style and manner of publishing the laws and documents. As to these it left nothing to be decided by the discretion of any one else, which could be regulated in advance. Laws 1873, p. 209. No statute is found, prior to the Act of 1879, on which the application before us is based, which makes any provision concerning the style and manner of publishing any law reports, except reprints of old volumes. Laws 1875, p. 260.

Unless the act of 1873, p. 70, amending section 292 of the Compiled Laws, was intended to cover the reports, there has been no statute which expressly requires them to be contracted for with the other State printing, or which authorizes it except by a somewhat liberal implication. The law of 1873 requires advertising for printing for the judicial as well as other departments. But the printing of the reports is in no sense printing for the judicial department. It is not done for the Courts and is not under their direction except in a very indirect way. And as already suggested, no provision is made in this statute for determining the style and manner of publication. There is nothing to exonerate the Reporter from the duty of determining this himself. They are as much left out of any legislation purporting to be in obedience to section 22, article 4 of the Constitution, as when the Reporter had the copyright and emoluments for himself. The reports differ from all other State documents in being copyrighted and sold in the market. The statutory distinction has always been kept up, and no legislation concerning them has complied with the constitutional requirements in regard to the manner of contracting for the general State printing. A contract which is not made as the Constitution requires it to be made, cannot come within the protection of the Constitution in regard to the right of the Legislature to make

a new one. And while we are not disposed to question the propriety of the action of the Auditors in putting them on the same footing so far as practicable in their contracts, yet the present contracts set up in the answers show on their face the difficulty they found in so doing. In advertising for the printing of the reports, the standard adopted was volume 38. This was the act of the Auditors themselves, and they undoubtedly did it because the Legislature had given no directions on the subject. It may here be remarked that one objection to the validity of the statute strongly insisted on by the answers, is that the statutory standard was this same volume 38, which was not in complete existence. It is needless to remark that if there is anything in this objection, it would be quite as fatal to the contract which adopts it. But we do not think the unfinished condition of this volume prevents it from being a sufficient guide for either. Nevertheless, the failure of the legislation under which the contracts were made, to direct how the printing should be executed, deprives that legislation of any constitutional sufficiency to protect the contract for the reports from interference, if otherwise it might have been within the protection. It indicates a legislative intent to keep the work separate.

But we think the respondents are in error concerning the meaning of the Constitution. That instrument does not require the Legislature to publish these reports at all at its own expense, or on its own account, and it must be within the legislative discretion what it will so publish and what it will not. Assuming them to come within the category of printing which if done at all for the State must be done under a printing contract, it would be a strange and unreasonable rule to hold that whenever the Legislature has once assumed the publication of a particular document or class of documents, it must thenceforth continue to publish them whether considered desirable or not, and in spite of private publications of the same matter. The utmost that can be

claimed is that if published they should be published by contract. No Legislature can bind its successors to publish at State expense documents which it does not regard as desirable to be so published. And no contract has ever been authorized or made, so far as we have discovered, which bound the State to publish anything it did not choose to publish. Most State documents will not be published at all unless by the State, and some are never published. But the statute of 1879 shows, what is well known to every one, that there is no occasion for the undertaking by the State to be at the trouble and risk of publishing the law reports at its own expense. The State, therefore, has seen fit to dispose of its copyright to others, who are to publish them at their own expense and for their own benefit, the only conditions being such as will give the State what is deemed a fair compensation for the privilege, and secure the purchasers of the published volumes from extortion. We think there is no doubt whatever of the right of the State to abstain from any further publication on its own account, and that it is only such publication by the State at its own expense as comes in any case within the constitutional provision.

It is proper further to call the attention of the respondents to the fact that the statute contemplates that the notice for bids should inform the bidders at what time the bids will be opened and examined, in order that they may be present, if they wish, and see that the law allotting the contract to the lowest bidder is complied with.

And their attention is further called to the provisions of the Constitution, with which the statute complies, as it must comply, which will not permit the Board to impose as a condition of bidding that the work shall be done at the capital. It must be thrown open to all bidders.

The mandamus must issue requiring them to proceed to advertise under the law of 1879.

The other Justices concurred.

42 436
109 52

ATTORNEY GENERAL v. DERESTES H. HANCHETT ET AL.

Private corporations—Estoppel by recognition.

Under Comp. L., § 3355, which permits the organization of private corporations for supplying water wherever the municipal authority shall resolve that it is expedient to have water-works, but inexpedient for the town to build them, no such corporation can be organized until these conditions have been strictly fulfilled; and the municipality cannot waive them.

Whether parties can be estopped by their recognition of a corporation organized in violation of the statute by which it was supposed to be authorized—*Q.*

How far the doctrine of estoppel by the recognition of corporate character can apply in favor of private corporations whose organization is defective because of illegalities in violation of public right—*Q.*

The State cannot be estopped from instituting *quo warranto* proceedings against a private body on the ground that it has been recognized as a corporation by a municipality.

QUO WARRANTO. Motion for entry of judgment of ouster. Submitted January 6. Decided January 13.

D. C. Holbrook for the motion.

Edward Bacon against.

CAMPBELL, J. An information having been filed in this court against respondents to compel them to show by what right they assumed to exercise corporate franchises under the name of the Niles Water Works Company, those of them who did not disclaim or deny the assumption, justified under an alleged organization in compliance with chapter 128 of the Compiled Laws of 1871, being a statute approved April 3, 1869, entitled "An act to authorize the formation of companies for the introduction of water into towns, cities, and villages in the State of Michigan." Issue having been joined, the cause was sent down for trial to the Berrien circuit, and

a verdict rendered against the contesting respondents, upon which David Bacon alleges exceptions. The Attorney General moves for judgment, and Bacon resists the motion and seeks a new trial.

On the trial articles of association were produced which were properly filed and regular in form except as to the signatures. In offering them respondent offered in addition to prove all the other facts alleged in his plea. Objection was made on two grounds, which were *first*, the informality of the document; and *second*, a failure to show any such action by the corporate authorities of Niles as was required in the first section of the statute before any corporation like that set up by respondents could be organized. The court excluded the evidence on these grounds.

It is not averred in the plea nor is it now claimed that any such action was had. But it is insisted that if necessary to have the action of the municipality, a subsequent recognition was had by dealing with the corporation as an existing body, and this is claimed to have cured any possible defect.

The statute in question declares that "whenever the common council of any city or incorporated village, or the municipal authority of any town in this State, shall, by resolution, declare that it is expedient to have constructed works for the purpose of supplying such city, village, or town, and the inhabitants thereof, with water, but that it is inexpedient for such city, town, or village, under the power granted in its charter, to build such works, it shall be lawful for any number of persons, not less than five, to organize a company" etc. Sec. 1. (Comp. L., § 3355).

This language is plain and can have but one meaning. No company can be organized until there has first been a declaration, in the shape of a resolution, that the work is expedient, and that its undertaking by the municipality is inexpedient. The object of the statute is to prevent any private interference in what is regarded as a matter of public concern, until the public body has had its attention so far called to the subject as to have been

satisfied of the necessity of the improvement, and being so satisfied has also become satisfied it may be left to private enterprise to the greater advantage of the municipality than if done at public expense. This is a duty laid on the municipality by the Legislature for the protection of the citizens and is not a right to be waived, but an obligation to be performed. And no one attempting to act under the statute can have any excuse for disregarding any of its provisions.

It is claimed, however, that the subsequent recognition by the city may cure this defect, and operate by way of estoppel. We do not think this doctrine can help the respondents.

There are cases where persons dealing with others as corporations are bound by their recognition on principles of equitable estoppel, to prevent mischief from misleading the association to its prejudice. It is certainly doubtful—to use no stronger expression—whether any such principle could apply to a recognition in direct violation of the statute under which the supposed organization took place. And it is also very questionable how far the doctrine of estoppel can apply in favor of private corporations, where the defect is not an informality, but an illegality in violation of public rights as well as of public policy.

But the whole doctrine is foreign to a controversy of this kind where the State itself complains of a usurpation of franchises which it has never granted to respondents. Whether private parties are estopped or not, the State cannot be estopped from such a prosecution except by action on its own part whereby it has become bound to recognize the corporate existence. In regard to some public corporations, the doctrine of estoppel by recognition has been applied to cases where otherwise the public business will be deranged and public interests jeoparded. But the cases are not very common where private corporations can be held to have acquired legality out of an illegal origin; and under our present Constitution,

which precludes the Legislature from creating them by special enactment, no case has yet been passed upon involving the effect of recognition by State authorities. In the present case there has been nothing of the kind, and we need not pursue the inquiry. The city of Niles cannot represent the State for any such purpose.

The result is that judgment must be entered on the verdict against the respondents found guilty of the usurpation, with a fine of one dollar against each, with costs. Judgment of not guilty will be entered in favor of the rest.

The other Justices concurred.

SILAS A. COOK v. STEPHEN P. WILES.

Proceedings to obtain possession of land—Description—Omission to find facts—Interest.

In proceedings to obtain possession of land bought on mortgage foreclosure, it is sufficient to follow the description in the mortgage, especially if the mortgager himself retains possession.

The omission to find the facts and law before giving judgment is not an error of which the party who did not request it can complain.

Where a note is made payable several years after date, "with annual interest," the interest falls due every year during the period for which the note is to run.

Case made from Genesee. Submitted January 6. Decided January 13.

PROCEEDINGS TO RECOVER POSSESSION of lands. Complainant had judgment below.

T. G. Smith for complainant, as to sufficiency of the description of the land, cited *Jackson v. Vickory*, 1 Wend., 406; *Willey v. Snyder*, 34 Mich., 60; Adams on Ejectment, 20, 21.

J. L. Topping for defendant, urged the insufficiency of the description, and cited *Clark v. Gage*, 19 Mich., 507; where a finding of facts and law is requested and is not made, there is nothing on which to render judgment, *Stansell v. Corning*, 21 Mich., 242; interest is not due until the principal is, *French v. Kennedy*, 7 Barb., 452; *Bander v. Bander*, id., 560.

MARSTON, C. J. The complainant Cook became the owner of certain premises under a mortgage foreclosure sale, and after redemption expired instituted these proceedings before a circuit court commissioner to recover possession thereof. The case was appealed, a trial had in the circuit, and the complainant was successful. The questions raised come up on a case made.

The first objection made goes to the sufficiency of the description of the premises claimed. The description follows the one given in the mortgages under which complainant acquired his title. Where a party is in possession of certain premises and gives a mortgage thereon, parties claiming thereunder, in an action to recover possession thereof, as against the mortgagor, may well follow the description in the mortgage, especially in a case like the present, where the mortgagor's occupancy removes all ambiguity. *Purkiss v. Benson*, 28 Mich., 538; *Dart v. Barbour*, 32 Mich., 267.

It was farther claimed that the complainant having requested a finding of facts and law, it was error for the court to render judgment without such finding. This omission was one of which the defendant has no right to complain.

It is next said the mortgages were foreclosed for interest due only; that the notes were "with annual interest at ten per cent," and that interest was not due until the principal became due. We cannot concur in this view. We must give force and effect to each word. Where a note is made payable several years after the date thereof, with annual interest, this calls for the

payment of interest annually—each year—at the rate agreed upon. Such has been the uniform practical construction in this State.

The judgment must be affirmed with costs.

The other Justices concurred.

42	441
108	628
42	441
s4NW	185
d129	s647

PETER FERGUSON v. ROBERT MILLIKIN.

Estoppel—Notice of set-off and recoupment.

A plaintiff declaring upon a written obligation which recited a settlement of accounts, gave evidence of its assignment to him, but did not show any consideration therefor. *Held* that he could not rely on equities that were not available to his assignor, and that the defendant was not estopped by the recital from contesting the settlement.

Estoppels rest on the protection of equities.

A joint and several note may be set off against a claim by one of the makers.

A notice of set-off in terms as broad as the common money counts in assumpsit, will, if no bill of particulars is called for, cover anything that could be proved as a demand under such counts; such as a joint and several note signed by the plaintiff.

A defendant filed two pleas of the general issue, and attached to one a notice of set-off and to the other a notice of recoupment. *Held* that the latter was not in the nature of a bill of particulars and did not restrict the notice of set-off.

Error to Lapeer. Submitted January 6 and 7. Decided January 13.

ASSUMPSIT. Defendant brings error.

C. & W. N. Draper and *M. V. Montgomery* for plaintiff in error.

W. W. & M. N. Stickney for defendant in error.

COOLEY, J. Robert Millikin, as assignee of James Millikin, brought suit upon the following writing:

"March 1, 1873. Having settled all accounts, demands and claims of every name and nature to date with James Millikin: It being understood that he receive in the final settlement with John Booth & Sons of the balance over paying up according to contract three hundred dollars from the time of the sale of the farm, being thirty-eight hundred dollars, first claims deducted, and the balance of said three hundred dollars to go to James Millikin, each having a copy.

Signed PETER FERGUSON,
JAMES MILLIKIN."

The defendant for some reason not explained, filed two pleas of the general issue. To one he attached a notice of set-off in terms as broad as the common money counts in assumpsit, and to the other a notice of recoupment of matters connected with the transaction in which the writing was given.

On the trial the plaintiff gave evidence of the assignment of the contract or writing declared upon to him, and also that at the time James Millikin was indebted to him in a sum larger than the three hundred dollars which he claimed was owing on this paper. He did not, however, show that he paid anything for the assignment, nor that any sum was agreed to be or was applied on the indebtedness of James Millikin because of it.

In defense Ferguson, who seems to have conceded that the paper made out a *prima facie* case against him of an indebtedness of three hundred dollars, offered to prove that all demands between him and James Millikin, connected with the transaction referred to in the writing, were not settled, and that he had various claims against James Millikin growing out of it, which he claimed should be allowed to him. The circuit judge held that these demands could not be used in defense to a suit by an assignee on the contract, because the recital therein of the settlement of all demands would operate, in favor of the purchaser of the contract, as an estoppel.

The circuit judge must have overlooked the fact that by failing to prove that he was a purchaser for value,

the plaintiff had precluded himself from relying upon equities which were not available to James Millikin himself. Whether the recital under any circumstances would have worked an estoppel, we need not determine; but estoppels rest upon the protection of equities; and none appear in this case which can support one.

Ferguson also offered by way of set-off a joint and several note made by James Millikin and another, and a joint and several note made by the plaintiff and another, the first of which was payable to him and the other to one Hartsell or bearer, and both of which he offered to show were owned by him when the contract was assigned to the plaintiff. The court rejected these as set-offs, under an objection by the plaintiff that they were not proper set-off, because the pleadings contained no notice of set-off, and because under the statute (Comp. Laws, § 5796, subd. 6 and 8) joint notes could not be set off.

The notes could be made use of either as joint or as several obligations, and the defendant was therefore at liberty to make use of them in the manner proposed if the notice of set-off was sufficient. We have already said it was very broad, and it was ample for the purpose. The plaintiff seems to have understood the notice of recoupment as being a second and more restricted notice of set-off, in the nature of a bill of particulars; but in this we think he erred. The notice of set-off was in no respect narrowed or restricted by it, and no bill of particulars having been called for, defendant was at liberty to prove any set-off which would be provable as a demand under the money counts in assumpsit.

It would be premature to attempt to determine now what demands upon which the defendant relies would be available to him by way of recoupment. The evidence appearing in the record is too imperfect to justify an opinion.

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

The other Justices concurred.

42 444
68 27
42 444
103 434
42 444
104 230
42 444
110 70
42 444
111 147
42 444
137 278
137 279

JOHN STROHAUER v. ANDREW VOLTZ.

An exception to a covenant of warranty is not a stipulation binding the grantee—Recital of consideration may be varied by parol evidence.

A deed containing a covenant of warranty "against all lawful claims whatsoever subject to a certain mortgage given by the parties of the first part for one thousand dollars," merely leaves the title subject to be defeated by a failure to pay the mortgage debt, but does not bind the grantee to pay it. And the exception is not such a written contract as will exclude evidence to show that in addition to the consideration expressed, the grantee had also agreed to pay off the mortgage. The exception and the agreement are distinct.

The recital of a consideration in a deed is merely to give it effect as a conveyance; and for any other purpose parol evidence is admissible to show that it was actually more or less than the amount stated.

Where a grantee of land agreed to pay a mortgage on it, but did not do so, and the land was sold for less than the mortgage debt, the fact that the foreclosure decree does not show how much was due as principal and how much as interest, is immaterial in an action against the grantee for damages resulting from his failure to pay the debt. He is liable for what he agreed to pay and no more, and evidence of the foreclosure is only important as showing that the land, which was a fund in his hands from which the mortgage might have been paid, had been exhausted without satisfying the debt.

Error to Tuscola. Submitted Jan. 7. Decided Jan. 13.

ASSUMPSIT. Plaintiff brings error.

Atwood & Atwood for plaintiff in error. The consideration of a deed may be shown by parol evidence to be different from that expressed, Rawle on Covenants, 258; *Clapp v. Tirrell*, 20 Pick., 247; *McCrea v. Purmort*, 16 Wend., 460; *Shephard v. Little*, 14 Johns., 209; *Brackett v. Evans*, 1 Cush., 79; an exception to a covenant of warranty in the words "subject to a certain mortgage," etc., is not affected by testimony as to the consideration, *Drury v. Tremont Improvement Co.*, 13 Allen, 168; *Wil-*

liams v. Allen, 123 Mass., 391; *Sidders v. Riley*, 22 Ill., 111; *Allen v. Lee*, 1 Ind., 58: the covenant does not extend to incumbrances which the grantee agreed to pay, *Pitman v. Conner*, 27 Ind., 337; and has nothing to do with any agreement between the parties as to their payment, *Bethel v. Woodworth*, 11 Ohio St., 393; *Barker v. Bradley*, 42 N. Y., 316; *Trevidick v. Mumford*, 31 Mich., 467.

R. P. Edson and *Black & Quinn* for defendant in error. A conveyance, when received, constitutes a contract between the parties, *Trotter v. Hughes*, 2 Kern., 78; *Halsey v. Reed*, 9 Paige, 446; and its terms cannot be varied by parol evidence, *Adair v. Adair*, 5 Mich., 210; *Jones v. Phelps*, id., 222; *Renner v. Bank of Columbia*, 9 Wh., 587; *Lafarge v. Rickert*, 5 Wend., 191; *Creery v. Holly*, 14 Wend., 25; *Martin v. Hamlin*, 18 Mich., 354; *Sutherland v. Crane*, Walk. Ch., 524; *U. S. v. Dunn*, 6 Pet., 59; *Bank of Albion v. Smith*, 27 Barb., 489; *Cook v. Combs*, 39 N. H., 593; *Oelricks v. Ford*, 23 How., 49; *Austin v. Sawyer*, 9 Cow., 39; *Dix v. Otis*, 5 Pick., 38; *Conner v. Coffin*, 22 N. H., 544; *Gregory v. Hart*, 7 Wis., 532; *Hoyt v. French*, 24 N. H., 199; *Lang v. Johnson*, id., 302; *Hoxie v. Hodges*, 1 Oregon, 251; *Underwood v. Simonds*, 12 Met., 278; *Adams v. Wilson*, id., 138; *Mumford v. McPherson*, 1 Johns., 417; *Howes v. Barker*, 3 Johns., 506; *Schemerhorn v. Vanderheyden*, 1 Johns., 139; *Armstrong v. Munday*, 5 Den., 196; *Stevens v. Cooper*, 1 Johns. Ch., 425; *Brown v. Wiley*, 20 How., 442; *Foster v. Clifford*, 44 Wis., 569; *Holley v. Younge*, 27 Ala., 203; *Howard v. Thomas*, 12 Ohio St., 204; 1 Greenl. Ev., § 275; 1 Phil. Ev., 495; parol evidence is not admissible in an action at law to show facts incompatible with the agreement of the parties as imported on the face of the deed, even though the consideration may be disputed, *Gelpcke v. Blake*, 19 Ia., 263; *Bennett v. Solomon*, 6 Cal., 134; *Murphy v. Branch Bank of Mobile*, 16 Ala., 90; *Grout v. Townsend*, 2 Hill (N. Y.), 554; *Curry v. Lyles*, 2 Hill (S. C.), 404; *Jack v. Dougherty*, 3 Watts, 151;

Emmons v. Littlefield, 13 Me., 233; *Kumler v. Ferguson*, 7 Minn., 442; *Spiers v. Clay*, 4 Hawks (N. C.), 22; *Gilbert v. Bulkley*, 5 Conn., 262; *Sewell v. Baxter*, 2 Md. Ch., 447; *Emery v. Chase*, 5 Greenl., 232; *Griswold v. Messenger*, 6 Pick., 517; *Harlow v. Thomas*, 15 Pick., 66; *Townsend v. Weld*, 8 Mass., 146; *Eastabrook v. Smith*, 6 Gray, 578; *Howe v. Walker*, 4 Gray, 318; *Logan v. Bond*, 13 Ga., 194; *Wyche v. Winship*, id., 209; *Sawyer v. Vories*, 44 Ga., 662; Rawle on Covenants, 118, 119; 2 Whart. Ev., §§ 1014, 1045 *et seq.*; a parol reservation of crops from a deed of the land cannot be sustained, *Vanderkarr v. Thompson*, 19 Mich., 82; a vendee cannot be subjected to conditions repugnant to the terms of the deed, *Beers v. Beers*, 22 Mich., 42.

Cooley, J. The plaintiff, in November, 1874, sold and conveyed to Voltz a parcel of land in Huron county, reciting in the conveyance a consideration of three thousand dollars, and covenanting to warrant and defend the title "against all lawful claims whatsoever subject to a certain mortgage given by the parties of the first part, [himself and wife] for one thousand dollars." This mortgage was given to secure the payment of two notes made by the plaintiff, of seven hundred dollars and three hundred dollars respectively, with interest. In this suit the plaintiff claims that the actual consideration for the conveyance of the land was four thousand dollars of which only three thousand was paid; that defendant agreed to pay the remaining one thousand dollars by paying the principal of the notes, which were secured by the mortgage, but that he has neglected to do so, and by reason of his neglect the mortgage has been foreclosed, the land sold on the foreclosure decree for three hundred and fifty dollars and a deficiency reported of $1,132.31, for which the plaintiff is personally responsible, whereby the defendant has become liable to pay to the plaintiff the said sum of one thousand dollars which he promised and agreed to pay on the notes aforesaid.

This is the plaintiff's case. The defendant pleaded the general issue, but on the trial objected to the evidence by which the plaintiff undertook to establish the facts alleged, on the ground that the evidence tended to contradict or vary the contract of the parties of which the deed of conveyance was the highest evidence, and was consequently inadmissible. The circuit court assented to this view, and the defendant had judgment.

It is not claimed, as we understand it, that the consideration expressed in the deed is to be held conclusively determined by the deed itself. On the contrary it is admitted that the recital in the deed is made for the purpose merely of giving it effect as a conveyance, and that for any other purpose parol evidence may be given to show that the real consideration was greater or less than the sum named. *Doty v. Martin*, 32 Mich., 462. It is insisted, however, that as the $1000 mortgage is mentioned in the conveyance, and there is a stipulation or agreement respecting it, the conclusive presumption must be that the parties embodied in this stipulation all their concluded negotiations respecting the mortgage, and that to add further stipulations by parol proof is to add to and vary the written instrument which must be presumed to have been deliberately made as the final and authoritative evidence of what the parties have agreed upon.

To be a little more specific, the defendant claims that by the deed it is agreed that he shall take the land subject to the mortgage, but that he shall not be personally liable for the mortgage debt. *Crawford v. Edwards*, 33 Mich., 354. But we have been unable to concur in this view. The deed contains no stipulation or agreement on the part of the grantee. He merely receives a conveyance of the land subject to the mortgage. The title conveyed is thereby made subject to be defeated by failure to pay off the mortgage debt, but the grantee agrees to nothing and stipulates for nothing respecting it. Evi-

dence that the grantee agreed to pay the consideration money or any part thereof which remained at the time unpaid, in no manner affects or qualifies the conveyance or any agreement or stipulation therein.

Nor can it make any difference that the grantee, instead of making payment directly to the grantor, was to pay to some one else in his interest. The agreement to pay has no connection whatever with the exception in the deed of the mortgage there mentioned from the covenants. The grantee, as has already been said, makes in the deed no agreement whatever, express or implied, respecting that mortgage or the mortgage debt, and his agreement to pay the further sum of $1000 is in no manner connected with the exception. His agreement to pay cannot in respect to validity depend upon the circumstance that the method of payment was specified, and that the mortgage debt happened to be mentioned as a demand which was to be satisfied by it, rather than some other, or rather than or in place of a direct payment to the grantor.

The cases of *Bolles v. Beach*, 22 N. J., 680, and *Drury v. Improvement Co.*, 13 Allen, 168, are like this in their facts and fully sustain this view. They are not, as is supposed by counsel for defendant, opposed to other cases, or out of harmony with the general rule which excludes parol evidence to control writings. That rule has been too often and too strongly affirmed in this State to be now departed from or qualified, but the present case stands wholly apart from it as we have already shown.

It is objected that the decree against the plaintiff for the deficiency on the foreclosure sale does not distinguish how much is for principal and how much for interest. But this is immaterial. Defendant must pay what he agreed, and is liable for no more. The showing that the mortgage had been foreclosed was only important because the land constituted a fund in defendant's hands from which, if sufficient, the mortgage debt might have

been satisfied. The foreclosure and sale only shows that the fund is exhausted without satisfaction.

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

The other Justices concurred.

JANE STIRLING v. THEODORE A. HEINTZMAN.

42 449
139 286

Partnership—Amendment of pleading by inserting names of partners.

A partnership must contain more than one person.

Comp. L., § 5307, permits a partnership suit to be instituted in the firm name if the names of the partners are not known, and allows of amendment at any time before the pleadings are closed, by inserting the names of the partners. *Held* that this can only apply in cases of actual partnership; and where a writ of replevin was issued in a partnership name, and the amendment showed that there was only one plaintiff, the action failed.

Error to Wayne. Submitted Jan. 7. Decided Jan. 13.

REPLEVIN. Defendant brings error.

James H. Pound for plaintiff in error.

Joslyn & Freeman for defendant in error.

CAMPBELL, J. This case comes up on certiorari to review a judgment of a justice of the peace, affirmed by the circuit court for the county of Wayne, and brought into this court by writ of error.

The original action was replevin brought to recover possession of a piano averred in the affidavit to belong to Messrs. Heintzman & Co., of Toronto, Ontario. The affidavit was made by John D. Standish, who set forth that he acted as their agent. A bond was given in which they were described as principals, as "Messrs.

Heintzman & Co. of Toronto," Standish and Charles H. Freeman being described and signing as sureties, and Heintzman & Co. signing and sealing by Standish as their agent.

The writ of replevin required the property to be taken and delivered to Heintzman and Co., plaintiffs, it being recited that the names of the individual partners were not known.

On the return of the writ the justice states that plaintiff appeared by Standish, and on his motion "the title of the said cause was amended by inserting the correct name of the plaintiffs as follows: Theodore Auguste Heintzman, doing business under the name and style of Heintzman & Co." It does not otherwise appear what was amended. Standish thereupon orally declared for the detention of the piano and gave testimony of property in the plaintiff and that Mrs. Stirling had hired it from him under a written contract, which is appended to the return of the justice, and which was a purchase lease purporting to be from Messrs. Heintzman & Co. The return contains no evidence of the identity of the present plaintiff with Heintzman & Co.

Several questions are presented, but as there is a fatal objection lying at the foundation of the action, the minor questions need not be considered.

The writ of replevin purports on its face to be issued in favor of a partnership, and sets up that their individual names are not known. The amendment whereby Theodore Auguste Heintzman was substituted for Heintzman & Co. was made under section 5307 of the Compiled Laws, which provides that in actions by or against a copartnership, if the names of all the several partners are not known, such suit may be commenced in the partnership name, and may be amended at any time before the pleadings are closed, by inserting the names of the parties composing the partnership.

This section can only apply to cases where there is a partnership. It can have no reference to a case where

there is but a single person who uses a name indicating a partnership which really does not exist. In the present case, there is now but one plaintiff and it is insisted on his behalf that he constitutes the firm of Heintzman & Co. But there can be no such thing as a partnership with only one member. The effect of the amendment was not only to negative the partnership set up in the writ of replevin, but also to change a joint claim into a sole claim against Mrs. Stirling. There is no statute which authorizes any such practice. The case declared on was repugnant to that on which the writ issued.

This being so, the whole case falls to the ground, and the other points need not be noticed. The judgments of the justice and circuit court must be reversed with costs of all the courts.

The other Justices concurred.

PHILIP NEIB v. CHARLES HINDERER AND BALTHASAR CHRISTNER.

42 451
128 262

42 451
147 137

Presumptions to sustain referee's finding.

A referee after finding that defendant had agreed to pay the cost price of certain articles, found what their "value" was according to a certain exhibit not set forth in the record. *Held* that all reasonable intendments must be made in support of the finding and judgment, and that in the absence of a demand for a more specific finding it might be properly assumed that he used the word "value" to signify "cost price."

A finding that defendant purchased a bakery, is specific enough to include the oven and oven fixtures, and authorize a finding of the value of the fixtures.

In finding the cost price of a stock of groceries, a referee may find the quantity and price of the different articles by name, even though he does not expressly find that each article enumerated constitutes a part of the stock; and though the testimony cannot be resorted to in aid of the finding, if it appears on inspec-

tion that the articles named are usually classed as groceries, the finding may be sustained, and it cannot be assumed that the referee included articles not within the contract of purchase.

Error to Berrien. Submitted Jan. 7. Decided Jan. 13.

ASSUMPSIT by Hinderer and Christner, who had constituted the firm of C. Hinderer & Co., for the value of a bakery, fixtures and stock of groceries which they had sold to Neib. Judgment was rendered for plaintiffs on the report of a referee, and defendant brings error.

O. W. Coolidge for plaintiff in error. A referee's report must contain such a finding of facts as can support a cause of action, and must state them as definitely as the verdict of a jury or the finding of a judge, *Wood v. La Rue*, 9 Mich., 158; *Wright v. Sanders*, 28 How. Pr., 395; *Meacham v. Burke*, 54 N. Y., 217; *Buckingham v. Payne*, 36 Barb., 81; judgment thereon will be reversed if it does not appear that enough facts were found to sustain the referee's conclusions of law, *Amboy & Lans. R. R. v. Byerly*, 13 Mich., 439.

Cholwell Knox for defendant in error. A referee's report will be set aside only for error by which a party has been injured, *Ludington v. Taft*, 10 Barb., 447; *Hunt v. Fish*, 4 Barb., 324; *Belmont v. Coleman*, 1 Bosw., 188; *Eddy v. Sprague*, 10 Vt., 216; it will not be disturbed unless there is gross error, *Grube v. Schultheiss*, 4 Daly, 207; *Gardner v. Lincoln* 5 Phil., 24.

MARSTON, C. J. The questions presented in this case arise upon a referee's report. The claim is that the referee did not find facts sufficient to support any judgment.

I. That the referee did not find the cost price of the things purchased.

The referee finds that the defendant purchased from the plaintiffs "a bakery and stock of groceries agreeing to pay therefor the cost price." "That the value of said

groceries, as appears from Exhibit 'A,'" after making certain deductions, was $1,151.15. The point made is that he here finds the *value*, but not the *cost price*. He finds the value, as appears from a certain exhibit, which is not printed in the record.

We are to make all reasonable intendments in favor of the finding and in support of the judgment. *Peabody v. McAvoy*, 23 Mich., 526. Having found that the sale made was at the cost price, we may well assume that his finding of value in accordance with the exhibit was at the cost price also. It is not at all likely that he would find the value to be upon a basis other or different than the one agreed upon by the parties. This exhibit may have been the original invoices of purchase. Certainly we cannot presume the contrary for the purpose of setting aside the judgment.

Aside from this view, and looking at the entire report, we consider it clear that the referee used the word "value" as being synonymous with the term "cost price," and to avoid a mere repetition. Indeed there is nothing in the finding or record indicating in the slightest degree that the cost price was not the full value of the goods. Common experience shows that the value of a stock of groceries sometimes, and indeed quite often, falls far below the cost price thereof. It is at least just as likely to be below as above, and if the defendant claimed that the cost price was less than the value, he should have shown this affirmatively and not left it for inference. He could have had the report of the referee made more certain in this respect. This also disposes of a similar objection made to the finding as to the other articles purchased.

II. It is also objected that the referee did not find that defendant agreed to purchase or did purchase any oven fixtures, although he found the value of such fixtures.

His finding was that the defendant purchased a bakery and stock of groceries. In finding that a bakery had been purchased, and in using the term "bakery," he

thereby included and embraced all fixtures belonging thereto and forming a part thereof. That an oven and oven fixtures will be found in, and constitute an important part of a bakery would seem to be beyond question. And in ascertaining the cost price or value of the bakery the referee would have the right to find the value of the separate articles constituting the same.

In ascertaining the cost price of the stock of groceries the referee might have found the quantity and price of the different articles by name which constituted the stock, and although he might not in express terms have found that each and every article enumerated constituted a part of such stock, yet if from an inspection of the finding, it was apparent that such articles were what are usually denominated and included within the term groceries, the finding would be sustained. While we cannot resort to the testimony in aid of the findings, neither can we assume that the referee included articles not embraced in the contract of purchase, unless the same clearly appears from an inspection of the findings made.

The judgment of the circuit court upon the referee's findings and in accordance therewith, must be affirmed with costs.

The other Justices concurred.

42 454
78 644
42 454
90 344

KATE E. WILLSON ET AL. v. JAMES M. GIFFORD ET AL.

Encroachment on highways—Laches in suing out certiorari.

The proceeding for the summary removal of encroachments upon a highway (Comp. L., ch. 27) does not cover cases where there is a dispute in good faith as to whether any highway was ever opened which included the land where the alleged encroachments are.

Where a writ of certiorari has been properly allowed and issued, it should not be dismissed for any delay in suing it out within the statutory period allowed, unless meanwhile rights have arisen in reliance on the proceeding attacked.

Certiorari to justice of the peace and commissioner of highways. Submitted January 7. Decided January 13.

Henry A. Shaw for plaintiffs in certiorari.

A. M. Culver for defendants in certiorari. The statutory remedy against encroachments on the public highway will not lie if there is any question as to the existence of the highway, *Parker v. People*, 22 Mich., 93; *Campau v. Button*, 33 Mich., 525.

COOLEY, J. This was a proceeding against the plaintiffs in error for encroaching by their fences upon a highway supposed to exist on the township line between the townships of Clarence in Calhoun county and Brookfield in Eaton county. The parties were proceeded against jointly, though the encroachment by each, if any existed, was distinct from that of the other. The principal question in contest appears to have been whether there was any highway at all. The public authorities seem to have had doubts on this subject, and in 1877 took proceedings for the laying out of a new highway over the same line, and the highway commissioners ordered one to be established. Willson, one of the plaintiffs in error, appealed from this order to the township boards, and those boards on a joint meeting to hear the appeal, decided that a highway, laid out in 1869, was already in existence. The present proceeding was then instituted, and resulted in a conviction.

There was no showing that any highway was ever opened or used which embraced the land claimed to be covered by encroachments. The case therefore stood upon proof of the laying out of a road which the defendants disputed, and which for many years had never been fully acted upon. If a road was actually laid out in

due form of law, the defendants have practically denied it from the first, and there is no doubt that they dispute it in good faith now.

The proceeding for the summary removal of encroachments (Comp. L., ch. 27) was not provided for a case like this. In *Roberts v. Highway Commissioners*, 25 Mich., 23, 28, it is said of such a case that "whenever the contest shall appear before the jury to be, really and in good faith, a question of the existence of the highway claimed, or a question involving the title to real estate, rather than a question of encroachment upon a highway admitted to exist, or the existence of which is not in good faith seriously contested, or so clearly shown as to admit of no real and *bona fide* contest, the whole proceeding should be dismissed by the jury, as beyond their jurisdiction in such a proceeding." That case should govern this.

It was said on behalf of defendants in error that the court ought not to review the proceedings because of the delay of plaintiffs in error in suing out the writ of certiorari. *Matter of Lantis*, 9 Mich., 324. The delay was a little over a year. If the case were one in which rights might have grown up in reliance upon the proceeding before the writ was sued out, this objection to the writ would have force; but it does not appear how this can be. The statute (Comp. L., §§ 7134, 7127) permits the writ to be sued out at any time within two years from the time the action was taken which is complained of, and when the writ is once properly allowed and issued, we should not dismiss it unless justice appeared to demand that course.

As the case made was not within the statute, we pass over formal errors.

The proceedings must be quashed.

The other Justices concurred.

MARGARET MCCALLUM v. TOWNSHIP OF BETHANY.

42 457
74 697
42 457
97 548
42 457
s 4NW 164
e133 2548
42 457
e137 1197

Supervisor's certificate to assessment roll—Action for unpaid taxes.

Comp. L., § 991, requires a supervisor, on completing an assessment roll, to certify in effect that he 'has set down all the real estate liable to be taxed according to his best information,' and that 'the roll contains *a true statement of* the aggregate valuation of the taxable personal estate.' A supervisor omitted the italicised words and certified that he had set down the real estate 'according to his best [judgment and] information.' *Held* that these variations from the authorized form did not invalidate the certificate.

Comp. L., § 1014, allows an action to be brought for personal taxes whenever they are returned unpaid by the town treasurer. *Held* that the treasurer's warrant for their collection must be exhausted before suit.

Error to Gratiot. Submitted Jan. 8. Decided Jan. 13.

ASSUMPSIT for unpaid taxes. Defendant brings error.

C. J. Willett and *J. K. Wright* for plaintiffs in error. The statutory form prescribed by Comp. L., § 991, for the supervisor's certificate to an assessment roll, must be followed, Cooley on Taxation, 239, 290; *Clark v. Crane*, 5 Mich., 151; *Warren v. Grand Haven*, 30 Mich., 30; *Hogelskamp v. Weeks*, 37 Mich., 426.

S. J. Scott and *N. Leonard* for defendant in error.

CAMPBELL, J. The township of Bethany sued plaintiff in error for an unpaid tax on personal property, and recovered judgment before a justice, which was affirmed on appeal. In the circuit court certain exceptions were taken to the form of the supervisor's certificate, the warrant to the treasurer, and the failure to show a return of non-payment.

The form of the supervisor's certificate is in terms identical with the one set out in section 991 of the Compiled Laws, except that where that speaks of acting according

to his best information, he adds further that it was according to his best judgment; and instead of mentioning the contents of the roll as containing a "*true statement* of the aggregate valuation," he says it contains the aggregate valuation; following it up with the statutory averments showing how the true valuation is obtained.

The certificate contains everything necessary under the statute, which does not prescribe any form but merely gives one which is allowable, as containing what is necessary. The criticisms made on the certificate are altogether too nice, and are unfounded.

The case does not show very clearly upon what grounds the renewal of the treasurer's warrant is attacked, and as on another trial no doubt the evidence will be put in more fully, we shall not discuss that matter.

The suit was not shown to have been authorized under the statute. By section 1014 of the Compiled Laws it is provided that an action may be brought for personal taxes whenever they are returned unpaid by the town treasurer. The warrant in the hands of the treasurer is itself in the nature of an execution, and while there may be property which cannot be reached by it, it is nevertheless a remedy which the law requires to be exhausted before the further remedy by suit is permitted. The action is regulated by statute, and can only be brought as the statute provides.

The failure therefore to show the return of the taxes unpaid, was fatal to the recovery. Upon a new trial it is probable this defect will be remedied, but for this error the judgment must be reversed with costs and a new trial granted.

The other Justices concurred.

42 459
92 84
42 459
109 185
42 459
110 347

CITY OF DETROIT v. WILLIAM HOUGHTON ET AL.

Official bond—Failure of joint action.

A joint action on an official bond fails if it appears that any one of the defendants is not liable.

A judgment for defendants in a joint action does not bar another proceeding against a portion of them on the same cause of action.

Error to Superior Court of Detroit. Submitted January 9. Decided January 13.

DEBT on an official bond. Defendants bring error.

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

Hawley & Firnane, Edward Minock and *George Gartner* for defendant in error.

GRAVES, J. The city brought a joint action of debt against John Taylor, Jr., John Taylor, Catharine Dardis, and William Houghton, and counted on an official bond given by John Taylor, Jr., as ward collector, and executed by the other defendants as his sureties.

Mrs. Dardis pleaded the general issue and denied upon oath the execution of the bond. Houghton also pleaded the general issue and added a notice of defense depending on the validity of the objection taken by Mrs. Dardis.

The only evidence offered was on the part of the city, and from that it appeared conclusively that Mrs. Dardis never executed the bond or became a party to it. As against her therefore the instrument was not admissible and there was nothing for the jury, and the effect bore upon the whole case.

The result as respected Mrs. Dardis was decisive against the city in this action as to all the defendants. The suit being upon contract against several, and being

carried through on that basis, the city was bound to prove a joint liability on the part of all. *Winslow v. Herrick*, 9 Mich., 380; *Ballou v. Hill*, 23 Mich., 60; *Mace v. Page*, 33 Mich., 38; *Livingston's Ex'rs v. Tremper*, 11 Johns., 101; *Shirreff et al. v. Wilks*, 1 East, 48; Buller's N. P., 129; 2 Evans' Poth., 57: 1 Chitty Pl. (16th Am. ed.), 51, 52 and notes; *Anderson v. Robinson*, 38 Mich., 407.

But as we have seen, instead of making such proof the city itself negatived liability on the part of Mrs. Dardis. The inevitable consequence was that the other defendants became entitled to a verdict.

Under these circumstances the questions suggested by the learned counsel for the city appear to be entirely immaterial.

The judgment must be affirmed with costs.

The other Justices concurred.

Motion for rehearing. Submitted Jan. 20. Denied Jan. 21.

F. A. Baker and *E. F. Conely* for the motion.

Per Curiam. A motion for a rehearing is made in this case for the reason principally that this court disposed of the case and affirmed the judgment on a question of pleading; and that being on the merits in the court below would be a bar to another suit brought against the other defendants. We do not see how this result would follow. A judgment in favor of defendants would be no bar to another action brought against some of them on the same cause of action. As the case was presented by the record in this court an affirmance was inevitable. The plaintiff upon the showing made could not recover against all the defendants, and as the case stood, the judgment could only be against all or none.

JOHN WOODWARD v. ESON T. CHESTER, ADMINISTRATOR.

Affirmance on non-appearance of appellant.

Where complainant appealed but did not appear in person or by counsel, nor file a brief, the decree was affirmed with costs, though a record was filed and a brief for the defendants.

Appeal from Allegan. Submitted Jan. 9. Decided Jan. 13.

SPECIFIC PERFORMANCE. Bill dismissed. Complainant appeals.

Padgham & Padgham and *J. W. Champlin* for complainants.

Norris & Uhl for defendants.

PER CURIAM. A record has been furnished us in this case, and also a brief on the part of the defendants. The complainant has not sent in any brief, nor has he appeared either in person or by counsel.

We cannot under such circumstances examine the case on the merits, and it follows that the decree must be affirmed with costs.

THE RIGHT WORTHY GRAND ENCAMPMENT OF THE INDEPENDENT ORDER OF ODD FELLOWS, IMPLEADED WITH LEWIS J. TWITCHELL AND WILLIAM G. CUMMINS v. THE FIRST NATIONAL BANK OF STURGIS.

Corporations—Parol authority to sign note—Exceptions to findings.

A corporation can give its treasurer parol authority to execute a promissory note in its name.

A party excepting to a finding must make it appear that his exception is well taken. So *held* where the objection was that the facts were found on parol proof duly objected to, and not on certain documents which the party bringing error did not include in the record.

Error to St. Joseph. Submitted Jan. 9. Decided Jan. 13.

ASSUMPSIT. Defendant brings error.

M. V. & R. A. Montgomery and *William L. Stoughton* for plaintiff in error.

D. E. Thomas for defendant in error. Parol evidence is admissible to prove the acts of a corporation if its official records cannot be produced. Ang. & Ames on Corp., §§ 83, 682.

GRAVES, J. The bank sued on the following paper:

"$860. STURGIS, MICH., Dec. 17, 1877.

Ninety days after date I promise to pay to the First National Bank of Sturgis, or order eight hundred sixty dollars at the Ninth National Bank in the city of New York, with interest at ten per cent after maturity, for value received.

RIGHT WORTHY GRAND ENCAMPMENT OF MICHIGAN,
By R. H. MORRISON, Grand Treasurer.
WILLIAM G. CUMMINS
L. J. TWITCHELL."

The encampment, an existing corporation under the laws of this State, pleaded the general issue, and filed a sworn denial of execution of the paper. The other defendants suffered default.

The issue between the bank and the corporation defendant was tried before the circuit judge without a jury, and he allowed a recovery for the amount of the note on special findings which are brought up for review by writ of error.

There is no bill of exceptions and the evidence on which the circuit judge acted is not before us.

The only question possible is whether the facts support the judgment, and we are entirely satisfied they do.

It is suggested that the case fails to establish authority in Morrison to execute the paper, but this is not so. The facts are abundantly sufficient to show authority. It is objected, however, that it appears from the judge's report that the facts in question were found "on parol proof, duly objected to," and on what appeared in and by the printed report or books referred to marked "Exhibit 1."

Were it true that record evidence was required, we cannot say it was not given. The report and books here mentioned are not in the record, and it is incumbent on an excepting party to make it appear that his exception is well taken. But it was competent for the corporation to authorize the treasurer by parol. The point is wholly untenable on many grounds.

The case presents nothing further that deserves comment.

The judgment should be affirmed with costs

The other Justices concurred.

EX REL. WILLIAM STEINHAUSER v. WAYNE CIRCUIT JUDGE.

Costs on appeal from a justice's court.

Costs on appeal from a justice can be awarded only by the judge who tried the appeal.

MANDAMUS. Submitted and denied January 13.

James H. Pound for the writ.

Ed. E. Kane against.

PER CURIAM. The discretion given circuit courts to allow costs in cases heard on appeal from justices' courts contemplates that costs shall be awarded in view of the facts appearing upon the trial. And no one but the judge presiding during the trial in the circuit can determine this question.

42a 464
96 243

CHARLES L. ORTMANN v. MERCHANTS' BANK OF CANADA.

Costs against surety for non-resident plaintiff.

The Supreme Court, on reversing a judgment recovered by a non-resident plaintiff, and remanding the case for a new trial, will not award costs under Comp. L., § 6133, against the surety for costs.

Motion for judgment for costs against surety. Submitted and denied January 13.

Wheeler & McKnight for the motion.

PER CURIAM. Where security for costs is given on behalf of a non-resident plaintiff in the circuit court, and a judgment for the plaintiff is recovered therein, which is reversed in this court on error and the cause remanded for a new trial, judgment cannot be rendered against the surety for costs in this court under Comp. L., § 6133.

Denied.

EX REL. ADAM SCRAFFORD v. THE SUPERVISORS FOR THE COUNTY OF GLADWIN.

Costs against public officers.

Costs are not generally imposed on public officers and boards where they appear to have acted in good faith.

Motion for costs. Submitted and denied January 13.

Wheeler & McKnight for the motion.

PER CURIAM. Motion is made to award costs in this case [41 Mich., 647] against respondents, and for taxation thereof. It has not been the practice in this court to give costs against public officers and bodies where it appears they have been acting in good faith.

Motion denied.

42 465
112 541

SILAS E. VANNETER v. DANIEL L. CROSSMAN AND GEORGE G. WHIPPLE.

Estoppel—Statements of a party in evidence for himself.

An estoppel arises from the act and not the intention of it.

Where a creditor, by attaching property and by his representations leads another creditor to suppose that he also has a right to attach it, and he does so, the first is estopped as against him from thereafter claiming that he himself was the owner of it.

Where an attaching creditor had induced another creditor to levy an attachment which afterward became a prior lien by reason of the discontinuance of the first suit, the former is estopped, in so far as the value of the property may be needed for satisfying the latter claim, from asserting that the ownership of the property was in himself.

Whether advancing the money to pay for an article gives one any other interest in it than as security for its price—*Q.*

The declarations of a party may be put in evidence against his interest, and where part of a statement or conversation is given for that purpose, he may himself bring out whatever has been omitted that bears on it.

A party cannot escape the force of adverse evidence by introducing his own statements made before the trial to his attorney.

Error to Ingham. Submitted October 10, 1879. Decided January 20, 1880.

REPLEVIN by Crossman and Whipple for a yoke of oxen belonging to one Watkins and held by Vanneter as constable under writs of attachment against Watkins, taken out first by Crossman and Whipple and afterwards by Mead & Fleming. It appears that the first attachment suit had been discontinued, and it is not shown that Vanneter was notified of that fact when the writ of replevin was taken out against him. Whipple gave some evidence tending to show that he and his partner Crossman had advanced the money to pay for the oxen and that they had a lien on them for the amount until it was repaid. Defendant brings error.

Smith & Smith for plaintiff in error. Intent to deceive is not necessary to an estoppel, *Horne v. Cole*, 12 Amer., 111; *Truesdail v. Ward*, 24 Mich., 117; costs and expenses may be the basis for it as well as anything, *Meister v. Birney*, 24 Mich., 440.

E. D. Lewis and *M. V. Montgomery* for defendants in error. It is not enough that a party may have been misled or injury done, to raise an estoppel, Herman's Estoppel, §§ 330, 335; one cannot be estopped from asserting the truth merely because his conduct has been construed to mean something he never intended, Bouv. Dict., tit. Estoppel; Co. Litt., 352; 2 Pars. Cont., 793, 800; 1 Addison Cont., § 249; Herman's Estoppel, §§ 342, 329, 331; Bigelow's Estoppel, 556; estoppels are only allowed to prevent injustice, ib. § 324, *et seq.*

MARSTON, C. J. We are not satisfied that this case differs materially from the shape in which it was presented before [39 Mich., 610] as to the notice to the officer of the discontinuance of the Crossman and Whipple attachment proceedings.

The court, however, was clearly in error in the charge given in reply to a question asked by one of the jurors.[1]

[1] The juror's question and the reply of the court were as follows:

Juror—"It is in regard to the summing up of your charge,—in regard to whether there was any testimony given in this case to prohibit or stop in this matter, as was talked of by counsel."

Court—"What I said or intended to say was, that I was not aware that there was any evidence in the case tending to show that the attachment proceedings were commenced by Crossman & Whipple with the intention on their part of causing the defendants, principally Mead & Fleming, or the general public, to understand that they did not own the property in fact. But it was left to you to determine whether there was any such evidence in the case tending to show, and which in your opinion was sufficient to show that these proceedings were commenced with the purpose of causing it to be understood by Mead & Fleming or the general public that they did not claim an interest in this property."

Mr. Reed, attorney for defendant—"Should not that be left entirely to the jury, as to whether they find anything in the evidence in relation to that?"

Court—"Unless they intended by these proceedings to give Mead & Fleming to understand they didn't claim any interest in the property, they would not be estopped from now showing what the real truth was about the title. They cannot be estopped from showing what the real truth was, because Mead & Fleming may have understood from what they had done that they didn't claim any interest in the property."

In order to estop Crossman and Whipple it would not be at all necessary that the jury should find that the attachment proceedings were commenced by them with the intention on their part of causing the defendants Mead & Fleming to understand that they, Crossman and Whipple, did not own the property in fact. It was a matter of no sort of consequence what intention they may have had, if any, upon that subject. It is the act and not the intention that governs. The owner of property may silently stand by and see it sold as the property of another, and this without any intention on his part of misleading or injuring any one, and yet the result would be the same.

It is clear, from the facts stated, that Crossman and Whipple had a claim against Watkins, who had left the State, which they were anxious to secure and collect, and that for this purpose they treated the price advanced or paid by them for these oxen as a debt against Watkins, and the oxen as his property. They also knew that Mead & Fleming had a claim against Watkins and the amount thereof, and they informed the business manager of Mead & Fleming, of the property attached by them as the property of Watkins, and that if properly handled it would be sufficient to pay all. This last remark could have had no meaning, except upon the theory that Mead & Fleming would also commence legal proceedings and levy upon the same property for the collection of their debt. Acting upon this information Mead & Fleming levied and obtained a valid lien upon the property, and this turned out to be a first lien, which would give them, if necessary, in order to satisfy their claim, the full value of the oxen. The change of position taken by Crossman and Whipple, if sustained, would cut off this lien of Mead & Fleming *in toto*.

Here Crossman and Whipple not only made no claim to the oxen, but by their levy, their conduct, and by words, gave other creditors of Watkins to understand that their common debtor was the owner, and this, we

must believe, with reasonable knowledge, at least, that Mead & Fleming would endeavor to secure their claim by treating the property as that of Watkins, and thus incur risks and expense they otherwise would not have done. If upon a new trial it should farther appear that Mead & Fleming did not obtain a lien upon other property sufficient to satisfy their claim, and the jury should find the above facts to be true, then they should be instructed that Crossman and Whipple would be estopped as against Mead & Fleming from claiming to be the owners of the oxen, in so far as the value thereof would be necessary, with the other property levied upon by the latter, to satisfy their claim, and this irrespective of the intention of Crossman and Whipple. *Dann v. Cudney*, 13 Mich., 242.

It is also worthy of consideration that, under the claim now made by Crossman and Whipple, it may be a question of some doubt whether they could be the absolute owners of the property at all, or whether their claim or interest in the oxen was other than in the nature of a security for the price paid by them therefor.

There was also an error committed in the rulings in relation to evidence. Mr. Lewis was allowed to make reference to a private call upon him by Mr. Whipple for advice before the first attachment, and to narrate Whipple's declarations then made to him in regard to the ownership of the oxen, and his motives and reasons for attaching. The giving of this evidence was prepared for by the explanation of counsel that its object was to hinder its being inferred from the attachment proceedings that the defendants in error then considered that Watkins owned the cattle and they did not.

The declarations of a party may be given against his own interest, and when a part of an entire statement or conversation is so given, he may adduce whatever has been omitted which bears in any way upon the rest. But he cannot, by collateral statements outside, make evidence for himself, and these statements given by Mr. Lewis

seem to be within the principle. Wharton's Ev., §§ 1100, 1101, 1102, 1104; Best's Ev. (Wood's ed.), §§ 518, 519, 520.

Judgment reversed with costs and new trial granted.

The other Justices concurred.

42 469
1140 253

EX REL. ISAAC N. JENNESS v. THE CIRCUIT JUDGE FOR LAPEER COUNTY.

Irregularity in legal proceedings—Revivor.

An irregularity is such a defect in legal proceedings as may be waived; a nullity is one that cannot.

The omission of plaintiff's administrators to revive a suit before taking out an execution after his death, is only an irregularity and may be cured by an order *nunc pro tunc*.

MANDAMUS. Submitted Jan. 6. Granted Jan. 20.

H. Geer for the writ.

S. B. Gaskill against.

GRAVES, J. June 1st, 1874, one James Turrill recovered judgment in the circuit court for Lapeer county against Oscar A. Williams for $454.10 damages and costs. July 31, 1876, the plaintiff Turrill died intestate, the judgment remaining in full force and unpaid. September 4, 1876, George N. Turrill and Ward H. Jennings were appointed administrators of the estate of the deceased plaintiff, and immediately entered upon the duties of their trust.

July 19th, 1877, the administrators caused an execution in the usual form to be issued on the judgment, and on the 23d of the same month the sheriff levied on the interest of the judgment defendant in a large quantity of lumber lying in a mill yard. The lumber was sup-

posed to belong to him and two others as tenants in common, and his undivided interest was understood as being one-quarter.

After the usual notice the sheriff sold the interest of the debtor, whatever it was, to the relator, who immediately paid his bid to the sheriff, and the latter made due return thereof to the court.

The sale was made on the 23d of August, 1877. The relator, being unable to come to an agreement with the other two owners for a division of the interests, proceeded on October 30, 1877, to file a bill for a receiver and for a sale by him of the whole lumber, and a division of the proceeds according to the rights of the parties. The case was put at issue in the early part of December of the same year, and under and pursuant to a stipulation made in the cause the relator adduced and closed his proofs, and thereupon the case was postponed to enable the defendants to submit their evidence but no time was fixed therefor.

In this state of the case in equity, and on the 28th of April, 1879, Oscar A. Williams, the judgment debtor, moved the court in the case at law to set aside the execution and proceedings had under it as being void for the reason that it was taken out after the plaintiff's death and without steps to revive.

The circuit judge granted the motion, and a mandamus is now applied for to remove that order.

It is of course conceded that if the execution and sale were void, the order objected to cannot be disturbed. And it is not denied by relator that the proceeding was irregular in consequence of the neglect to revive. But he contends that the defect went no further, and did not make what was done absolutely null, and that proceedings *nunc pro tunc* are admissible to cure what is amiss, and that the case presents strong equities for the relief.

Upon the question whether the execution and sale

were void or merely voidable, the authorities elsewhere do not afford any very clear or very satisfactory light. For the most part, the decisions seen to have been governed, or at least much influenced by local practice or regulations, rather than by any general or leading principle. We must consider the point as a domestic question and depending on the facts and our own practice.

It has been laid down that an irregularity is either the omitting to do something necessary for the due and orderly conducting of a legal proceeding, or doing it in an unseasonable time or improper manner. Tidd's Prac., 512. Another author observes that in its most general sense an irregularity is the technical term for every defect in practical proceedings or the mode of conducting an action or defense as distinguished from faults in pleadings, and that a nullity is the highest degree of an irregularity, in the most extensive sense of that term, and is such a defect as renders the proceeding in which it occurs totally null and void, of no avail or effect whatever, and incapable of being made so; and that it may perhaps be defined as a proceeding that is taken without any foundation for it, or that is essentially defective, or that is expressly declared to be a nullity by statute. And he proceeds to add that it may be laid down as a certain rule that whenever there is any doubt upon the matter, it will always be safe to treat the defect as an irregularity rather than as a nullity, and that there is a tendency in the judges to consider defects merely as irregularities. He also says that an irregularity may be waived, whilst a nullity never can be. McNamara on Nullities, 2, 3, 6. In *Holmes v. Russel*, 9 Dowl., 487, Mr. Justice Coleridge said: "It is difficult sometimes to distinguish between an irregularity and a nullity; but I think the safest rule to determine what is an irregularity and what is a nullity, is to see whether a party can waive the objection. If he can waive it, it amounts to an irregularity; if he cannot, it is a nullity."

There can be no doubt, I think, that the defect in

question was an irregularity within the definition of Tidd; and the other authorities, I conceive, show it to have been nothing more. Had the execution defendant filed a stipulation by which he expressly assumed to waive the omission complained of, we cannot admit that any ground of error would have remained. And if it was competent to waive the defect by any method, the proceeding was not a nullity.

The execution was demandable as matter of right. If regularly applied for it could not be refused. And those who applied were the proper applicants in fact. All that was lacking was a formal proceeding. There was nothing on the face of the papers or in the record to apprise the clerk or sheriff that there existed any impediment in the way. Neither was there anything to warn the relator of any defects in the proceedings.

There was no fraud or inequitable conduct. The sale was fair, and the relator purchased in good faith and paid his bid to the sheriff and the latter returned it into court, and it is to be presumed that it was paid over to the plaintiff's representatives and placed where relator cannot recall it,—at least without trouble and expense. The judgment debtor received the benefit of it. Had he voluntarily paid the amount to the representatives of the deceased plaintiff without any revivor of the judgment, the transaction would have been valid. He did not pay, but allowed execution to be issued and the subsequent proceedings to be taken without objection or raising any question. Not only so; he abstained from moving until the judgment was apparently satisfied, and the relator's position so altered that the objection, if successful, must necessarily cause the latter serious loss.

Moreover, the position taken implies that both the relator and the sheriff were trespassers and liable for damages as wrong-doers. It would be very unreasonable to wink at such consequences. Nothing more was required to preface the issuing of the execution than an order to revive upon affidavit and notice (Circuit Court

Rule 100), and the case shows that such an order would have been a matter of right.

The neglect to obtain it under the circumstances was, we think, a mere irregularity, and which may be cured by an order *nunc pro tunc*. *Cumber v. Wane*, Strange, 426; *Tapley v. Goodsell*, 122 Mass., 176.

The mandamus should be allowed.

The other Justices concurred.

CORNELIUS WORTH ET AL. v. RICHARD L. MCCONNELL ET AL.

Seller's talk—Warranty—Damages—Special questions to jury.

The representation by the vendor of a threshing machine that it is a very good machine and will do nice work, is not a warranty.

Where a special question to the jury as to whether they found a machine was sold with a recommendation or a warranty that it would do good work, was answered yes, it was *held* that the answer did not determine whether they found a warranty or a mere recommendation.

Where defendants to an action on a note relied upon the recoupment of damages for an alleged breach of warranty, and there was no evidence to show a warranty, and the jury did not find that there was any, a modification of the defendant's request to charge on the subject of damages was immaterial.

In an action on a note the question arose whether defendant had written certain letters. The execution of the note was not in issue, but defendant denied having signed it, and there was testimony tending to show he did not write the letters. *Held* proper to admit, for purposes of comparison, the testimony of a witness showing that he had a note which he had seen defendant sign, and to allow him to compare the note in suit with it, and express his opinion as to whether he had signed the note and written the letters.

Recoupment for breach of warranty was claimed in an action on a note given for the article sold. The plaintiff claimed that defendant had sent certain letters expressing his satisfaction with the article and asking an extension of time for payment. *Held*

proper to introduce the letters so that the jury, by comparing them with the note, and from the other evidence, might determine whether they were genuine and were written by the defendant or by his authority.

Error to Genesee. Submitted Jan. 7. Decided Jan. 20.

ASSUMPSIT. Defendants bring error.

Gaskill & Thayer for plaintiff in error. Handwriting cannot be proved by comparison with papers outside of the case unless they are already properly before the jury for other purposes or the parties admit their genuineness and fitness for comparison, or unless the documents in question are ancient, *Vinton v. Peck*, 14 Mich., 287; *Foster's Will*, 34 Mich., 21; *Van Sickle v. People*, 29 Mich., 65; *Van Wyck v. McIntosh*, 14 N. Y., 442; *Dubois v. Baker*, 30 N. Y., 355; *Randolph v. Loughlin*, 48 N. Y., 456.

H. R. Lovell and *C. D. Long* for defendant in error cited as to proof of handwriting by comparison, *Jhons v. People*, 25 Mich., 500; *First Nat. Bank of Houghton v. Robert*, 41 Mich., 709; *Haner v. Wallis*, 6 Amer. Dec., 169.

MARSTON, C. J. This action was brought to recover the amount due upon the joint promissory note of Worth & Bartell, given in part payment of a clover threshing machine purchased by Worth from the plaintiffs. The execution of the instrument sued upon was not denied in the pleadings.

The defense relied upon was that there was a warranty accompanying the sale of the threshing machine, a breach thereof, and a recoupment of the damages sustained in consequence of such breach.

To meet this defense the plaintiffs sought upon cross-examination of defendant Worth, when examined in his own behalf, to show that he had written certain letters to the plaintiffs and their agents, referring to the machine, asking an extension of the time of payment, and expressing satisfaction with the machine. It appeared

that Worth was illiterate, and evidence was given tending to show that the letters referred to were not written by him, but by his wife and others under his directions, and he was asked and testified that his signature to the note was not written by him. This last was called out not for the purpose of questioning the validity of the note as against him, as under the pleadings this could not be done, but to prevent a comparison by experts of the signatures to the note and letters to prove that the latter were signed by Worth.

Evidence was given tending to show that the note was in fact signed by Worth, and one of the witnesses, when upon the stand, testified that he had seen Worth write his name; that he, the witness, had a note in his possession given by Worth, and he was permitted to examine such note, with the one in suit, and give his opinion concerning the same and also that Worth had written certain of the letters already spoken of.

The witness Hakes having seen Worth sign a note, and having that note in his possession, it was proper to allow him to compare the signature to the note in suit with the one in his possession, and then give his opinion, and to make a like comparison with and give his opinion therefrom that the letters also were written by Worth. This comes clearly within what was said and the authorities cited in *Vinton v. Peck*, 14 Mich., 293.

Upon this proof having been made, the letters were admissible, not as counsel seem to argue, for the purpose of comparing them with the note in suit to prove it genuine, because that question was not in issue, but that the jury might from all the evidence in the case, by comparison with the note in suit and the oral evidence, determine whether the letters were written by Worth or under his direction and authority, and if they did so find, to consider their bearing and weight upon the question of a breach of warranty. Thus far we discover no error.

It is said that the court erred in modifying defend-

ants' requests to charge relating to the subject of damages. The defense relied upon was a warranty and breach thereof. The record sets forth the evidence given on the trial. The only evidence tending to show a warranty, if there was any such, was that of defendant Worth. He testified that he purchased the machine of Odell of Flint. "He was acting as agent of plaintiff McConnell. Said it was a very good machine and would do very nice work, and I purchased it with that understanding." On cross-examination he testified: "The warranty of Odell was verbal."

The representation made that it was a very good machine and would do very nice work falls far short of amounting to a warranty. If this statement could be so held, then no man could with any degree of safety say anything in praise of his wares without being held as thereby warranting them—a doctrine certainly not sustained in the law. The jury by their general verdict did not find a warranty, because it was in favor of the plaintiffs, and although certain questions were submitted to them, and some of which they answered, yet the answers given do not show that they found either that there had been a warranty or a breach thereof.

The first question submitted asked them to find whether the machine was sold with a *recommend* or warranty that it was a good machine and would do good work, and to this they answered, "Yes." Now whether they found a mere recommendation or a warranty certainly is not here settled by this question and answer. In answer to the next question submitted to them they were unable to agree whether the machine was a good one and did good work, and under the next question they could not agree whether the machine was as good as recommended at the time of sale. Under such circumstances it was wholly immaterial whether the court was correct in the modification of the requests to charge or not, as under the answers given by the jury it is clear they never even approached that question.

When we look at the testimony given by Worth referring to the representations made, in connection with his letters written asking for an extension of the time of payment, it becomes very clear indeed that there was no warranty of the machine by the plaintiffs or their agents, and that there was nothing therefore to submit to the jury upon that subject or damages in connection therewith. *Deuel v. Higgins*, 9 Mich., 223.

The judgment must be affirmed with costs.

The other Justices concurred.

---

42 477
98 73
42 477
103 529.

NEWELL MATSON, GEORGE JOHNSON, LEVERETT J. NORTON AND WILLIAM E. HYLER v. HARRIET MELCHOR, EDWIN B. MELCHOR, LOUIS W. MELCHOR, AND CHARLES MELCHOR, HEIRS OF THADDEUS W. MELCHOR.

Chancery practice—Bill in aid of execution—Formal objections—Deposition not affected by deponent's subsequent death—Admissions made in one suit used in another—Gift from husband to wife in fraud of creditors—Neglect to assert homestead exemption in defense.

Formal objections are not allowed on the hearing of a cause where they could easily have been made before.

A deposition filed with a commissioner to take testimony, and recognized in the cause by a stipulation, will not be excluded on the hearing if there was no motion to suppress it, even if the stipulation was not in proper shape.

The death of a party to a suit before it is brought up for hearing does not affect the validity of a deposition taken during his lifetime, nor exclude evidence of his own admissions.

Where defendants in chancery had answered in another suit attacking the same transaction, their answer, if meant to be an admission, is admissible as such, though never filed in the suit for which it was drawn.

The fraudulent effect of a gift from a man to his wife by which the property is placed beyond the reach of creditors, is not changed by the fact that the wife, while she knew her husband was indebted, did not know that he could not give her his property under the circumstances.

One who claims as a *bona fide* purchaser, but who has only given his notes, must also show that he had made payment thereon before notice of the defect in his grantor's title.

Where a bill was filed in aid of an execution that was levied on a lot which had been conveyed in fraud of creditors and was occupied as a homestead, and the answer did not aver its value to be low enough to bring it within the constitutional exemption, the levy was *held* legal, and action should have been taken under it to ascertain the homestead right or secure such interest as might remain over in case the value of the property exceeded the amount of the levy.

Where a homestead right is not asserted in defense to a bill in aid of execution, and the defendant has died and his children are of full age, there is no obstacle to a sale under the levy.

Error to Van Buren. Submitted January 7 and 8. Decided January 20.

BILL IN AID of execution. Dismissed. Complainants appeal.

G. W. Lawton for complainants. Sworn admissions made in answer to a bill of complaint are admissible in another case involving the same issues, though they had never been filed, 1 Greenl. Ev., §§ 169, 171, 172; 2 Whart. Ev., §§ 1116, 1123; *Williams v. Cheney*, 3 Gray, 215; *Tupper v. Kilduff*, 26 Mich., 394; *Kelly v. McKenna*, 18 Mich., 381; *Hickey v. Hinsdale*, 12 Mich., 99; *Atwood v. Cornwall*, 28 Mich., 336.

Knowles & Rowland for defendants.

CAMPBELL, J. This bill was originally filed against Thaddeus W. Melchor and Jennie Wilson as well as against Harriet Melchor and Edwin B. Melchor. Defendants Louis and Charles Melchor were brought in as heirs on the death of Thaddeus. The bill was voluntarily dismissed against Jennie Wilson, who claims interests as a *bona fide* encumbrancer.

The bill was filed in aid of an execution levied on lands conveyed by Thaddeus to his wife Harriet, and in part conveyed by her to their son Edwin—the conveyances being charged as in fraud of complainants as judg-

ment and execution creditors. The conveyances to Harriet Melchor were made at different times in the year 1874. The judgment, rendered in July, 1875, was upon claims existing before any of these transfers. The property consisted of several lots in Paw Paw, one of which seems to have been occupied as a homestead during all this time, and is still occupied by the grantee, Mrs. Melchor. It does not appear that any of them are minors.

A preliminary question is raised concerning the most direct testimony in the cause, which requires notice. A deposition was taken of complainant Norton, referring to matters which it is claimed were within the equal knowledge of Thaddeus Melchor, and which it is insisted should be excluded—*first*, because the deposition was not regularly taken, and is said not to have been regarded by the court below: and *second*, because the transactions were not receivable in evidence as against the representatives of the deceased party.

The deposition was probably taken regularly, as it is otherwise difficult to account for several things concerning it. But whether regular or not, it was recognized as in the cause by a written stipulation. It is claimed that this stipulation was not in such a shape as to cure the irregularity. We need not discuss this, because there was no motion to suppress. The practice has never allowed formal objections on the hearing where they could have been made without difficulty before. *Boxheimer v. Gunn*, 24 Mich., 372; *Cook v. Bell*, 18 Mich., 387.

If the deposition was on file, it makes no difference whether the court below received it or not. It is evidence which ought to have been received.

The testimony was taken during the life of Thaddeus Melchor, and his subsequent death cannot affect its validity, or render his admissions incompetent.

The other testimony objected to was the record of another suit by creditors attacking the same transaction, and allowed to go by default. There was also evidence

of an answer in the same cause signed by all the parties, but for reasons connected with an arrangement, never filed.

This answer is clearly receivable as a deliberate and positive admission of facts. It cannot lose its quality of an admission simply because it was never filed, provided it was meant at the time to be an admission,—of which there can be no doubt. We have not found it necessary for our own satisfaction to consider the record itself, and it is not important to refer to the rules of evidence bearing on it.

It appears very distinctly from this answer that no consideration in fact passed from Harriet to Thaddeus Melchor, and that she entered into no obligation of such a nature as to stand for value. She claims to have taken the property on a promise to pay debts. It does not appear anywhere what this agreement (if any such was made) referred to, and it is not probable there was any valid agreement made or contemplated. From all the circumstances it is clear to our minds that it was a purely voluntary transaction. The case in its best aspect is like *Fellows v. Smith*, 40 Mich., 689, where there was a conveyance on very similar terms, but under less suspicious circumstances. While very probably Mrs. Melchor had no actually wrong design, yet she knew that her husband was indebted, and whether she did or did not know that he could not under such circumstances give her his estate is not important. He had no right to put his property beyond the reach of creditors as a means of settlement, or for any other purpose, and the fact that he told his wife, or that she may have believed, he did not intend to defraud any one, does not change the fraudulent operation of the gift.

Edwin B. Melchor was not a *bona fide* purchaser. Whether he had notice of the fraudulent character of his mother's title or was ignorant of it, he did not pay a valuable consideration, but gave his notes. He claims to have paid something on them, but when and how

much does not appear. It was for him to make out payment before notice. *Thomas v. Stone*, Walker's Ch., 117; *Stone v. Welling*, 14 Mich., 514; *Dixon v. Hill*, 5 Mich., 404; *Warner v. Whittaker*, 6 Mich., 133; *Blanchard v. Tyler*, 12 Mich., 339; *Palmer v. Williams*, 24 Mich., 328; *Boxheimer v. Gunn*, id., 372.

The attempt in this case to show mental incapacity in Thaddeus Melchor is feeble and deserves no attention.

It appears that one lot levied upon was at the time occupied as a homestead. The answer sets up this fact, but relying on the conveyance does not claim the exemption. It does not, however, aver or claim that the value was low enough to make it exempt within the constitutional limit of fifteen hundred dollars. This being so, there can be no doubt of the legality of the levy, and of the necessity of some inquiry and action under it to ascertain the homestead right, or to secure such interests as might exist in case the property was too valuable. Inasmuch as Thaddeus Melchor died without making any such claim, and his children are not shown to be minors, but have appeared as being of full age, the homestead right has terminated if it ever existed, and presents no obstacle to a sale under the levy.

We are of opinion that the transfer to Mrs. Melchor and her sale to Edwin were fraudulent and void as against complainants, and must be set aside; and that the land should be sold to satisfy complainants' judgment, subject only to Mrs. Melchor's right of dower, and such interests as Jennie Wilson may hold.

The decree dismissing the bill must be reversed and a decree entered in favor of complainants, with costs of both courts.

The other Justices concurred.

42 482
105 220

ELISHA W. PARKS ET AL. v. GRANGER ALLEN.

Tender of payment on mortgage.

A mortgager, by way of tender, made repeated offers of money to the mortgagee while they were riding together on the public highway. He involved it with other matters of dealing between them, and the settlement was interrupted by a quarrel, but before any costs were incurred the mortgagee offered to receive the amount due. *Held* that no tender had been made that would discharge the mortgage lien.

Where a bill to enforce the discharge of a mortgage had been filed before the time for redemption had expired, but after foreclosure was begun, and it was held that the complainant mortgager was not entitled to discharge, he was allowed to redeem on paying the amount of the debt with interest at the stipulated rate, and the costs of foreclosure, with interest, but without the attorney fee provided for in the mortgage.

Appeal from Tuscola. Submitted Jan. 8. Decided Jan. 20.

BILL TO COMPEL THE RELEASE of a mortgage and to obtain the statutory penalty for refusing to discharge it on tender of the amount due thereon. Complainant Parks testified that he saw the mortgagee Allen driving past the place where he was at work, and that he called to him to stop and went out to where he was and asked him if he had the mortgage with him. Allen said he had, and also said that he had some other mortgages and was going to Caro to get some money on them; Parks said he would pay him some money, and Allen asked him how much; Parks said $40, and Allen said he would not take any of it unless he could have the whole; Parks then said, "Very well, I will pay you the whole of it," and Allen replied that he had all the money he wanted to use that day and had not time to figure up the interest. Parks then went to his house and got his coat and some money, while Allen waited for him in his wagon, and when Parks returned he got in and they drove on together. Parks told Allen that he had

the money there to pay him that mortgage, and held it out towards him; Allen answered as before that he had all the money he wanted to use, and would not take it; Parks repeated his offer and Allen his reply ten or a dozen times on the road, and when they reached the place of a mutual acquaintance named Covey, Parks alighted and in Covey's presence repeated his tender. The money was in greenbacks with one or two National bank bills.

Defendant's testimony set forth that the offer of money was involved with other matters of mutual indebtedness. He claimed that when the money was first offered he said "Give me your money," and Parks said "Give me the mortgage;" Allen replied that he, Parks, could not discharge the mortgage, and after some other talk asked him how much money he had; Parks said 'more than enough to pay him.' Allen replied "Count out your money; I don't know as this mortgage has anything to do with our other deal;" and he then laid down his lines and took out some papers and looked them over to find the mortgage. Both parties appear to have lost their tempers, and Parks accused Allen of talking about him and his wife, on which both began quarreling and swearing, and Allen put up his papers and drove on. He afterwards left the mortgage with an attorney for foreclosure, but sent word to Parks to pay before a certain time if he wanted to save costs, but Parks did not pay and he proceeded to foreclose, on which Parks filed his bill to compel a discharge. This bill was dismissed below and complainant appeals.

W. C. Buchanan and *H. P. Atwood* for complainants. A tender is good if enough money is offered, and must be received, *Wheeler v. Knaggs*, 8 Ohio, 169; 2 Jones on Mortgages, § 893 et seq.; an unconditional tender discharges the lien of a mortgage even though not kept good, *Potts v. Plaisted*, 30 Mich., 149; and if refused the mortgagee is entitled to the statutory penalty, *Barnard v. Harrison*, 30 Mich., 8; *Collar v. Harrison*, id., 66.

B. W. Huston for defendant. A tender made without notice at an unfit place may be declined until the creditor can examine the account, *Waldron v. Murphy*, 40 Mich., 668.

MARSTON, C. J. We are of opinion that there was no such tender made as would discharge the mortgage lien, much less entitle the complainants to the statutory penalty. The place where the tender was made and the circumstances attending the same, show that there was no willful refusal by the defendant to receive the amount due, while he did decline going into other matters of dealing between himself and the complainant, and he afterwards and before any costs were incurred offered to receive the amount due on the mortgage note.

In view of all the facts we think complainants should be permitted to redeem, the bill in this case having been filed before the time for redemption expired, upon paying the amount of the note with interest thereon at the rate therein prescribed, together with the costs of foreclosure, with interest thereon, but not the attorney's fee provided for in the mortgage.

The defendant herein should recover full costs in both courts.

The other Justices concurred.

42 484
69 577

42 484
118 538

42 484
150 $562

WILLIAM W. WITHERSPOON v. JOHN H. CLEGG AND DESIRE B. WILLEMIN.

Trover—Proof of plaintiff's interest—Certiorari.

Proof of a judgment and an execution issued on it in plaintiff's favor shows sufficient interest in the property levied on to sustain trover for its conversion.

Where an officer who has levied on a piece of property leaves it with a custodian and it is taken away by another person under a claim of superior right, trover lies as for its conversion.

On *certiorari* to a justice, the circuit court cannot take notice of errors that were not assigned in the affidavit for the writ, nor presume errors that were not affirmatively shown by the return.

Error to Wayne. Submitted Jan. 8. Decided Jan. 20.

TROVER. Plaintiff brings error.

George W. Bates for plaintiff in error. It is conversion to take possession of property in the custody of the law, *Johnson v. Grand Trunk Ry.*, 44 N. H., 626; even though the party taking it supposes he has a right to, *Flanders v. Colby*, 28 N. H., 34; *Hyde v. Noble*, 13 N. H., 494.

C. H. Burritt for defendants in error.

COOLEY, J. Witherspoon, being an acting constable of the city of Detroit, received for collection an execution on a judgment standing on the docket of Justice Barbier against William C. J. Campau at the suit of Edwin H. Stevens. This suit was dated December 4, 1876, and on the eighth day of that month he levied by virtue of it on a paper boat, which he took to and left at the Excelsior Boat Club in charge of one Plass. On the next day Willemin went to Witherspoon with what purported to be a copy of a mortgage from Campau to John H. Clegg of the boat, together with a buggy and cutter, given to secure a debt of three hundred dollars, dated November 24, 1876, and due three days thereafter. On this mortgage Willemin, as agent for Clegg, demanded possession of the boat, of Witherspoon, and on the latter refusing to deliver it up, went to the boat-house and took possession of it. Thereupon Witherspoon brought this suit in trover, and recovered judgment for the amount of the execution. Defendants sued out a writ of *certiorari* and alleged as errors that the judgment was rendered without any proof of conversion by the defendants, and without any proof of the plaintiff's interest in the property. There was a further assignment that the judg-

ment by Justice Barbier was not sufficiently proved, but this was manifestly without merit. The circuit court reversed the justice's judgment, and the case is now before us on writ of error.

The proof of plaintiff's interest was made by producing the judgment rendered by Justice Barbier, and the execution issued upon it. The proof of conversion was also ample. The officer left the property in the boat house with a custodian, and Willemin, acting for Gregg, removed it claiming superior right. Nothing more could be essential to make out a right of action.

It is now claimed that the judgment of the circuit court should be sustained because Witherspoon had no right, as against Clegg's mortgage, to make a levy on a part of the property covered by it (*Worthington v. Hanna*, 23 Mich., 534; *Harvey v. McAdams*, 32 Mich., 477), and if he had, it does not appear that the mortgaged property was sufficient to pay both the mortgage and the execution, and consequently the judgment in favor of Witherspoon for the full amount of the execution was unwarranted. It is sufficient to say on these points that it does not appear from the record that the justice had his attention called to them, nor was any error assigned upon them in the affidavit for a *certiorari*. The circuit court could not take notice of errors which were not assigned, nor presume errors which were not affirmatively shown by the return. *Fowler v. Detroit & Milwaukee Ry. Co.*, 7 Mich., 79.

The judgment of the circuit court must be reversed and that of the justice affirmed, with costs of this and of the circuit court.

The other Justices concurred.

SOLOMON ZOOK v. J. P. BLOUGH.

Certiorari—Attachment—Petition to dissolve.

A circuit court commissioner has power to allow a writ of certiorari to bring up proceedings before a justice for the dissolution of an attachment, and a circuit court has jurisdiction to issue it, and hear the case.

A distinct allegation of the ownership of attached property is enough to give jurisdiction to hear a petition for the dissolution of the attachment; but if it appears on the hearing that the right of possession was in third persons, the petition must be denied.

Error to St. Joseph. Submitted Jan. 8. Decided Jan. 20.

ATTACHMENT. Petition to dissolve the attachment was granted by a circuit court commissioner, whose proceedings were quashed by the court below, and petitioner brings error.

O. P. Coffinberry for plaintiff in error. Attachment proceedings are purely statutory, *Wight v. Warner*, 1 Doug. (Mich.), 385; *Chandler v. Nash*, 5 Mich., 416; a writ of certiorari cannot be allowed by a circuit court commissioner except in the case provided for in Comp. L., § 5466, but must be issued by the circuit judge, *Taylor v. St. Clair Circ. Judge*, 32 Mich., 95; Const., Art. vi., § 8; Comp. L., § 5465; a petition for dissolution of an attachment is bad if it does not sufficiently describe the property, *Nelson v. Hyde*, 10 Mich., 522.

S. B. Kingsbury for defendant in error. A right to the possession of personal property cannot be inferred from an averment of ownership, *Price v. Reed*, 20 Mich., 72; *Osborne v. Robbins*, 10 Mich., 278; a circuit court commissioner has the powers of a circuit judge at chambers and can grant an application for a writ of certiorari, Comp. L., § 5567; Const., art. vi., § 16; *Whipple v. Saginaw Circ. Judge*, 26 Mich., 342; *Rowe v. Rowe*, 28 Mich., 354; Comp. L., §§ 7132–3.

MARSTON, C. J. Blough sued out a writ of attachment before a justice of the peace against Zook, and property was seized by virtue thereof. An application was made before a circuit court commissioner for a dissolution of the attachment, and upon the hearing it was dissolved. The proceedings were then removed to the circuit court by certiorari, and on hearing quashed.

A circuit court commissioner had power to allow the writ (2 Comp. L., § 7133) and the circuit court had jurisdiction to issue and hear the same. *Merrick v. Township Board*, 41 Mich., 630.

The principal question, and the only one remaining to be considered which is deemed of any importance, relates to the sufficiency of the petition praying for a dissolution of the attachment.

The objection urged against it was that it did not contain any allegation that the petitioner was entitled to the possession of the property. The petition set forth that the officer did "seize and take into his possession, of the goods and chattels of this deponent," * * * certain described property, and that he levied on ten acres of corn and seven and one-half acres of oats, all of which corn and oats "*are and then were growing on the farm of deponent*," which was described, all of which goods and chattels "*were* and *now are*, and *ever since have been*, the goods, property and chattels of this deponent."

As was said in *Johnson v. DeWitt*, 36 Mich., 96, the fair inference is that the owner of personal property is entitled to its possession, and yet he may not be, and that therefore on principle the application should allege a right to the possession of the attached property. Where however an allegation of ownership is distinctly made, and there is nothing in the case indicating that any other person has acquired any right in opposition thereto, the legal presumption that the owner of property is entitled to the possession of the same may very fairly be indulged, for the purpose of giving the commissioner jurisdiction. If upon the hearing it appears that the

applicant is the owner, yet that third parties have rights therein and are entitled to the possession, the petitioner must fail.

In *Macumber v. Beam*, 22 Mich., 395, the statement of ownership in the application was not so clear and distinct as in this case, yet it was held sufficient. Although an intimation was made in *Johnson v. DeWitt* as to what should be alleged in the petition, yet that case was not disposed of on such grounds, but what appeared from the evidence on the hearing. It must appear from the petition that the party is thus entitled to the possession and restoration of the property levied upon; but this, for the purpose of giving the commissioner jurisdiction to issue a citation, may sufficiently appear from clear and distinct allegations of present ownership.

The judgment of the circuit court quashing the proceedings of the commissioner must be reversed with costs.

The other Justices concurred.

---

42 489
112 282

JOHN HEBERT v. CHRISTIAN BULTE.

42 489
f157 1 53

Statutory foreclosure—Evidence of regularity.

The sheriff's deed on statutory foreclosure is no evidence that the foreclosure was legal; and the affidavits required by Comp. L., § 6926, are merely to perpetuate evidence of the sale.

Foreclosure by advertisement is not a judicial proceeding, but an act of a party, and cannot take place unless the mortgage contains a power of sale.

Error to Wayne. Submitted Jan. 8. Decided Jan. 20.

PROCEEDINGS TO RECOVER POSSESSION OF LANDS. Defendant brings error.

Moore, Canfield & Warner for plaintiff in error.

G. H. Lothrop and *E. F. Conely* for defendant in error.

GRAVES, J. Bulte commenced a summary proceeding before a circuit court commissioner under Comp. Laws, ch. 211, to recover possession of certain premises in Detroit. He based his complaint on section 6706, and at the trial rested his right to recover upon an alleged purchase made at a foreclosure sale under the statute regulating foreclosure by advertisement. Comp. Laws, ch. 218. After proving that Hebert was in possession and that the premises had been demanded of him, he gave in evidence a deed to himself from the sheriff, the sheriff's indorsement that the deed would become operative December 15, 1878, the foreclosure advertisement and the affidavits specified in section 6926, and rested. No evidence was given of the mortgage. The commissioner then heard the evidence on the part of Hebert and decided that he held against the right of Bulte, and that the latter was entitled to possession. The case being taken by certiorari to the circuit court, the judgment was affirmed and Hebert brought error.

At the hearing the case was very fully discussed on one or two points, which, upon the view we feel compelled to take, are not material to the result.

It is objected that in consequence of the want of evidence of the mortgage, Bulte not only failed to show that Hebert was holding over after foreclosure as alleged, or holding against his right, but also failed to show that he, Bulte, held any title, and therefore that he made out no case whatever. The result depends on the question whether the deed and affidavits were sufficient by themselves to establish a completed title in Bulte through valid foreclosure.

The deed was no evidence of legal foreclosure (*Barman v. Carhartt*, 10 Mich., 338), and we must therefore inquire whether the affidavits were. The statute author-

izes the affidavits for the purpose of preserving evidence of the sale, and for no other purpose; and they are made presumptive evidence of the facts they are intended to perpetuate, and no other. They are not needed to perpetuate evidence of the mortgage, and the law does not provide that they shall afford such evidence.

A foreclosure under the statute is an act of the party and not a judicial proceeding, and it is only possible when the mortgage is so framed as to authorize it. There must be a power of sale by which the mortgagee and his assigns are empowered by the mortgagor to sell in order to collect the debt. *Doyle v. Howard,* 16 Mich., 261. The mortgage contract containing the power of sale is the authority for the proceeding, and the validity of the deed and the force of the affidavits depend upon it. Until it is shown that there is a mortgage with the requisite power of sale, it does not appear that there is any foundation for the proceedings, and they have no inherent force to prove that a legal title has vested through foreclosure. Before placing reliance upon an act of delegated power, it is indispensable to ascertain that the power itself has been delegated.

Without discussing the point further, we are satisfied the objection taken is insurmountable, and that upon the facts the defendant in error established no right whatever to possession.

The judgments below must therefore be reversed, and the plaintiff in error will recover his costs of all the courts.

The other Justices concurred.

42 492
66 337
67 462
42 492
112 457
42 492
116 8
117 58

CATHARINE DUPONT v. HULDAH F. STARRING ET AL.

Boundaries—Special findings—Objection to special question—Verdict.

A boundary line acquiesced in for fifteen years ought not to be disturbed on a new survey.

In a case of a contested boundary between two city lots, the jury were asked to find specially how long the old line fence had stood and been regarded as the boundary line. *Held* that as the establishment of a line by adverse claim and acquiescence was a subject of dispute, it was to be presumed that the jury supposed the questions contemplated such a state of things, and not merely a case in which no question as to the correctness of the line had ever arisen.

Where special questions to the jury do not meet the whole case, the defect must be pointed out when they are submitted, and if it is not, the special findings are not open to minute criticism.

A verdict should not be sustained where, on the whole special finding, it is reasonably certain that it ought not to be.

Error to Superior Court of Detroit. Submitted January 9. Decided January 20.

TRESPASS. Plaintiff brings error.

John W. McGrath for plaintiff in error. Simple possession by the grantee under a mistaken idea that the description in his deed covers more than it really conveys, cannot constitute adverse possession, *Grube v. Wells*, 34 Ia., 148; *Dow v. McKenney*, 64 Me., 138; *Thomas v. Babb*, 45 Mo., 384; *Russell v. Davis*, 38 Conn., 562; there must be an intent to claim the land, *Bradley v. West*, 60 Mo., 33; an assertion of title, *Hamilton v. Wright*, 30 Ia., 480; the possession must be hostile, *Morse v. Hewett*, 28 Mich., 492; *Hamblin v. Warner*, 30 Mich., 97; *Davenport v. Sebring*, 52 Ia., 364.

Charles M. Swift and *Henry M. Campbell* for defendants in error. Acquiescence in a boundary cannot be inferred from the mere failure to object to it, *Chapman v. Crooks*, 41 Mich., 595.

COOLEY, J. This is an action of trespass *quare clausum*, and involves the right to a strip of land a few inches in width, which the parties respectively claim as constituting a part of premises occupied by them in the city of Detroit.

The disputed land is on block 34 of the La Brosse farm. Lot 4 of that block was conveyed by George B. Russell to William Cowie, Dec. 6, 1850; by Cowie to John P. McKeown, April 28, 1863; and by McKeown to plaintiff, July 5, 1874. Lot 3 adjoining lot 4 on the east has been owned and occupied for many years by the defendants, or some of them.

When the plaintiff became owner of lot 4 there was an old fence standing on the west line of the strip in dispute, and enclosing it with lot 3 or as a part of it. Defendants claim that this fence stood on the true line between lots 3 and 4. Plaintiff procured a survey of the lots to be made in 1875, which satisfied her that the old fence was not on the true line but several inches to the west of it, whereupon she erected a fence where she claimed the true line to be. Defendants tore down this new fence in 1878, and this action was then brought.

It was shown in evidence that previous to the conveyance to the plaintiff the parties through whom she derived title had regarded the old fence as the boundary line between the two lots. The jury, however, reached the conclusion that this was an error, and that the true line was as the plaintiff claimed. They therefore found a general verdict in favor of the plaintiff. The following were special questions put to them, and the answers thereto:

Question: "How long do you find that the old fence had stood upon the line where it was situated when Mrs. Dupont came into possession of lot 4?" *Answer:* "Over fifteen years." *Question:* "How long do you find the old fence had been regarded as the boundary line between lots 3 and 4 by plaintiff's grantors, McKeown and Cowie, if for any time?" *Answer:* "Over fifteen years."

The judge of the Superior Court was of opinion that

these answers were inconsistent with the general verdict, and entitled the defendants to judgment; and he ordered judgment for them. The plaintiff brings error.

It has been repeatedly held by this court that a boundary line long treated and acquiesced in as the true line, ought not to be disturbed on new surveys. *Smith v. Hamilton*, 20 Mich., 438; *Joyce v. Williams*, 26 Mich., 332. Fifteen years' recognition and acquiescence are ample for this purpose (*Stewart v. Carleton*, 31 Mich., 270), and in view of the great difficulties which often attend the effort to ascertain where the original monuments were planted, the peace of the community requires that all attempts to disturb lines with which the parties concerned have long been satisfied should not be encouraged. *Diehl v. Zanger*, 39 Mich., 601.

We have had some doubt whether the special findings in this case were sufficient to show that there had been a claim on the part of the defendants, of the old fence as the true boundary line, and an acquiescence in this claim by the plaintiff's grantors for the period named. The finding is that the plaintiff's grantors had *regarded* the old fence as the boundary line; not that the defendants had claimed it as such, or occupied up to it adversely, or that any claim they made respecting it, if any, was known to and expressly or tacitly assented to by the owners of lot four. It is justly said that those owners might have supposed the fence was the line and looked upon it as such, without ever having had any communication with the defendants on the subject, or without knowing what claim, if any, was made by them or either of them, and without therefore putting themselves in position where they would be precluded from showing that the facts were different from what they supposed.

But as the establishment of a line by claim and acquiescence appears from the record to have been a subject of dispute on the trial, we do not doubt that the

jury supposed their special findings covered the case. And they had a right to suppose this, because the special questions must have been submitted to them as sufficient for the purpose. If they were defective, the attention of the court should have been called to the fact at the time the questions were submitted. Special findings are not to be criticised closely under such circumstances; and especially should not a verdict in favor of the plaintiff be sustained when on the whole finding it is reasonably certain that it ought not to be.

The plaintiff complains that certain requests for instructions which were made on her behalf were refused. We think all to which she was entitled were in substance given. Some of the requests were founded upon the idea that if the old fence was not built on the true line, defendants could have acquired no rights by anything short of twenty years' adverse possession; but this is inconsistent with the previous decisions of this court already cited.

We are of opinion that the judgment must be affirmed with costs, and it will be ordered accordingly.

The other Justices concurred.

---

42 495
128 140

EX REL. WILLIAM DOUGLASS AND CHARLES GUSTAFF v. CIRCUIT JUDGE FOR MANISTEE COUNTY.

Execution to be levied in default of bond to stay proceedings—Capias ad satisfaciendum—Answer to order to show cause.

A judgment creditor may proceed to collect his judgment notwithstanding the allowance of a writ of error, if his opponent has filed no bond to stay the proceedings; and if he does not exhaust this remedy he cannot take out a *capias ad satisfaciendum* after three months from the return day of the execution.

An answer to an order to show cause is disregarded if only drafted by the attorneys in the case without being submitted to the respondent and approved by him. But the case may be treated as on demurrer to the relator's showing.

MANDAMUS. Submitted January 9. Denied January 20.

S. W. Fowler for the writ.

Morris & Nelson against.

MARSTON, C. J. February 21st, 1878, relators recovered a judgment in the Manistee circuit court against Nicholas Daily, in an action in which they would become entitled to an execution against the body of the defendant. May 13th, 1878, they caused an execution to be issued against his goods, chattels, lands and tenements, which was returnable August 6th following. This execution was held by the sheriff until July 9th, 1879, when it was by him returned unsatisfied. The only excuse given for the delay is that the case was, by writ of error, brought to this court, where the judgment was affirmed. It does not appear from the petition that any bond was filed by the defendant on removing the case to this court, so that the plaintiffs were at liberty to proceed in the collection of their judgment.

After the return of the execution on July 9th, 1879, and on the same day, a *capias ad satisfaciendum* was issued and the defendant was taken into custody. On the 17th day of July the defendant was by the circuit judge discharged from custody, and this court is now asked by mandamus to compel the judge to vacate the order of *supersedeas*.

This we cannot do. The statute is clear that the plaintiff shall charge the defendant in execution upon the judgment, where an execution has been issued against his property, "within three months after the return day of such execution." 2 Comp. L., § 6189.

By section 6190, if the plaintiff shall neglect so to charge the defendant, he may be discharged from custody, unless good cause to the contrary be shown.

We think no sufficient cause was shown in this case to prevent his discharge. Notwithstanding the removal of the case to this court on writ of error, no bond having been filed by the plaintiff in error to stay the proceedings, the plaintiffs were at liberty to proceed in the usual manner and collect their judgment. No reason is alleged why this was not done.

The writ must be denied, with costs against relators.

The answer filed is not signed by the circuit judge. It purports to have been drafted by attorneys and not to have been submitted to the respondent for approval by him. We do not consider, therefore, what appears therein, but have treated the case as on demurrer to the showing made by the relator.

The other Justices concurred.

---

42 497
98 85

42 497
109 526

42 497
117 75

42 497
118 614

MARGARET MCGUFFIE v. JOHN G. CARTER.

Complainant in statutory proceedings to recover possession of lands must show right to possession.

Where proceedings to recover possession of land are brought against a tenant holding over, the latter may show that the complainant had parted with his title before bringing the proceedings, and was no longer entitled to possession.

Proceedings to obtain possession of land under Comp. L., ch. 211, cannot be entertained if the complainant does not show himself lawfully entitled to possession.

Error to Jackson. Submitted Jan. 9. Decided Jan. 20.

PROCEEDINGS TO RECOVER POSSESSION OF LANDS. Defendant brings error.

Thomas A. Wilson for plaintiff in error. A warranty deed transfers the right to bring suit to recover posses-

sion of the lands deeded, *Vos v. Dykema*, 26 Mich., 399; *Bennett v. Robinson*, 27 Mich., 26; *Perrin v. Lepper*, 34 Mich., 292; a tenant may show that his landlord's title has terminated or been assigned, 1 Taylor's L. & T., §§ 629, 707; 1 Washb. R. P., 370; Tyler on Ejectment, 166, 556; *Hoag v. Hoag*, 35 N. Y., 469; *Pierce v. Brown*, 24 Vt., 165; *Jackson v. Rowland*, 6 Wend., 666; *Binney v. Chapman*, 5 Pick., 124.

Austin Blair for defendant in error. A tenant is estopped from denying his landlord's title in a suit brought by the latter to recover possession according to the terms of the lease, *Bertram v. Cook*, 32 Mich., 521; *Milsap v. Stone*, 2 Col., 137; *Jackson v. Harder*, 4 Johns., 210; *Jackson v. Walker*, 7 Cow., 637; 1 Greenl. Ev., § 25; cases in which a tenant may show that his landlord's title has terminated are those in which the title is in issue and the plaintiff must recover by virtue of his own title, or where the title has terminated by its own limitation or by operation of law, *Nellis v. Lathrop*, 22 Wend., 121.

GRAVES, J. This was a summary proceeding commenced before the judge of probate to recover the possession of eighty acres of land. Comp. L., ch. 211. The defendant in error, who was complainant, obtained judgment, and Mrs. McGuffie appealed. The action was tried in the circuit court without a jury, and the complainant again recovered. She then brought error.

It appears from the finding that Carter, the complainant, on the 15th of April, 1878, at a foreclosure sale in a cause in chancery between one Cynthia Hobart, complainant, and Mrs. McGuffie, defendant, became the purchaser of the premises in question, and that the sale was duly confirmed and carried out by conveyance; that Mrs. McGuffie was then and for some time previous had been in possession, and that shortly after such conveyance it was agreed between herself and Carter that she

should remain and cultivate the premises until March 1st, 1879, and have the privilege to plant and put in spring crops, rendering to Carter one-third, but surrendering possession on said 1st day of March. The agreed share of the crops was delivered, but Mrs. McGuffie remained in possession, and in the forepart of March Carter served a writing upon her by which he claimed to be entitled to possession and required her to surrender it to him. On the 15th of February, 1879, and sometime prior to this demand of possession, Carter conveyed the premises in fee simple to Mary K. Reed, and thereby extinguished all his title and right of possession.

He commenced this action on July 3d, 1879, and Mrs. McGuffie was then in possession. The question in the case is whether it was competent for her to resist the claim of Carter by showing his conveyance. The circuit judge was of opinion that she was bound to give possession to him on his request and was estopped from showing the change of title.

I am not able to concur in this view. The general doctrine is not questioned. The rule is familiar that both tenants and those in privity, either in blood or estate, are estopped from disputing the title of the landlord or the title of any one who succeeds to his rights, so long as they hold the possession originally derived from him. But this principle does not forbid the tenant from showing that the landlord's title has expired or has been extinguished by his own act or by operation of law. *Lamson v. Clarkson*, 113 Mass., 348; *Fuller v. Sweet*, 30 Mich., 237; *Hilbourn v. Fogg*, 99 Mass., 11; *Despard v. Walbridge*, 15 N. Y., 374; *Mountnoy v. Collier*, 1 El. & Bl., 630: 16 E. L. & E., 232.

It is an indispensable condition in this kind of action that the complainant is lawfully entitled to the possession, and unless he shows himself to be so, the jurisdiction fails (*Bryan v. Smith*, 10 Mich., 229), and the authorities holding that one who has succeeded by grant to the estate and right of the landlord can maintain the

proceeding, very strongly if not conclusively imply that the grantor cannot. *Howard v. Merriam*, 5 Cush., 563–584; *Hayden v. Ahearn*, 9 Gray, 438; *Rabe v. Fyler*, 10 Sm. & M., 440. The complaint before us alleged expressly that complainant was entitled to possession, and the plea put the fact in issue, and this issue concerned the state of things existing at the institution of the proceeding, and not at the time of Mrs. McGuffie's entry or at the time of her agreement with Carter. The claim made by defendant is not one to dispute any right or pretended right of Carter at the time of the lease. His ownership and right of possession at that date are conceded. The position is that Carter subsequently extinguished his title and right of possession, and as between him and his grantee estopped himself from setting up any claim; that by his own act he disentitled himself and placed Mrs. McGuffie under a duty to surrender to another and not to himself; and in my judgment it was competent for her to show this change of relation and new duty caused by complainant himself. The court in Massachusetts says it is well settled that the tenant is not estopped to deny that subsequent to his own entry the lessor has put an end to his title by his own act (*Hilbourn v. Fogg*, supra), and in New York the court observes that if the landlord die during the tenancy and a contest arises with the heir, the tenant cannot dispute the title of the ancestor, but he may show a devise to a third person; that were it otherwise the tenant would be at the mercy of both heir and devisee. He could defend himself against neither; and reference is made to *Jackson v. Rowland*, 6 Wend., 670, where it is said: "A tenant cannot dispute the title of the landlord, so long as it remains as it was at the time the tenancy commenced; but he may shew that the title under which he entered has *expired*, or been *extinguished*." *Despard v. Walbridge*, supra, and see *Lancashire v. Mason*, 75 N. C., 455.

According to the facts in the record it was competent

beyond question for Carter's grantee to institute an action for possession at the very time this proceeding was commenced; and if the view of the circuit court is correct, then, in case each of said parties had sued her, Mrs, McGuffie must have been placed, in the language of the Court of Appeals, "at the mercy of both," and could have defended against neither. The law will warrant no such result.

I think the judgment should be reversed with costs and a new trial granted.

The other Justices concurred.

---

42 501
109 247

JOHN F. BROWN, IMPLEADED WITH SAMUEL B. DOUGLASS v. THE JUDGE OF PROBATE FOR KENT COUNTY.

Guardian's bond—Signing on condition not apparent on the bond.

A surety cannot escape liability on a guardian's bond as having signed only on condition that a specified co-surety should be procured before it was used, if he had delivered it to the principal to be completed with nothing on its face to suggest to the approving officer that such a condition was imposed. The fact that the obligation clause in a printed form was so filled out as to read "sureties" is not enough. The name of the person designated for co-surety should be inserted in the bond.

Error to Kent. Submitted Jan. 9. Decided Jan. 20.

ASSUMPSIT on bond. Defendant Brown brings error.

Champlin & More for plaintiff in error. It is necessary to the valid execution of a bond that it be delivered with intent that it shall be the bond of the obligor, *Pawling v. U. S.*, 4 Cr., 219; *Duncan v. U. S.*, 7 Pet., 435; *People v. Bostwick*, 32 N. Y., 445; *Awde v. Dixon*, 5 E. L. & Eq., 512; *Moore v. Sandusky*, 46 Mo., 377;

Linn Co. v. Farris, 52 Mo., 75; if a bond is delivered conditionally it will not be binding until the condition is performed, *Warfel v. Frantz*, 76 Penn. St., 88; and if so delivered to the principal named in the bond or to some other party thereto, the obligee must be notified of the condition or the surety will be held liable, Brandt on Suretyship, § 349 et seq.; *Harrington v. Wright*, 48 Vt., 427; *Passumpsic Bank v. Beattie*, 32 Vt., 315; *Knight v. Hurlbut*, 74 Ill., 133.

Hughes, O'Brien & Smiley for defendant in error. If a bond is perfect on its face when presented to the obligee the surety is bound, *Smith v. Crooker*, 5 Mass., 537; *Webb v. Baird*, 27 Ind., 368; *South Berwick v. Huntress*, 53 Me., 89; *Deardorff v. Foresman*, 24 Ind., 481; *Bothrick v. Potter*, 63 Mo., 212; *Simpson v. Bovard*, 74 Penn. St., 351; *Exp. Fulton*, 7 Cow., 484; *Miller v. Finley*, 26 Mich., 249; *Bartlett v. Board of Education*, 59 Ill., 364; *Hunt v. Bennett*, 6 Mass., 519; *Reed v. Kemp*, 16 Ill., 444; *Nichols v. Johnson*, 10 Conn., 192; *Brown v. Pinkham*, 18 Pick., 172; *U. S. v. Hatch*, 1 Paine C. C., 342; *Russell v. Freer*, 56 N. Y., 67.

CAMPBELL, J. Suit was brought and recovery had below upon a guardian's bond made by Samuel B. Douglass as principal and John F. Brown as surety, to Benjamin F. Harlan, judge of probate of Kent county, to secure the performance of Douglass' duties as guardian of four minor heirs of Allen B. McGuervan, deceased. The bond was in the sum of $10,000, was dated February 1, 1872, and was joint and several. The guardian settled with such of his wards as came of age, but after resigning his trust as to the others it was claimed he did not pay and deliver the assets remaining in his hands to his successor, and the jury rendered a verdict against Douglass and Brown on the bond for the alleged deficiency of $4387.28. Brown, the surety, brings error, and rests his objections on the rejection by the court

below of evidence tending to show that the bond was not his act and deed.

The facts on which this defense is based were these: The bond was drawn up on a printed form, and filled in with all but the names of the obligors. It purported as drawn to bind the guardian as principal, and the word "sureties" was partly written and partly printed, with a blank for their names not filled in. Brown signed the bond while no name was inserted as surety, and he offered to show that when he had signed it he gave it to Douglass, the principal, with an agreement that Douglass should procure the signature of Lewis H. Withey as another surety, and that the bond should not be used without Withey's signature; that Douglass did not obtain Withey's signature, but took the bond to the judge of probate who wrote in Brown's name and changed the word "sureties" to "surety," and subsequently made an order of approval.

The circuit court of Kent county, where the cause was tried, ruled out this defense as legally insufficient.

The case before us is claimed to differ from any other case which we have yet passed upon. Three cases have been decided by this court bearing upon the general doctrine. In *Johnston & Vincent v. Township of Kimball*, 39 Mich., 187, a township treasurer's bond in which the treasurer was named as principal, but which he never signed, was held invalid as against the sureties in the absence of any agreement that they would be bound without him. In *Hall v. Parker*, 37 Mich., 590, the same ruling had been made on an appeal bond. In *McCormick v. Bay City*, 23 Mich., 457, it was held no defense that the names of additional sureties were not procured, when it was agreed by the principal that he would not use the bond without obtaining them,—the bond in that case when signed by McCormick not having the penalty or the names of the obligors filled in, and the officer receiving the bond having no notice of such an agree-

ment. In *Dair v. United States*, 16 Wall., 1, a very similar case was decided in the same way.

In the present case, while no names were inserted in the bond when presented to the judge of probate, it contained the word "sureties" which plaintiff in error insists fairly informed him that any surety signing must have expected to have one or more co-sureties. It is claimed that inasmuch as this matter was brought distinctly to the notice of the judge of probate, who made the corrections himself, he was bound to assume that Brown might not be willing to become the sole surety of the guardian, and have no contribution from any one else in case he had to respond for the guardian's default. The question is one of some importance, and the facts differ from those in any of the cases referred to.

It becomes necessary to consider the statutory regulations relating to such bonds, as well as the *position* of the various parties concerned.

By section 4518 of the Compiled Laws it is provided that all bonds required by law to be taken in or by order of the probate court shall be for such sum, and with such sureties as the judge of probate shall direct, except when the law otherwise prescribes. By section 4817 it is provided that a guardian shall give bond, with surety or sureties, to the judge of probate, in such sum as the judge shall order.

The bond in suit was approved after its date, and there is nothing in the record to indicate that the judge had given any previous directions concerning names or number of sureties.

When Brown signed this bond he made Douglass his agent to have it completed and delivered. No secret instructions could affect his power to do this in anything which was not so apparent on the face of the bond as to make the change suspicious. If the word "sureties" had not been written out in full, the case would be literally within the rule of *McCormick v. Bay City*.

If Brown required a particular co-surety the most

natural way of securing this was to have the name inserted. If Douglass had inserted the name of an entirely irresponsible person, Brown would not have been helped by it, and the judge of probate, if willing to accept Brown alone, would not probably have inquired further. If the form presented to the judge suggested anything, it did not of itself suggest that Brown had any preferences, and it was a natural inference that if he was willing to trust Douglass far enough to allow him to put in any name he chose as a co-surety, he gave him credit enough to have his word accepted as true concerning the whole transaction. He was bound to know that one surety could be legally received, and that in giving the guardian a bond in blank, he was giving him power to deal with it so as to make it no better for himself than if he had no co-surety. It does not seem to us that under such circumstances the judge of probate was bound to be any more suspicious than he was in this case.

It must be remembered that such officers are expected to have persons doing business in their office come to the office. The judge of probate is not called upon to go out of his office and hunt up parties for purposes of inquiry, or for any other purpose. They are not acting for themselves but for the estates and interests over which they are made custodians. They have a right to suppose that such persons as in any way become parties or intervenors in proceedings will do whatever is necessary to provide for their own security, so far as it depends on their own action.

Brown could have prevented all the difficulty by requiring the bond to be filled before he signed it, and the failure to require this was gross carelessness which he ought not to make any one responsible for but the agent whom he selected and allowed to complete the document. Common prudence should have led him to see in what condition the bond was filed. Had he attended to this before any complications arose, there would have been

no difficulty in having a new bond given. The fact that the parties interested had no one to protect their rights but this very guardian, furnishes additional reason for requiring the surety to look to the papers, because no one else was interested in doing so.

We think the case does not differ in principle from *McCormick v. Bay City*, and that there was nothing on the face of the bond which made it improper for the judge of probate to correct the apparent grammatical error, and receive the instrument as sufficient.

The judgment must be affirmed with costs.

The other Justices concurred.

William F. Turner and Perry Youngs v. The Village of Stanton.

Damages for taking land for public street—Waiver—Revocation of license to use land.

Everything necessary to support the proceedings of a village board in laying out a street across the land of private persons ought to appear of record; such as any waiver of damages.

Where a petitioner for a village street across his land verbally stated to the authorities that he claimed no damages, it was merely a license that would be binding only when they proceeded to take the land, and might be previously revoked by a written notice.

One who petitions for the laying out of a street which would cross his land is not thereby precluded from claiming compensation therefor.

Certiorari to the village clerk of the village of Stanton. Submitted January 13. Decided January 20.

Mitchel & Pratt for plaintiffs in certiorari.

N. J. Brown and *Blanchard, Bell & Cagwin* for defendant in certiorari. Verbal consent to laying out a road

across one's property is enough, if it is acted on before revocation, *Marble v. Whitney*, 28 N. Y., 307.

Cooley, J. The certiorari in this case brings up the proceedings of the village authorities in laying out a street through lands owned by the plaintiffs in the writ. The proceedings are undoubtedly irregular, and it is not claimed that they can be sustained unless the plaintiffs in error have waived by their conduct all right to object to them.

There is nothing in the record of the proceedings which is returned here by the village clerk, which can be considered as constituting a waiver, unless it is that both of the plaintiffs in error united with others in petitioning to have the street laid out. But there was nothing in the petition which waived compensation for any land of the petitioners which might be taken, and it is perfectly consistent with the petition that the petitioners expected to be paid if their land was taken. And they had a right to be paid, beyond question.

But the village clerk returns that while the matter was pending before the village board, the plaintiff Turner personally appeared before the board when in session, on or about the 2d day of June, 1879, and verbally and orally stated in their hearing and presence, that he claimed no damages in case the street should be established and laid out by the board in accordance with the prayer of the petition. Also that the board were informed sometime in June, 1879, by its clerk and by one Wetherwax, one of its members, that the plaintiff Youngs claimed no damage whatever, in case the street should be established and laid out, but wanted the right to use a spring of water, which he was told he might reserve. This spring, it seems to be conceded, would be within the limits of the proposed street.

The facts thus returned by the clerk do not appear in any manner on the village records. In so important a proceeding as the appropriation of lands, all the facts

necessary to their support ought to appear of record; and so far as Turner was concerned, they might well have been made matter of record in this case, if they occurred as stated, and the board proceeded to act upon them. But at most the oral declaration of Turner could only amount to a license, which would be binding when acted upon, but might be revoked at any time previous.

The resolution of the village board that the street be laid out and established was passed August 18, 1879, and Turner was notified thereof September 4, 1879. Two days thereafter he served on the board a written notice that he forbade the opening of the street through his premises, but that he would meet the board at such time as should be fixed by its action to settle damages that would be occasioned to him by the opening of the street. The board disregarded this notice, and on September 15, 1879, proceeded to open the street through Turner's land.

The oral license given by Turner cannot be said to have been acted upon until the board proceeded to take his land. The notice of September 6, 1879, was therefore a complete revocation. The case of *Marble v. Whitney*, 28 N. Y., 297, is perfectly consistent with this view, for in that case the license was not revoked until the road had actually been opened.

As to Youngs, the board had no evidence of a license, unless mere hearsay can be so called. But even the hearsay made the license conditional on the spring being reserved, which was not done. He gave notice as Turner did on September 6, which was in like manner disregarded. It is plain that he has never waived his rights.

It follows that the proceedings, as to these parties, must be quashed with costs.

The other Justices concurred.

42 509
71 193
42 509
105 63
42 509
f149 s141
f150 s419

DANIEL T. CORRIE v. SARAH B. CORRIE.

Habeas corpus as between parents for possession of child.

In *habeas corpus* proceedings between parents for the custody of a child, there should be full inquiry and examination on oath to enable the court to decide as the welfare of the child may require.

Neither parent has any right to the custody of a child if it is against the child's own welfare.

The Supreme Court does not examine on *certiorari* the evidence taken on the hearing of *habeas corpus* proceedings in a lower tribunal, but is confined to questions of law.

It seems that a writ of *habeas corpus* should be taken out from the Supreme Court, if they are to pass upon the evidence in the proceedings.

CERTIORARI to Wayne Circuit Court. Submitted January 13. Decided January 20.

James W. Romeyn for plaintiff in certiorari. Custody of a child belongs *prima facie* to the father at common law, Hunt on Habeas Corpus, 462–7; *People v. Mercein*, 3 Hill, 400; *People v. Humphreys*, 24 Barb., 522; *People v. Olmstead*, 27 Barb., 13.

John W. McGrath for defendant in certiorari. Courts will not disturb a mother's possession of her child unless to promote its welfare, Schouler's Dom. Rel., 339; *Gishwiler v. Dodoz*, 4 Ohio St., 621; in New Jersey the custody of children under seven is given to the mother, *Bennet v. Bennet*, 2 Beas., 114.

GRAVES, J. This is a certiorari to review certain proceedings had in the circuit court on *habeas corpus* between parents relative to the custody of their child. The parents are in fact living apart, and the child, Fannie C. Corrie, who is a little over seven years old, is with her mother in Detroit. The proceedings were instituted by the father, and the mother, at the hearing, exhibited her

answer on oath, and the court declined to transfer the custody.

On the presentation of the answer the petitioner filed a general traverse, but without oath. He offered no sworn contradiction or explanation of the matters in the answer, and no evidence was adduced on either side. He contends that such matters in his petition as were not particularly met by the answer were admitted, and that sufficient was then made out to entitle him to an order for the custody of the child. On the other hand the respondent claims that the facts set forth in the answer, to which no sworn denial has been attempted, and which, as is said, must therefore be taken as true for the purpose of this proceeding, are full to show the unfitness of the petitioner for the trust he seeks, and constitute a complete reply to the application.

In contests of this kind the opinion is now nearly universal that neither of the parties has any rights that can be allowed to seriously militate against the welfare of the child. The paramount consideration is what is really demanded by its best interests. It is doing no violence to what is taught by judicial experience to assume that the disputing parties will be more alive to the satisfaction of their own feelings and interests than to the true end of the inquisition; while the innocent subject of the contention is utterly unable to speak or act for itself, and is in danger of being lost sight of in the strife for its possession. No other occasion can call more loudly for judicial vigilance in reaching for the exact truth, and in putting aside with an unsparing hand the mere technicalities of procedure. The fate or interest of the child is not to depend on what the parties may see proper to state or to evade in their formal altercations, nor on any artificial rule of pleading. There should be full inquiry and an exhaustive examination on oath in order that the tribunal may have all the light practicable.

As already stated, the hearing below proceeded on the

petition and answer, and the petitioner did not assume to controvert any of the facts alleged on oath by the respondent. As these facts, if true, were sufficient to show that the petitioner was not a suitable person to take charge of the child, we fail to see that any case was made out to require a shift of the custody. We deem it proper to add that we do not re-examine on certiorari the evidence upon the hearing in *habeas corpus*. We are confined to questions of law. If a consideration of evidence is required we suppose the proper way to be to take a *habeas corpus* from this court.

The order is affirmed with costs.

The other Justices concurred.

JOHN THORP, GARNISHEE OF EDWARD A. ELLIOTT v. DAVID PRESTON ET AL.

CARL VOGEL, GARNISHEE v. DAVID PRESTON ET AL.

Garnishment applies to liquidated claims.

A tenant cannot be garnished for rent payable in the future, and not absolutely due at the time of garnishment.

Comp. L., § 6503, in providing that demands to become due, absolutely, may be garnished, refers only to claims which are already fixed in amount or capable of being fixed, and not dependent for their validity or amount on anything to be done or earned in the future, or the continued liability for which may be changed by events.

A claim under an insurance policy is not garnishable if the company has the right to elect whether to pay for the property lost or replace it.

Error to the Superior Court of Detroit. Submitted January 13. Decided January 20.

GARNISHMENT. The garnishees bring error.

Ed. E. Kane for plaintiff in error.

Julian G. Dickinson for defendant in error.

CAMPBELL, J. Thorp and Vogel were summoned as garnishees in a suit in favor of David Preston and John L. Harper against Edward A. Elliott. Each of them was shown to be a tenant of Elliott, under leases to run for sometime thereafter. All rent was paid which had accrued up to the time of garnishment. A receiver was appointed to receive the rents, and ultimately these were made the basis of a judgment against each garnishee.

The statute declares that no person shall be adjudged a garnishee "by reason of any money or other thing due from him to the principal defendant, unless it be at the time of the service of the writ of garnishment due or to become due, absolutely and without depending on any contingency." Comp. L., § 6503.

It is quite clear that rent payable in future is not due absolutely and without any contingency to the owner of a fee at the time of garnishment. It may at any time be stopped as to Elliott by a sale of the land to a third person, or by surrender of the lease, or by ouster in any way. The statute concerning demands payable in the future refers to claims which are already fixed in amount or capable of being so fixed, and which do not depend for their validity or amount on anything to be done or earned in the future, or the continued liability for which may be changed by events. In *Martz v. Detroit Fire & Marine Ins. Co.*, 28 Mich., 201, it was held that a claim which had already arisen under an insurance policy was contingent so long as the company had a right of election to pay or replace the property destroyed. In that case there was an absolute duty to do one or the other, but the right to elect made it uncertain which responsibility would be found ultimately to exist. In the present case there was no absolute certainty of any future liability whatever to Elliott.

The judgment must be reversed with costs of both courts.

The other Justices concurred.

EX REL. JOHN BURKLE ET AL. v. THE CIRCUIT JUDGE FOR INGHAM COUNTY.

42 513
117 314

Ejectment—Special findings—Pay for improvements.

Where special findings in ejectment are inapplicable to the case, they are nugatory and a general judgment should be entered, whether the findings are stricken from the record or allowed to remain.

The statutes allowing for improvements on a recovery in ejectment (Comp. L., § 6252: Act 180 of 1875) can apply only to cases where the plaintiff establishes a title in fee simple.

MANDAMUS. Submitted Jan. 13. Denied Jan. 20.

H. B. Carpenter for the writ.

M. V. & R. A. Montgomery against.

COOLEY, J. An application for a mandamus is made to us, based on certain proceedings in an action of ejectment. The defendant in the suit had for many years been in possession of the land in dispute under tax-titles, and had made valuable improvements. The plaintiff claimed the land by devise from the owner of the original title, and it seems to have been a matter of dispute whether the interest devised was the fee simple or a life estate merely. The defendant under the statute filed a claim to have the value of his improvements assessed by the jury, in case the plaintiff should recover. There were two counts in the plaintiff's declaration in one of which she claimed the fee and in the other only a life estate. She recovered on the count last mentioned. The jury assessed the increased value of the land by reason of defendant's improvements at $1480, and the value of the land independent of the improvements at $1332. Immediately on the verdict being returned, the clerk, without any motion being made for the purpose, entered up judgment for the plaintiff that she recover possession of the land according to the verdict.

At the succeeding term of the court the plaintiff, who seems to have been doubtful about the regularity of her judgment, which took no notice of the special findings, moved the court to vacate and set aside the judgment, and to strike out the special findings as being inadmissible in such a case. This motion was opposed by the defendant, but was granted by the court. The plaintiff then had judgment entered in the same form as before, that she recover possession.

The defendant now applies for a mandamus to compel the circuit judge to vacate the action so taken by him on the plaintiff's motion, and to restore the special findings. The first thing that strikes the mind on this application is that the action complained of was entirely immaterial to the plaintiff, and in no manner important to her rights, and if irregular, as the defendant contends, the irregularity was of no importance, as the case stood, after the action was taken, in the same condition as it did before. The clerk had entered a general judgment for the plaintiff; and if the special findings were inapplicable to the case, this was the proper judgment to be entered, whether the special findings were struck out or left in the record. The findings were merely nugatory if the case was not one in which they were important.

The question remains, however, whether the judge was correct in holding that the special findings were inapplicable to the case.

The statute provides that "whenever in any action of ejectment the plaintiff, or any one or more of the plaintiffs, if there be more than one, shall recover, the defendant or defendants shall be allowed compensation for buildings and improvements on the premises recovered, erected, or made by him or them [or] by any person through whom he or they claim title, to the extent that such buildings and improvements shall increase the present value of said premises: *Provided*, the defendant or defendants, or the person through whom he or they claim title, shall have been in the actual, peaceable occupation of the premises recovered, for six years before the commencement of the action: *or provided* the same shall have been so occupied for a less time than six years under a color of title and in good faith."

In the cases specified in the statute the defendants may file a claim to have the increased value of the premises by reason of the improvements found by the jury, and also the value of the land if the improvements had not been made; and the plaintiff, if he recovers, must either pay the value of the improvements and take the land, or he must abandon the land to the defendant on being paid the value with the increase by reason of the improvements deducted. Public Acts 1875, p. 207.

The most cursory reading of this statute must satisfy one that it undertakes to provide only for the case where the plaintiff establishes a title in fee simple. The value of the land is to be assessed in favor of the plaintiff, and the defendant must pay this value if the plaintiff abandons to him. On the other hand the increased value of the land by reason of the improvements is assessed against the plaintiff, and he must pay this if he elects to take possession. No provision is made for the case of interests less than the fee, and the statute is incapable of being applied to such a case.

This is exclusively a statutory proceeding. All the rights the defendant can have must come from the statute. If that is insufficient to protect his equities, we cannot legislate to give him suitable remedy. *Martin v. O'Conner*, 37 Mich., 440; *Sands v. Davis*, 40 Mich., 14; *Morris v. McKay*, 40 Mich., 326. To do full justice in all cases, further legislation is needed.

The writ must be denied.

The other Justices concurred.

42 516
75 287
42 516
101 243

WILLIAM L. RYAN v. HEALEY C. AKELEY ET AL.

Replevin bond—Evidence to reduce the judgment in the replevin suit.

Where property attached was replevied by a third party, and the defendant in replevin took judgment by default, it was *held* that as against the plaintiff the judgment showed that the defendant in attachment had a leviable interest that would bind him and his sureties in an action on the replevin bond.

Comp. L., § 6766 providing that in an action on the replevin bond the defendants may show that the obligee had only a special property, only applies where the obligee has taken judgment for a return of the property, and sues on the bond to recover its value; and it cannot apply where the value is not sued for.

The plaintiff in replevin suffered judgment by default, and the defendant waived return and had his damages assessed. *Held* that in suing on the replevin bond, the defense could not introduce evidence in reduction of the judgment in replevin, as allowed by Comp. L., § 6766, in cases where judgment had been taken for a return.

Error to Ottawa. Submitted Jan. 13. Decided Jan. 20.

REPLEVIN. Plaintiff brings error.

Smith, Nims, Hoyt & Erwin for plaintiff in error. Judgment in replevin determines the rights of the parties, and is conclusive as to defendant's special interest, *Williams v. Vail*, 9 Mich., 162; and the defendant in a suit on the bond cannot show in mitigation of damages that the right to the property was in the plaintiff in the replevin case, Field's Damages, § 83; *Cumberland C. & I. Co. v. Tilghman*, 13 Md., 84.

Akeley & Farr for defendants in error.

CAMPBELL, J. This is a suit on a replevin bond. One William R. Bowes sued out a writ of replevin from the circuit court for the county of Muskegon against Ryan to recover certain bark which Ryan had levied on by virtue of attachment proceedings against Philip A. Wooley. The case went against Bowes by default, and

Ryan's right was ascertained as a lien under these attachment proceedings, and judgment went in his favor for $381.30 for damages and costs. The proper steps having been taken to authorize suit on the replevin bond, a defense is set up denying Wooley's title to the property levied on.

The court below allowed evidence to show that Wooley took this bark as a trespasser from lands of other persons, Bowes being alleged to be owner of a part, and certain other persons of other parts. The jury were directed that if this was shown it was a sufficient defense to defeat the action on the bond, and that it was not necessary to show that the sureties in the bond had any interest in the property.

It is very doubtful whether there was any sufficient evidence to show the interest of Bowes. But assuming that there was such evidence, we do not think the defendants were in any position to set it up.

The title of Wooley, as sufficient to authorize a levy as against Bowes, was certainly determined as against Bowes by the verdict and judgment in the replevin suit, so to bind him and his sureties on this record, whatever may have been the facts which he failed to show in that controversy. The statute (Comp. L., § 6765) makes the amount of the judgment in such cases the measure of recovery under the replevin bond, unless modified by § 6766. That section provides that in an action on a replevin bond for the deliverance of any property the defendants may show in mitigation of damages that the obligee had only a lien or special property or part ownership at the commencement of the replevin suit, and that the defendants, or either of them, had a part ownership or some interest therein, and if the obligee's interest is less than the value of the whole property replevied a corresponding deduction shall be made from such value.

This latter section it is quite evident only applies to cases where the obligee in the replevin bond has taken judgment for a return of the property, and sues on the

bond to recover its value. It cannot apply to a case where the value of the property is not sued for. The statute in most cases allows a defendant prevailing in replevin to waive a return and have an inquiry into his damages, and when this is the case, his interest is ascertained and his true damages assessed. Comp. L., §§ 6754, 6759.

In the case before us a return was waived, and an inquiry had into the special property of Ryan. Upon that inquiry, as already suggested, the whole merits of his claim were open to investigation, and his rights became fixed against Bowes by the verdict and judgment. That being the case, section 6765 makes the same amount the measure of damages on the replevin bond, and no other statute provision changes or affects this rule.

In *Lindner v. Brock*, 40 Mich., 618, which was supposed by defendants in error to countenance the rulings below, the sheriff took judgment of return, and a writ *de retorno habendo* was issued and returned partially unsatisfied, and suit brought on the bond for the value of the property not returned. It was thus brought distinctly within section 6766.

The court erred, therefore, in allowing proof to be given in reduction of the judgment in replevin. The judgment must be reversed with costs, and a new trial granted.

The other Justices concurred.

---

42 518
f126 4
126 5
42 518
s4NW 223
129 585

FLORANCE SULLIVAN v. CLAGEON M. DUNHAM.

Abandonment of claim under land contract.

The Statute of Frauds in providing that a surrender of any interest in land must be in writing does not prevent one who has given back a land-contract held by him, in order that the land might be conveyed to another party, from recovering the consideration

for which he gave it up, as by bringing suit he ratifies the conveyance and precludes himself from claiming any interest in the lands.

Error to Allegan. Submitted Jan. 14. Decided Jan. 20.

ASSUMPSIT. Defendant brings error.

Pope & Hart for plaintiff in error. Surrender of a land contract can only be made by operation of law, or in writing, *Wright v. DeGroff*, 14 Mich., 164; *Hayes v. Livingston*, 34 Mich., 384; *Parker v. Barker*, 2 Met., 423; *Gimon v. Davis*, 36 Ala., 589; *Roe v. Doe*, 31 Ga., 544; *Washabaugh v. Entrikin*, 36 Penn. St., 513; *Jackson v. Vosburgh*, 9 Johns., 277.

W. W. Warner and *Fenn & Donaldson* for defendant in error. Surrender can be presumed from acts done, *Weed v. Terry*, 2 Doug. (Mich.), 351; *Putland v. Hilder*, 2 B. & A., 782; *Peabody v. Tarbell*, 2 Cush., 226; *Livermore v. Aldrich*, 5 Cush., 431; *Brown v. Lunt*, 37 Me., 423; *Nickells v. Atherstone*, 10 A. & El. (N. S.), 944; *Greider's Appeal*, 5 Penn. St., 422; *Laurence v. Brown*, 1 Seld., 394; *Murray v. Shave*, 2 Duer, 182; *Dodd v. Acklom*, 6 M. & G., 672; Sheppard's Touchstone, 300; 1 Greenleaf's Cruise on Real Property, 392, n; 3 id., 468.

COOLEY, J. The facts out of which the legal questions in this case arise are the following: Sullivan, being owner of a certain parcel of land, contracted to sell it to Dunham, and gave him a written contract whereby he agreed to convey the land on certain payments being made as therein specified. While Dunham held this contract, Sullivan had some negotiations for an exchange of the same land with one Gordy for land owned by the latter, and he proposed to Dunham that if he would surrender his contract so that the trade could be made with Gordy, he should be paid one-half of all the "boot money" he could obtain from Gordy in excess of $400. Dunham agreed to this, but told Sullivan he must get at least

$500. Sullivan thereupon completed his negotiations with Gordy, taking from him a mortgage of $500 for the difference in exchange of places. Dunham soon after called upon Sullivan for his one-half of the surplus over $400, but Sullivan declined to pay it. At this time Dunham had not his contract with him, but he came back in a few days, bringing the contract with him, and tendered it to Sullivan, who took it, but still refused to pay Dunham anything. Dunham then brought suit, and in the court below recovered judgment for $50 and interest.

The objection to the recovery is that Dunham had never performed his part of the agreement, inasmuch as the surrender of the contract has never been made in legal form. By the statute of frauds "no estate or interest in lands, other than leases for a term not exceeding one year, * * shall hereafter be created, granted, assigned, surrendered, or declared, unless by act or operation of law, or by a deed or conveyance in writing, subscribed by the party creating, granting, assigning, surrendering, or declaring the same, or by some person thereunto by him lawfully authorized by writing." Comp. Laws, § 4692.

Dunham never made a written surrender of his contract. He simply handed it back to Sullivan. For the particular purpose to be accomplished in this case, however, this was completely effectual, for it is not pretended that Gordy's title from Sullivan is defective for want of the written surrender. This, however, does not appear to us important, as we think the judgment may be sustained on familiar principles.

When the agreement sued upon was made between Sullivan and Dunham, each party was owner of an interest in the land which was afterwards traded with Gordy. It was agreed between them that Sullivan might dispose of both interests to Gordy, accounting to Dunham for what he obtained, according to a certain basis which was agreed. He did trade accordingly, and Dun-

ham now calls upon him to account as he agreed. Now it is of no importance whether or not the authority given by Dunham to Sullivan was sufficient in law: for, as already stated, the title has passed to Gordy, and if Sullivan's authority to trade with him was originally insufficient, Dunham by demanding his share of the price and bringing suit to recover, has affirmed the transaction, and ratified whatever was before imperfect.

The agreement that Dunham should surrender his contract in order that the trade with Gordy might be made, evidently meant no more than this: that he should give up the contract and make no further claim under it. It is not at all likely that the word "surrender" was used or understood by the parties in any technical sense. Dunham was to permit Sullivan to dispose of his interest in the land: that was the essence of the agreement, and it has been complied with. By his consent in the first place to what Sullivan proposed, and his acquiescence afterwards, he has precluded himself from asserting any further rights under the contract.

The judgment must be affirmed with costs.

The other Justices concurred.

42 521
86 584

42 521
124 110

THE GRAND LODGE OF THE INDEPENDENT ORDER OF ODD FELLOWS OF THE STATE OF MICHIGAN v. ROBERT H. MORRISON, DANIEL H. HAWLEY, LEWIS J. TWITCHELL, WILLIAM G. CUMMINS, EDWIN M. ELLIOTT, OTIS A. ELLIOTT AND H. R. OSBORN.

Referee's finding—Special questions—Judgment on bond in excess of the penalty stated therein.

A referee is not required to supplement his general finding by special answers to specific questions dictated by counsel.

A finding in an action on a bond that defendants are liable for a sum greater than the penalty of the bond, is not invalid because of the excess, but will support a judgment in debt for the penalty, and for a like sum as damages found by the referee.

Error to Ingham. Submitted Jan. 14. Decided Jan. 20.

ASSUMPSIT. Plaintiffs bring error.

M. V. & R. A. Montgomery for plaintiffs in error.

S. L. Kilbourne for defendants in error.

GRAVES, J. The plaintiffs, a corporation under the laws of the State, organized for benevolent purposes, chose the defendant Morrison for their treasurer, and in order to secure his proper accountability for such funds and property as he might at any time hold as such treasurer, the lodge took a bond executed by himself as principal and the other defendants as sureties in the penal sum of $10,000.

Believing him to be delinquent in his trust, the lodge elected another in his place, and brought this action on the bond. The court pursuant to stipulation, referred the case to a gentleman of high character and much experience, and after a patient and extended examination he reported on the 13th of February, 1879, that Morrison was then a defaulter for $10,269.20, and he concluded as matter of law that the plaintiffs ought to recover that amount with interest from the date of the report.

The defendants filed ten exceptions, and the circuit court sustained them and entered judgment for the defendants. The plaintiffs brought error. All the exceptions are now abandoned except the last two, and they are only faintly insisted on.

They have no merit. The first complains that the referee did not specially find in answer to five specific requests made therefor by defendants' counsel.

In the first place, the requests call for nothing beyond the findings made, of any apparent materiality; and in

the next place, there is no regulation which requires a referee to supplement his general finding by special replies to specific requests dictated by counsel.

The remaining exception not waived is to the referee's conclusion of law that the plaintiffs recover the amount reported, and the position is that the whole finding is bad because the sum ascertained exceeds the penalty in the bond. It is difficult to regard this objection as seriously intended. The greater includes the less, and it will hardly be claimed that because the debt exceeds the security the creditor must not only bear the loss of the excess but of the other also. The finding shows that the plaintiffs are entitled to damages up to the amount of the bond, and there is no reason why they should not recover them.

The judgment of the circuit court must be reversed, and judgment in debt for the plaintiffs must be entered here for the penal sum mentioned in the bond, and also for the like sum as damages found by the referee, and the plaintiffs will recover their costs of both courts.

The other Justices concurred.

42 523
78 518

42 523
93 159

BRAYTON C. DAY v. TOLEDO, CANADA SOUTHERN & DETROIT RAILWAY COMPANY.

Contributory negligence—Injury to brakeman—Liability to employee for negligence of fellow employees.

An experienced brakeman was ordered by the conductor to attach a car loaded with lumber which projected forward and compelled him to stoop in making the coupling. In doing so, he delayed a little and his fingers were caught in the coupling-link and hurt. *Held* that he could not maintain an action against the railway company, as he fully understood the difficulty to be guarded against, and the conductor was not shown to have been in fault in any way.

A brakeman cannot hold the company which employs him responsible for the failure of fellow-servants to take peculiar precautions.

Error to Wayne. Submitted Jan. 14. Decided Jan. 20.

TRESPASS ON THE CASE. Plaintiff brings error.

Julian G. Dickinson for plaintiff in error. A railroad company is bound to keep its cars in suitable, safe and convenient condition for the uses of a brakeman's ordinary employment, *Swoboda v. Ward*, 40 Mich., 420; *Smith v. Chic. & St. P. Ry.*, 42 Wis., 525; *Wedgwood v. Chic. & N. W. Ry.*, 44 Wis., 44; *Snow v. Housatonic R. R.*, 8 Allen, 441; it is a brakeman's duty to obey orders from the conductor to couple cars, if the circumstances do not interfere, *Walker v. Bolling*, 22 Ala., 294; *Berea Stone Co. v. Kraft*, 31 Ohio St., 287; *C., C. & C. R. R. v. Keary*, 3 Ohio St., 201; *Pittsburgh, Ft. Wayne & C. Ry. v. Devinney*, 17 Ohio St., 197; *Cooper v. Mullins*, 30 Ga., 146; he is subject to the conductor's orders though both are serving the same employer, and if without his own fault he is injured in the performance of his duty through the gross neglect of the conductor, the company is liable, *Thompson v. Hermann*, 47 Wis., 602; *Haynes v. E. Tenn. & Ga. Ry.*, 3 Coldw., 222; *Louisville & Nash. R. R. v. Collins*, 2 Duvall (Ky.), 114.

Frank H. Culver and *Henry H. Swan* for defendant in error. The plaintiff in an action for negligence was guilty of contributory negligence, if he discovered the danger in time to avoid it, *Davis v. D. & M. R. R.*, 20 Mich., 125; *Kroy v. Chic. &c. R. R.*, 32 Ia., 357; *Ft. Wayne, J. & S. R. R. v. Gildersleeve*, 33 Mich., 137; Cooley on Torts, 564; conductors and brakemen are fellow servants, *Mobile &c. R. R. v. Thomas*, 42 Ala., 672; *Wonder v. B. & O. R. R.*, 32 Md., 411; and it is immaterial that the one guilty of negligence has greater responsibility, *Quincy Mining Co. v. Kitts*, 42 Mich., 34; injury from coupling cars is a risk incidental to a brake-

man's employment, *Lyon v. Detroit &c. R. R.*, 31 Mich., 430; *Mich. Cent. R. R. v. Austin*, 40 Mich., 249; *Toledo &c. R. R. v. Black*, 88 Ill., 112.

CAMPBELL, J. Day sued the railway company for injuries received in having his fingers caught in coupling cars on a train of which he was brakeman. The train was a freight train, and the car which he claims caused the damage had been brought a few miles from Grosse Isle to Wyandotte, and the plaintiff was unable to say that he had not himself originally attached it to the train. At Wyandotte a car was to be detached, and then the car in question, which was loaded with lumber, was ordered by the conductor to be recoupled to another car on the train. The lumber is said by plaintiff to have projected forward more than usual, so as to make it necessary to stoop down to make the attachment, and while doing so plaintiff delayed a little and his fingers were caught in the coupling-link and hurt.

The court below very properly took the case from the jury. The injury was from one of the risks incident to the occupation of plaintiff, and he knew better than the conductor or any one else the precise difficulty to be guarded against. The conductor was not shown in any way to have been in fault, and it would be absurd to hold a corporation for imputed negligence, when no person except the plaintiff could have been actually guilty of it. And it is very clear that a brakeman cannot hold the company responsible for the failure of any of his fellow servants on the train to take peculiar precautions, even if it could be seen what further care they could have taken. Upon his own showing he was better informed than any of them. He appears to have been an experienced brakeman, fully able to take care of himself.

The judgment must be affirmed with costs.

The other Justices concurred.

42 526
105 615

Ex rel. Warren S. Abels v. The Board of Supervisors of Ingham County.

Private detectives—Claims for services—Constables.

Acts 217 of 1859 and 55 of 1873 are invalid in giving the members of voluntary detective associations the powers of constables and authorizing them to require the assistance of the regular police.

Private detectives, organized in voluntary associations under Comp. L., ch. 126, cannot compel the supervisors to allow their claims for voluntary services in pursuit of criminals.

The Constitution of Michigan contemplates that persons vested with the powers of constables shall be selected by the people at regular elections.

Mandamus. Submitted Jan. 20. Denied Jan. 21.

John C. Shields for the writ.

Per Curiam. The relator asks for a mandamus to compel the supervisors to audit and allow certain claims which he has presented to them for services as a detective in the discovery and apprehension of a criminal. It is not claimed that the relator, at the time of the performance of the services, held any public office or was lawfully entitled to make the arrest except as he was authorized by being a corporator in a detective association incorporated under the laws of the State.

The act of 1859 (Comp. L., ch. 126) authorized the voluntary incorporation of companies for the detection and apprehension of horse thieves and other felons. As amended in 1873, it provides that the incorporation "shall have power to call to their aid the peace officers of this State in accordance with law, in the pursuit and apprehension of felons and reclaiming stolen property; and each and every one of the members of such company, when engaged in arresting offenders against the criminal laws of this State, shall be entitled to all the protection, rights, and privileges of constables, when

so engaged." Public Acts 1873, p. 57, § 9. The act provides for no supervision by any public authority of the proceedings to incorporate these bodies, and any number of persons, not less than ten, may elect themselves corporators. It is as a member of one of these bodies that the relator claims to have performed the services for which he asks compensation.

It can hardly, we think, be seriously contended that any individuals can thus be authorized to elect themselves public officers and assume authority over the regular police force of the State. However honestly and beneficially the power might be exercised generally, the fact could not be concealed or disguised that the authority is as susceptible of a felonious use as an honest one, and that the criminal classes can as easily organize under it for the purpose of employing the machinery of the law in their schemes as can law-abiding citizens for the purpose of punishing wrongs. If the acts referred to are valid to the full extent, the persons associating are to all intents and purposes clothed with the powers of constables for the arrest of persons accused of crime, and may supersede the regular officers in the performance of their regular duties. But the Constitution contemplates that persons clothed with such powers shall be selected by the people in regular elections. What is said in *Ames v. Port Huron etc. Co.*, 11 Mich., 139, is in point here.

We make no question that relator performed valuable services honestly, but he performed them as a private citizen, and the board have full discretionary authority to make such allowances as they may think proper. But they are not legally compellable to make any.

The writ will be denied.

42 528
71 192

42 528
148 518

In the matter of William Rice, an infant.

Guardians—Conflict between foreign and domestic appointments—Domicile.

The laws of Michigan usually contemplate the appointment of a guardian who shall have custody of the estate, whoever may have custody of the person, and do not provide for corporation guardianships. They contemplate that guardians may be appointed for infants who have property in Michigan whatever may be their residence, and only recognize foreign guardians as a matter of comity.

If a guardian has been appointed for an infant at a foreign domicile, and has had personal custody of the infant, his claims as guardian should be respected elsewhere; but this is not necessarily the case if he has no control of the infant's estate and was appointed in a jurisdiction from which the infant was personally absent.

Where a person has left his domicile with no intention of returning, and is killed before he establishes another, the legal character of the old domicile does not necessarily control in matters of policy, and determine the place where a guardian for the decedent's infant child should be appointed.

The parents of an infant were killed and the child was injured in a railway collision in Michigan while on their way from their former home in Philadelphia, to Kansas where they meant to reside. The child's property consisted chiefly in his right to compensation, and was therefore in Michigan where he remained. A guardian who was nearly related to him was appointed for him in Michigan where the guardian has charge of the estate, and another guardian who was to have charge of the person only, was appointed for him in Philadelphia, where a trust corporation was made guardian of the estate. The guardian appointed in Philadelphia sought to obtain the custody of the child on a writ of *habeas corpus*.. *Held* that the foreign guardian was not entitled to it as a matter of right, and the writ was refused.

Habeas corpus. Submitted Jan. 20. Denied Jan. 21.

Conely & Lucking for petitioner. An unauthorized appointment of a guardian by the probate court is absolutely void, and may be attacked collaterally or by a motion to vacate, *Sears v. Terry*, 26 Conn., 273; *Dorman v. Ogbourne*, 16 Ala., 759; *Lacy v. William*, 27 Mo., 280;

Herring v. Goodson, 43 Miss., 392; *Townsend v. Kendall*, 4 Minn., 412; *Wright v. Wright*, 24 Mich., 180; *People v. Dawell*, 25 Mich., 247; comity, if not absolute right, requires that the foreign guardian have the child. Wharton's Confl. Laws, §§ 259, 263; 3 Redf. Wills, 448, 450; Schouler's Dom. Rel., 443; *Woodworth v. Spring*, 4 Allen, 321; *Nugent v. Vetzera*, L. R. 2 Eq., 704; the right of the domiciliary guardian of an infant of tender age is as nearly absolute as is that of a parent, and should prevail, except in those cases of abuse or misconduct where, under similar circumstances, the right of a father would be interfered with, *Di Savini v. Lonsada*, 18 W. R., 425; *Townsend v. Kendall*, 4 Minn., 419; Wharton's Confl. Laws, §§ 262–263; a man's domicile continues till a new one is acquired, *Neff v. Neff* 1 Binn., 351; Fisher's Dig., tit. Domicile, col., 9444; *Gilman v. Gilman*, 52 Me., 165; Phillimore on Domicile, 21; the doctrine that where one dies in journeying towards an intended domicile, he loses the old domicile, is not at all sustained by the facts of the case in which the doctrine had its origin, *Munroe v. Douglas*, 5 Maddock, 246; and is severely criticised in the following: *Harvard College v. Gore*, 5 Pick., 374, 375; *Somerville v. Somerville*, 5 Vesey, 786–7; *Munro v. Munro*, 7 Cl. & F., 876; *Bell v. Kennedy*, 1 L. R. Scotch & Div. App., 307; actual presence within the territory is essential to the acquisition of a new domicile, *Sears v. Boston*, 1 Met., 250; *Abington v. North Bridgewater*, 23 Pick., 170; *Thorndike v. Boston*, 1 Met., 242; in a suit for divorce under a statute requiring the complainant to be a resident of Massachusetts at the time the cause of divorce occurred, it was held that where the parties left Massachusetts to remove to Colorado, and stopped four months in Philadelphia on the way, at which place the cause of divorce occurred, that the complainant was domiciled in Massachusetts, *Shaw v. Shaw*, 98 Mass., 158; the domicile of an infant is that of its father, and an infant cannot of

its own motion change its domicile, Shouler's Dom. Relations, 412; *School Directors v. James*, 2 W. & S., 570.

T. A. Wilson and *Austin Blair* against the petition.

CAMPBELL, J. A *habeas corpus* was issued in this case on behalf of a Pennsylvania guardian to obtain possession of the infant over whom a guardian had been appointed by the probate court of Jackson county before any appointment was made in Pennsylvania.

The parents of the child, having formerly lived in Philadelphia, determined to change their residence and left that city with their son to go to Kansas to reside. They were both killed and the child injured by a railroad collision at Jackson last October. The boy, who is but three years old, was cared for at that city until an aunt, Mary C. Rogers, his mother's sister, came on and has since taken care of him, and was in December last appointed guardian. Afterwards an uncle in Philadelphia applied to the Orphan's Court, and a corporation, which is apparently created for trust purposes, was made guardian of the estate, and an aunt, his father's sister, Mrs. Ellen Taney, appointed guardian of the person.

Our laws usually contemplate the appointment of a guardian who has custody of the estate, whoever may have the custody of the person, and provide for no corporation guardianships.

All of the infant's property is now in Michigan, and his chief interest is supposed to be such compensation as may be obtained for his own injuries and the death of his parents.

Our laws contemplate that guardians may be appointed for infants, whatever may be their residence, who have property in this State, and do not recognize any absolute right in foreign guardians to be recognized. Whatever respect is paid them springs from comity and not from law, and is therefore not a matter of right.

If an infant, after having a guardian appointed at his

domicile, where he has been in that guardian's personal custody, should be taken or found elsewhere, great respect should be paid to the claims of such guardian, which would probably in most cases be considered as paramount.

But where, on the other hand, the foreign appointment secures no control over the infant's estate, and has been created in a jurisdiction from which he was personally absent, the case is materially different.

It may or may not be that Philadelphia is to be regarded in law as technically the domicile of the parents and infant, inasmuch as they were still on the road to another, and had not reached it. Upon this we express no opinion, and assume that it may be. But for purposes of comity, the domicile is chiefly respected because it is in fact the home; and where there has been a departure with no design of returning, the legal character of the old domicile does not make it so controlling in matters of policy as it would be under other circumstances, although for other matters it may possibly control.

In the present case there can be no doubt that the Jackson probate court had power to appoint the guardian, and the infant's interests are also chiefly here, which made it a very proper thing to make some appointment here, whatever might be done elsewhere. The Michigan guardian is as near a relative as any other living relative, and the Pennsylvania guardian has not as full powers. There is nothing in the case which indicates that the latter should be preferred, and we do not feel that there is any duty imposed upon us, under the circumstances, of changing the custody.

The other Justices concurred.

LAWRENCE P. EDDY v. JOHN MANSHAUN.

Pleading in justices' courts—Entry of defense on docket—Amendments.

A plea in a justice's court is sufficient if it fully apprises the plaintiff as to what the defense is.

The requirement that in cases tried before a justice, the plea shall be the general issue in all cases, with notice of any special defense, is mere matter of form and will not invalidate a special defense pleaded alone.

A justice should enter an oral defense on his docket, unless it is imperfect in substance, but his failure to do so will not deprive the defendant of his defense. If it is imperfect the defendant should be allowed to amend.

Case made from Kent. Submitted and decided Jan. 21.

ASSUMPSIT. Plaintiff had judgment below.

Taylor & Eddy for plaintiff. The rule favoring a liberal construction of pleadings in a justice's court does not extend to cases where the sufficiency of the plea is questioned and passed upon by the justice, and irregularities are not waived, *Barber v. Taylor*, 1 Mich., 352.

Grove & Harris for defendant. The object of pleading is to apprise opponents of the nature of the action or defense, *Daniels v. Clegg*, 28 Mich., 46; the presumption is in favor of the plea, *Deitz v. Groesbeck*, 32 Mich., 304.

PER CURIAM. This is an action upon a promissory note, which appeared to have been given and become due more than six years before suit was commenced. It was begun in justice's court. The plaintiff declared on the note, and defendant pleaded orally as follows: "Defendant pleads limitation of statute, that the cause of action did not accrue within six years preceding the commencement of suit." The justice held this pleading insufficient to admit the evidence, and the circuit court, on appeal, held the same way.

Both courts were in error. The pleading fully apprised the plaintiff what the defendant's defense was, and that is enough for justice's court. *Hurtford v. Holmes*, 3 Mich., 460; *Comstock v. Howd*, 15 Mich., 237; *Smith v. Dodge*, 37 Mich., 354.

The objection to the pleading seems to have been that the statute requires a general issue in all cases, with notice of any special defense, while in this case the special defense was pleaded alone. But this is mere matter of form. When the defendant notifies the justice orally what his defense is, the justice ought to put it on his docket in due form, but if he fails to do so the defendant is not to be deprived of his defense thereby. If the pleading were imperfect in substance it would be different, but even then defendant ought to be allowed to amend, and that privilege was denied in this case.

Judgment reversed, and new trial ordered.

William H. Bishop v. Amos Freeman.

Justices' jurisdiction in actions on bond.

An action of covenant does not lie in Michigan upon a bond that does not contain covenants, when it is given to secure anything but the payment of money, or when the amount secured exceeds $150.

The statutes of Michigan, like the common law, treat the penalty of a bond given to secure any sum exceeding $150 as the debt to be sued for in an action of debt on the bond. They require the plaintiff to assign breaches, and allow a recovery of the debt, but permit execution for only the damages and costs, the judgment standing as security for the satisfaction of farther breaches, for which damages are recoverable on *scire facias*, the breaches being alleged according to the facts. Comp. L., §§ 6155-61.

No covenants that do not appear on the face of the bond can be implied as against the surety.

Suit was brought in justice's court against the surety on a bond drawn in the sum of $2000. The plaintiff declared on the com-

42 533
86 584

42 533
104 393

42 533
115 45

42 533
117 635

42 533
124 110

42 533
s4NW 290
f131 4629

mon counts in an action of debt on the bond, assigned breaches and claimed $300 damages. The bond contained no covenants. *Held* that the action was neither assumpsit nor covenant, but debt on the bond, in which, under the Justices' Act of Michigan, a justice has no jurisdiction if the sum sued for exceeds $150; that the proceedings were therefore void, and an execution title based on the judgment was illegal and would not justify an entry on the land.

Error to Jackson. Submitted Jan. 8. Decided Jan. 23.

TRESPASS. Defendant brings error.

John D. Conely for plaintiff in error. The form of an action is not determined by the name given to it in the declaration, but from the nature of the declaration, *Seneca Road Co. v. A. & R. R. R.*, 5 Hill, 177; *Burdick v. Worrall*, 4 Barb., 596; *Cornes v. Harris*, 1 Comst., 223; *Lord v. Houstoun*, 11 East, 62; *Sheppard v. Furniss*, 19 Ala., 760; *Coggswell v. Baldwin*, 15 Vt., 404; the test of a justice's jurisdiction is the amount claimed in the *ad damnum* clause, *Strong v. Daniels*, 3 Mich., 466; *Inkster v. Carver*, 16 Mich., 484; *Merrill v. Butler*, 18 Mich., 294.

Austin Blair for defendant in error.

CAMPBELL, J. This was an action of trespass in which defendant justified under an execution title, obtained on sale upon a transcript of a justice's judgment. Recovery was had below, and error is brought on several grounds. The principal question relates to the validity of the justice's judgment.

The suit before the justice was on a bond in the penal sum of $2000 to secure such indebtedness or liability in any form as might be incurred by one L. N. Melosh to the Domestic Sewing Machine Company. The bond was joint and several. Freeman was sued severally, and the transcript contains the following recital of the proceedings. The summons in favor of the Domestic Sewing Machine Company, as set forth *verbatim*, was "in a plea of debt to his damage, three hundred dollars or

under." The declaration is thus described: "Plaintiff declared on the common counts in an action of debt on bond, filed copy of bond with court, and assigns as breaches the non-payment of two judgments against the principal in said bond [describing them]. Plaintiff claims $300 damages."

Inasmuch as a justice can under our statutes have no civil jurisdiction beyond three hundred dollars in actions on contract, the only question of any consequence is whether this was an action for a less sum. Plaintiff in error insists it was an action of assumpsit to recover the amount of the two judgments, and not an action of debt on bond.

Under the Justices' Act, where a bond is for a penalty beyond $150, but is given to secure money in one sum or by instalments not exceeding $150 in the aggregate, an action of covenant may be brought for any instalment, and does not bar further actions for other instalments. Compiled Laws, § 5255. This section is confined to money bonds, and to amounts less than $150. Beyond that sum, even in money bonds, no provision is made taking cases out of the general rules governing actions.

Where a bond is given to secure anything but the payment of money, no provision has been made under our laws for bringing successive actions upon it. The statutes, like the common law, treat the penalty as the debt to be sued for; and they require the plaintiff when bringing actions, to assign breaches, and allow a recovery of the debt, but permit execution only for the damages and costs. But this judgment stands as security for the satisfaction of any further breaches, not to be sued for in separate actions, but to be recovered on *scire facias*, alleging such breaches according to the facts. The whole ground is covered by statute, in accordance with the modified common-law practice which has long prevailed in this State. Comp. Laws, §§ 6155 to 6161. This does

not bar actions of covenant, in lieu of actions for the penalty, where covenants exist. § 6162.

The action in the case before us was evidently an action of debt on the bond, and neither covenant nor assumpsit. The plaintiff assigned breaches and recovered under them. The statute allowing actions of covenant in justices' courts on money bonds has no application, and Freeman made no covenant whatever. The conditions of the bond were all to be performed by Melosh, and even if covenants could be implied against the latter, upon which we need not now make any suggestions, there can be no such implication against Freeman.

The action was therefore for a debt largely in excess of any claim which could be sued before a justice, and the proceedings were void for want of jurisdiction. The judgment being void, and not voidable, could not give validity to the execution title, which was properly held by the court below to be illegal, and no justification for the trespass.

There is no error in the record, and the judgment of the circuit court for the county of Jackson must be affirmed with costs.

The other Justices concurred.

42 536
80 495
42 536
144 7145

42 536
f149 4530

JAMES K. LOCKWOOD v. THUNDER BAY RIVER BOOM COMPANY.

Action for use and occupation—Waiver of tort and suit in assumpsit—Contract relation—Estoppel—Agency of corporate officers.

An action for use and occupation will not lie except where there is an obligation to pay rent by virtue of a contract relation as of landlord and tenant.

An adverse relation cannot be turned into a contract relation, either express or implied, unless some duty exists on the part of the party occupying it, upon which the law permits the fiction of a contract so as to simplify the redress.

A contract for use and occupation cannot be made out unless the person charged as tenant has either accepted possession from the landlord, or done some other act in plain recognition of the relationship or which equitably estops him from denying it.

A corporation cannot be held to have contracted unless by such agents or officers as have express or implied authority.

Individual directors of a corporation cannot bind it.

Assumpsit does not lie at common law to recover the value of chattels obtained by means of a trespass.

Act 165 of 1875 permitting one to waive a trespass on lands and bring assumpsit, only applies to cases where damages have been sustained, and the declaration must show that the damages accrued from the trespass. The action cannot rest upon any theory of a contract, as for use and occupation.

Error to Alpena. Submitted Jan. 9. Decided Jan. 23.

ASSUMPSIT. Plaintiff brings error.

Turnbull & McDonald for plaintiff in error. Where a man is in possession of land which belongs to another, an obligation to pay rent will be implied unless there is an express disclaimer that he holds under the owner, *Jackson v. Mowry*, 30 Ga., 143; *Dell v. Gardner*, 25 Ark., 134; *Hull v. Vaughan*, 6 Price, 157; if he entered as a trespasser, but afterward consented to hold under the owner, it would be enough, *Ackerman v. Lyman*, 20 Wis., 478; a trespass on land may be waived and assumpsit brought for the value of its use, Cooley on Torts, 95; *Church v. Imp. Gas Light Co.*, 6 Ad. & E., 854.

Kelley & Clayberg for defendant in error. Torts may be waived and assumpsit brought at common law only where a person has converted another's property to his own use, *Fiquet v. Allison*, 12 Mich., 328; *Welch v. Bagg*, 12 Mich., 42; and where he has sold or disposed of it without lawful authority and converted the proceeds to his own use, *Lamine v. Dorrell*, Ld. Raym., 1216; *Miller v. Miller*, 9 Pick., 34; *Gilmore v. Wilber*, 12 Pick., 120; *Staat v. Evans*, 35 Ill., 455; *Lord v. French*, 61 Me., 420; but where an act is a naked trespass, assumpsit cannot lie, *Moses v. Arnold*, 43 Ia., 187; *Noyes v. Loring*, 55 Me.,

408; possession alone is not evidence of tenancy, Taylor's L. & T., §§ 21-5; the use of an unimproved river bank in moving rafts does not make the owner of the raft the tenant of the riparian owner, *Hall v. Jacobs*, 7 Bush, 595; *Stewart v. Fitch*, 2 Vroom, 17.

CAMPBELL, J. Plaintiff sued defendant for the use and occupation of booming grounds in front of his lands on Thunder Bay River. The occupation consisted of filling up the river with logs, which were kept back by a large boom which they had below crossing the stream, the effect of which was to leave their logs lying in that part of the stream belonging to plaintiff.

The testimony showed that there had never been any agreement for the occupation of this property, but that plaintiff had repeatedly told members of the company, individually, and at a company meeting, that they must pay for the use if they occupied the premises. The company is not shown to have taken any action on the subject, but some of the directors appear to have told the superintendent not to use it. The first interference with plaintiff was the destruction of his boom by the jamming of logs caused by defendant's boom below, and in his complaints to the company and its members he also claimed damages for this. The sum which plaintiff insisted he should be paid if they used it was $300 a year. Plaintiff, among other acts, asked the manager what they meant by using the premises, and if they intended to continue the use. The manager replied they did, as they could not well get along without it. Plaintiff told him they must pay for it, and was answered that it was for the Boom Company to decide, and not for the manager.

It has been uniformly held in this State that an action for use and occupation will not lie except where a contract relation exists of landlord and tenant, by virtue of which an obligation exists to pay rent. *Dwight v. Cutler*, 3 Mich., 566; *Hogsett v. Ellis*, 17 Mich., 351;

Dalton v. Laudahn, 30 Mich., 349; *Wilmarth v. Palmer*, 34 Mich., 347; *Marquette, Houghton & Ontanagon R. R. Co. v.* 37 Mich., 554.

While there are some cases in which tort may be waived and assumpsit brought, this doctrine has not been applied to trespass on lands, except under a statute which will presently be referred to. Usually no adverse relation can be turned into a contract relation, express or implied. The exceptions are only apparent, and do not rest on the idea that a contract has been created, but upon some duty on which, for purposes of convenience, the law has allowed a fiction of a contract to simplify the redress. See *Ward v. Warner*, 8 Mich., 508; *Watson v. Stever*, 25 Mich., 386.

Unless the person charged as tenant has either accepted possession from the landlord, or done some other act in plain recognition of the relationship, or whereby he is equitably estopped from denying it, no contract can be made out. In the present case the action sued upon has been a long continued series of similar acts, which began in what is claimed by plaintiff to have been a trespass, whereby his boom was destroyed, and which have been continued without asking or accepting permission or admitting any tenure or obligation to pay rent.

If there has been any responsibility to plaintiff it is to respond in damages for a wrong and not to pay a contract obligation. A careful inspection of the record fails to show any act or thing whatever which indicates that the defendant ever did anything under recognition of tenancy. A corporation cannot be held to have contracted unless by such agents or officers as have express or implied authority. In the corporate meeting there was no response indicating an acceptance or recognition of plaintiff's claim or offer. The manager declined to act without authority from the corporation. Individual directors have no power whatever to bind a corporation. There was clearly no actual tenancy. The question then arises whether the law is changed by the statute of 1875.

Laws 1875, p. 193. That statute, so far as it gives a right of action, is very short, and the first section reads as follows: "In all cases where a party has a right of action for the taking of timber or other trespass on lands, it shall be lawful for the party having such right of action to waive the tort and bring assumpsit." The statute is entitled "An act to facilitate the collection of damages for trespass on lands."

This statute was chiefly intended to remedy the difficulty arising under the rule recognized in *Watson v. Stever*, before cited, which denied a right of action in assumpsit for property taken by trespass but not converted into money, which, if sold, the original owner might, if he chose, treat the proceeds as money had and received to his use, inasmuch as it was the price received for his property on an unauthorized sale which he was allowed to affirm. But there is no common law action of assumpsit for chattels had and received by wrong, and no method, therefore, of reaching such a case without going further in the way of legal fiction than could be done without legislation.

This statute is very broad in its language, and may perhaps allow a recovery for damages arising out of any trespass on lands in assumpsit. But it does not purport to make contracts in fact, or to allow anything to be sued for except as damages sustained by the trespass. It simply operated to provide that, when a trespass has been committed whereby damages accrue the duty to pay those damages may be treated as a debt or implied agreement.

To bring any case within the statute the damages must be shown in the declaration to have accrued out of a trespass. The statute gives no warrant for making any suggestion which is false in fact, or for turning an adverse holding into a contract of tenancy.

The numerous questions of evidence, and particular rulings in regard to the relative rights of the parties to the use of the stream, become unimportant, inasmuch

as the form of action is misconceived. The court below correctly ruled that an action for use and occupation could only spring from an actual tenancy. As already suggested, there was nothing tending to show such a tenancy. If not, then it made no difference whether a good cause of action existed for a different method of redress. It would be entirely improper for us to discuss such a case until it arises.

The judgment for defendants in error must be affirmed with costs.

The other Justices concurred.

BRIDGET JOHNSON v. WILLIAM STILSON.

Exception to sureties on replevin bond.

Where a justice of the peace issued a writ of replevin before any bond had been filed by the plaintiff, and approved it next day under a misapprehension as to a surety's qualifications, it was *held* that Comp. L., § 5294, would not prevent the defendant from excepting to the sureties.

Error to Cass. Submitted Jan. 13. Decided Jan. 23.

REPLEVIN. The writ was issued late at night, and as the justice who issued it objected to the surety offered, the petitioner for the writ promised to produce another next day. The latter appeared and signed the bond, and the justice, understanding him to say that he was worth $200 subject to execution, indorsed his certificate of qualification. Afterwards, on objection to the sureties, the justice again put this surety on oath, and examined other witnesses and became convinced that he was mistaken in supposing that the surety had so testified, and he thereupon dismissed the writ. The circuit court on certiorari affirmed this dismissal and plaintiff brings error.

J. A. Kellogg for plaintiff in error.

Cholwell Knox for defendant in error.

MARSTON, C. J. The judgment of the circuit court must be affirmed with costs. It appears from the return of the justice to the writ of certiorari, that he issued the writ of replevin before any bond had been filed with and approved by him; and his approval on the following day, after an additional surety had signed, if such could be called an approval, was under a misapprehension of the facts. The statute, § 5294, would not prevent the defendant from taking exceptions to sureties signing under such circumstances.

The other Justices concurred.

---

42 542
68 164
69 259
42 542
94 281
94 361

42 542
118 154

42 542
126 572

JOHN W. BRIGHAM, EDWARD B. BOWEN AND JOHN W. BRIGHAM, JR., v. ROBERT FAWCETT AND MARY FAWCETT.

Defendant as plaintiff's witness—Debt to wife may be preferred—Waiver of limitation law.

Complainants must accept the statements of the defendants when they make them their witnesses and rest the case on their evidence.

Where a husband is honestly indebted to his wife, he may satisfy her claim in preference to those of other creditors, by transferring the homestead to her, if its value does not exceed the amount exempt from execution and the debt taken together.

A debtor may waive the statute of limitations as to a particular creditor, and other creditors cannot complain.

Appeal from Superior Court of Detroit. Submitted January 13. Decided January 23.

BILL TO SET ASIDE a deed. Complainants appeal.

George W. Bates for complainants. An outlawed debt is not a valuable consideration as against other debts, *A'Court v. Cross*, 3 Bing., 329: 11 E. C. L., 126; *Butcher v. Hixton*, 4 Leigh, 519; *Sutton v. Burruss*, 9 Leigh, 381; *Brown v. Joyner*, 1 Rich., 210; *Crawford v. Carper*, 4 W. Va., 56; 1 Pars. Cont., 434; where a wife has acquiesced for a long period in her husband's use of her own estate as if it were his, it does not constitute a debt to her as against the rights of antecedent creditors, *Fox v. Moyer*, 54 N. Y., 125; *Savage v. Murphy*, 34 N. Y., 508; *Babcock v. Eckler*, 24 N. Y., 623; *Robinson v. Stewart*, 10 N. Y., 190; *Humes v. Scruggs*, 94 U. S., 22.

Jas. A. Randall, *George Gartner* and *Edwin F. Conely* for defendant Mary Fawcett.

GRAVES, J. In 1877 the complainants credited the defendant Robert Fawcett with a bill of goods amounting to about $300. At that time and up to March 6, 1878, he owned and occupied as a homestead a portion of a city lot in Detroit. At the date last named he quit-claimed the premises to his wife, the defendant Mary, but the occupation as a homestead has continued without interruption. The debt to complainants remaining unpaid, they sued the defendant Robert, in December, 1878, to collect it, and in the succeeding January obtained judgment. The damages were $323.20, and costs $22.35. Execution was taken out immediately, and levied on the premises in question. Subsequently the complainants filed this bill in aid of the execution and required the defendants to answer on oath. The defendant Mary accordingly put in her sworn answer, but no answer being received or insisted on from the defendant Robert, the bill was taken as confessed by him. The case being brought to hearing on the pleadings and the evidence taken, the court dismissed the bill and the complainants appealed.

The essence of complainants' case is that the convey-

ance from defendant Robert to his wife was made with intent to defraud them.

The answer denies this, and alleges *first*, that the deed was given for a debt which her husband owed her; and *second*, that the premises were at the time a homestead and not liable for complainants' debt.

The defense offered no testimony, and all given by complainants, except some few items, was drawn from the defendants, who were made witnesses to support the bill. The case depends upon their evidence, and the complainants must accept their statements. *Darling v. Hurst*, 39 Mich., 765; *Powden v. Johnson et al.*, Cir. Ct. U. S. Dist. N. J., 1878, 7 Rep., 294.

They state positively that there was no intent to defraud complainants or hinder them in the collection of their demand; and moreover that the conveyance was made in consideration of an actual money indebtedness of the husband to the wife of more than $1700.

The sources from whence Mrs. Fawcett derived the money and the items of the debt are fairly explained, and we are satisfied of their justice. Five hundred dollars of the amount, if not more, was applied directly in putting up the dwelling, and as much more was passed to her husband at or about the time of the conveyance. The only amount repaid is about $15 for interest.

The homestead right in the premises was not exposed to creditors, and according to the highest estimate the excess of value over the exempt interest did not exceed $750. This valuation is probably too high. But whether so or not, it was certainly lawful for the husband to transfer whatever there was over and above the exempt interest to his wife in payment of his honest indebtedness to her, and the amount of that indebtedness was many hundred dollars beyond the amount of interest left after deducting the homestead.

It does not lie with complainants to contend that part of Mrs. Fawcett's demands against her husband were outlawed, and hence incapable of serving as a con-

sideration for the conveyance. Whether the benefit of the statute should be asserted against her was something to be determined by her debtor,—her husband,—and not by his other creditors, the complainants. Being honestly indebted to his wife, the law did not disable him from waiving the privilege given by the statute, or require him to repudiate his obligation.

The defendant Robert, during his examination, spoke of the deed to his wife as "security." But it is reasonably certain that by this mode of expression he did not mean that the transaction was a mere mortgage. The grant was absolute, and the circumstances imply that it was intended to be an actual conveyance; and that such was his meaning may be inferred from his more precise statement that he gave the deed to his wife "to entitle her to the property."

It does not appear necessary to consume time in noticing other features of the case, because we think they are obviously governed by previous decisions. *Roberts v. Miles*, 12 Mich., 297; *Hill v. Bowman*, 35 Mich., 191; *Allen v. Antisdale*, 38 Mich., 229; *Darling v. Hurst*, 39 Mich., 765.

The decree should be affirmed with costs.

The other Justices concurred.

Ex rel. Roderick J. Macdonald v. The Board of Supervisors for the County of Muskegon.

Auditing justice's accounts.

The Justices' Act contemplates that a justice, in rendering his account to the board of supervisors, shall specify the services in detail, so that the board may determine whether the amounts charged corresponded with the statutory fees. The board is not concluded by the account, but may require proof, and examine his

docket and files and the returns made by him, and where they do so, and reject claims on the ground that the services were not performed, or that the charges made exceeded those allowed by statute, their action cannot be disturbed on a review of their finding upon the facts.

MANDAMUS. Submitted Jan. 13. Decided Jan. 23.

Smith, Nims, Hoyt & Erwin and *C. C. Chamberlain* for relator. The board of supervisors can only allow the statutory fees of justices, *Bristow v. Macomb County Supervisors*, 3 Mich., 480; *Kennedy v. Gies*, 25 Mich., 90.

Stevenson & McLaughlin for respondents.

MARSTON, C. J. The petition of relator shows that he was a justice of the peace; that he presented his bill for services to the board. The answer shows that in many of the cases the charges made were rejected and in others largely reduced, after a careful examination as to the correctness thereof made by the board.

The statute prescribes the amount that shall be allowed a justice of the peace in each case, not in gross, but in detail, and contemplates that in presenting his account to the board of supervisors for allowance, the services performed in each case shall be distinctly set forth, so that the board may ascertain and determine whether performed, and if so, that the amount charged therefor is in accordance with the fees prescribed by the statute. In doing this they are not concluded by the account rendered, but may require further proof, and may examine his docket, and the files and returns made by him, in order to ascertain the correctness of his account. Where they do this and reject his account in whole or in part on the ground either that the services or any part thereof were not performed, or that the charges made were in excess of those allowed by the statute, and reject such overcharges, or items charged for services not performed, we cannot in this manner disturb or interfere with their action. We cannot review their finding upon the facts.

and this is what in effect we are asked to do in this case. *People v. Auditors of Wayne,* 10 Mich., 308.

The writ must be denied with costs.

The other justices concurred.

ROBERT DOOL v. THE VILLAGE OF CASSOPOLIS.

Taxation—Notice of Review of Assessment roll.

An ordinance of Cassopolis imposing a tax on saloon keepers required the assessor to give notice of a review and correction of the assessment roll, which must take place before the collection of the tax. The special assessment roll for the saloon tax was distinct from the general assessment roll of the village, and notice of review was given only for the latter. *Held* that the want of notice invalidated the saloon tax.

Error to Cass. Submitted Jan. 13–14. Decided Jan. 23.

ASSUMPSIT. Plaintiff brings error.

Howell & Carr for plaintiff in error. Every notice required by a taxing law must be given, Cooley on Taxation, 216–9; *Powers' Appeal,* 29 Mich., 504; *Merritt v. Village of Portchester,* 71 N. Y., 309.

L. H. Glover for defendant in error.

COOLEY, J. This suit is brought to recover from the village a sum of money paid by the plaintiff under protest, for a tax levied on him in respect to his business as a saloon keeper, which was carried on by him in the village for 1877 and for a time in the early part of the year 1878. The tax was levied under a village ordinance, and it is claimed that it was illegal and unjust for many reasons. Some of these reasons have no legal force whatever, though they might very justly have some influence with

the village board in determining whether the ordinance should be permitted to stand as it is. There is one objection, however, which is fatal.

The special tax under the ordinance was to be assessed by the assessor of the village, and immediately on his completion of the assessment roll he was required by the ordinance to "give ten days' notice by publishing or posting, that on a certain day and at a certain place in said village therein named he will review said assessment roll, and that any person or persons deeming themselves aggrieved by such assessment may be heard." The ordinance further provides that "the assessor at the time and place mentioned in said notice shall receive the complaints of any persons interested therein and if it shall appear that any such person or persons have been wrongfully assessed, the assessor shall then and there alter such assessment roll as to him shall appear proper;" and it is only after he has thus revised and completed the roll, that process can issue for the collection of the tax.

It is seen that the notice has a very important office to perform, and that in the absence of notice the party assessed has no opportunity to appear and be heard. The notice in this case was never given. There was a notice given by the assessor for the review of the general village tax roll for each year; but the roll for the saloon tax was separate and distinct, and the notice which was given had no reference to it whatever. The defect was fatal. *Thomas v. Gain*, 35 Mich., 155.

The judgment must be reversed with costs.

The other Justices concurred.

THE EVENING NEWS ASSOCIATION v. JAMES E. TRYON.

42 549
66 309
42 549
103 318

Libel—Exemplary damages—Retraction.

A publication that is libelous *per se* is presumed to be voluntary and with malicious motive, and is therefore ground for exemplary damages.

Where it appears that a libel was published with no intent to injure the person libeled, and that all proper precautions were observed in publishing it, the recovery of damages is limited by the actual injury.

It seems that a retraction of a libelous article, published after suit is begun for the libel, cannot be considered in mitigation of damages.

Error to Superior Court of Detroit. Submitted January 14. Decided January 23.

TRESPASS ON THE CASE for libel. Defendant brings error.

C. I. Walker for plaintiff in error. A retraction of a libel made before suit may be considered in mitigation of damages, Townshend on Slander, § 416, n; 2 Greenl. Ev., § 275; *Hotchkiss v. Oliphant*, 2 Hill, 512; *Kent v. Bonzey*, 38 Me., 438; exemplary damages are not to be imposed for negligence unless there is a reckless disregard of rights, *Det. Post v. McArthur*, 16 Mich., 452; *Phil., W. & B. R. R. Co. v. Quigley*, 21 How, 214; *Milwaukee R. R. v. Arms*, 91 U. S., 493.

Maybury & Conely for defendant in error.

MARSTON, C. J. This was an action brought to recover damages suffered by reason of the publication of a libelous article by the plaintiff in error.

We are of opinion that the court correctly instructed the jury upon the subject of exemplary damages. In cases like the present the publication is considered a voluntary act, and is presumed to have proceeded from malicious motives, thus entitling the plaintiff to recover

exemplary damages. If it appears upon the trial that there was no intention in fact to injure the plaintiff, and that all proper precaution was observed in the publication of the article complained of, such facts will not prevent a recovery of such damages, but will reduce the amount thereof to such sums as must inevitably have resulted from the wrong. *Scripps v. Reilly*, 38 Mich., 23.

The next question is whether a retraction of the article, published after the commencement of the action, could be considered in mitigation of damages. No direct authority in support of such a position has been cited on the argument, and the cases referred to do not, we think, sustain such a doctrine. If such a retraction may be so considered then there can be no limitation well fixed as to the time within which it should be made, or beyond which it ought not to be so considered. The action may not be commenced until long after the publication complained of, and the trial may be still longer delayed. Besides there may be more than one trial, so that after the libelous article has run its course, a retraction could in no sense mitigate the injury sustained. Indeed, at such a late day, a retraction would but revive the scandal and might be an aggravation rather than otherwise.

We discover no error, and the judgment must be affirmed with costs.

The other Justices concurred.

JOHN J. BAGLEY v. JOHN PRIDGEON.

Jurisdiction of municipal courts in transitory actions should appear in the declaration—Costs on reversal of judgment by default.

Under Act 97 of 1879 the jurisdiction of the Superior Court of Detroit is confined in transitory actions "to cases where one of the

parties lives in Detroit." *Held* that a judgment by default for non-appearance in a suit begun by declaration cannot be sustained where the declaration does not show the residence of either party.

Costs are awarded only on error where a judgment by default for defendant's non-appearance, is reversed.

Error to Superior Court of Detroit. Submitted January 14. Decided January 23.

ASSUMPSIT. Defendant brings error.

Wisner & Speed for plaintiff in error.

Moore, Canfield & Warner for defendant in error. A return by the sheriff that defendant was served with a copy of the declaration within the city of Detroit is *prima facie* evidence that he resided there (*Marsh v. Hutchinson*, 2 B. & P., 230; *Ryall v. Kennedy*, 40 N. Y. Sup'r Ct., 361; *Fagg v. Clements*, 16 Cal., 389) and will give jurisdiction unless defendant shows there was none, *Donnelly v. Libby*, 31 N. Y. Sup'r Ct., 279; the rule that jurisdiction must affirmatively appear upon the record applies only to courts of inferior jurisdiction, *Peacock v. Bell*, 1 Saund., 74; *Spencer v. Rogers etc. Works*, 8 Bosw., 612; *Foot v. Stevens*, 17 Wend., 486; which the Superior Court of Detroit is not, *Gott v. Brigham*, 41 Mich., 227.

CAMPBELL, J. The only question in this case is whether a judgment by default, rendered in the Superior Court of Detroit, in a suit commenced by declaration, can be sustained where the declaration does not show the residence of either party, and there has been no appearance.

The statutes of 1879 changed the jurisdiction of this court by confining it in transitory actions to cases where one at least of the parties resides in Detroit. Pub. Acts 1879, p. 90. Under former statutes there was no such expressed requirement.

In *Grand Rapids, Newaygo & Lake Shore Railroad Company v. Gray*, 38 Mich., 461, it was intimated that the

jurisdiction should appear on the face of the proceedings; and in *Denison v. Smith*, 33 Mich., 155, it was also declared that this must be shown. In that case the law provided, as it formerly did in the case of the Detroit Superior Court, for jurisdiction by service of process in some cases not depending on mere residence, and there was some reason for not requiring residence to appear on the pleadings. But the changes made in 1879 place the Detroit Superior Court on a similar footing with the courts of the United States, where, since the early decision in *Turner v. Bank of North America*, 4 Dal., 11, it has always been held erroneous not to show jurisdiction on the pleadings. Now that residence has become uniformly essential to jurisdiction, we think it follows, in accordance with the general rules respecting courts of limited jurisdiction, that the party declaring should show himself within the statute. The presumption now must be in favor of the jurisdiction of the circuit courts as exclusive, until overthrown by some averment; and as the residence of parties cannot be put on the record in the outset except in the declaration or summons, or other original proceeding, it must appear in that way before the defendant is bound to answer. There can be no presumptions in favor of special and limited jurisdictions.

No amendment having been made in this case, we have no means of knowing on what ground the jurisdiction was founded, and while the proceedings at a proper stage may not have been beyond correction, they are in their present shape undoubtedly erroneous.

The judgment must be reversed with costs of this court. Not having appeared below, no costs can be awarded against Pridgeon except on error.

The other Justices concurred.

MICHAEL MCLAUGHLIN v. GEORGE WILKS.

42 553
86 492

Misnomer—Amendment of declaration.

An amendment to a declaration whereby the plaintiff's name was changed from Dilks to Wilks was properly allowed on due showing, after personal service and default made absolute, and before judgment.

Error to Superior Court of Detroit. Submitted January 15. Decided January 23.

ASSUMPSIT. Defendant brings error.

Hawley & Firnane for plaintiff in error. The plaintiff's name in a declaration is matter of substance. *Gilbert v. Hanford*, 13 Mich., 40; *Wixom v. Stephens*, 17 Mich., 518; *La Grange v. Chapman*, 11 Mich., 499; *Foster v. Alden*, 21 Mich., 507.

Maybury & Conely for defendant in error.

MARSTON, C. J. This action was commenced by declaration, in the name of George Dilks as plaintiff. Personal service upon the defendant was obtained, but he did not appear. After his default had been entered and made absolute, a motion was made to amend the record so that the name of the plaintiff, wherever it occurred, should read George Wilks instead of George Dilks. Affidavits were read and filed in support of the motion, showing that the name Dilks was inserted by mistake, how it occurred, and that the defendant had knowledge of that fact and was not misled, and upon this showing an amendment was allowed and made, and judgment rendered in favor of the plaintiff. The amendment was proper, and comes clearly within previous decisions of this court. *Final v. Backus*, 18 Mich., 218; *Barber v. Smith*, 41 Mich., 138 and cases cited.

Judgment affirmed with costs.

The other Justices concurred.

42 554
136 295

42 554
154 212
d154 215

42 554
156 151

SIMON G. WEBSTER v. ANDREW ANDERSON.

Sale of live stock—Constructive delivery.

A farm laborer orally agreed with his employer to take in payment a number of hogs which were pointed out, but which were to remain in the pasture and be fed by the employer, with others, until there should be an opportunity to sell them. *Held* that there was sufficient delivery to transfer title as against a subsequent levy on the employer's property.

Error to Mecosta. Submitted Jan. 15. Decided Jan. 23.

TROVER. Defendant brings error.

John R. Parsons for plaintiff in error, cited as to the insufficiency of the delivery, under the statute of frauds, *Webster v. Bailey*, 40 Mich., 641; *Walker v. Nussey*, 16 M. & W., 302; *Pena v. Vance*, 21 Cal., 142; *Walrath v. Richie*, 5 Lans., 362; *Ham v. Van Orden*, 4 Hun, 709; *Moore v. Bixby*, id., 802; *Pitney v. Glen's Falls Ins. Co.*, 65 N. Y., 27; Benj. Sales (2d Amer. ed.), 193.

John H. Palmer for defendant in error. A sale is perfected by delivery when the property is so situated that the purchaser can rightfully take possession of it at his pleasure, *Means v. Williamson*, 37 Me., 556; Benj. Sales (2d ed.), § 679, n.; the contract is not released from the Statute of Frauds, unless the property is placed unequivocally within the power of the buyer as absolute owner, discharged of any lien for the price, *Marsh v. Rouse*, 44 N. Y., 643; *French v. Freeman*, 43 Vt., 93; *Yale v. Seely*, 15 Vt., 221; if a verbal contract of sale is proved, and an acceptance and receipt in pursuance of it shown, the purpose of the statute is fulfilled, Benj. Sales, § 149; *Van Woert v. A. & S. R. R.*, 67 N. Y., 540; *McKnight v. Dunlap*, 5 N. Y., 537.

COOLEY, J. The only question in this case is whether a sale of certain hogs by one Hooper to Anderson was

effectual to transfer the title as against a subsequent levy upon them made by Webster by virtue of an execution against Hooper.

The facts as found by the circuit judge are that in October, 1877, Anderson was at work in Hooper's employ on a farm; that Hooper then owed him $100; that Anderson requested Hooper to pay him, and it was agreed between them that the latter should transfer to him 20 hogs then on his place, with others, at the price of $96, and that Anderson should receive them at that price; that the parties went where the hogs were, and those to be taken by Anderson were pointed out and specified, and Hooper charged Anderson the purchase price on account; that it was a part of the arrangement that the hogs should remain in the same pasture as before with the other hogs, and be fed and cared for by Anderson with the others until an opportunity should be found for selling them. The whole agreement between the parties was oral.

The circuit judge was of opinion that there was a sufficient transfer of possession of the property to constitute a delivery under the circumstances. We agree in this view. It was all the delivery that could well have been made under the circumstances without requiring Anderson to remove the hogs from the farm where he was employed to some other place where they would have been less in his possession than where they were; and for this there could have been no sufficient reason. The case is within the reason of *Adams Mining Co. v. Senter*, 26 Mich., 73.

The judgment must be affirmed with costs.

The other Justices concurred.

DANIEL FORREST v. JOHN O'DONNELL.

42 556
125 615

Attachment—Right to sue on bond.

An assignment of a judgment in attachment does not carry the legal title to the bond, if it does not expressly purport to do so.

An action at law must generally be brought in the name of the party who holds the legal interest as distinguished from the equitable right, even though the latter embraces the exclusive interest in the benefit to be derived from the property.

The trustee and not the beneficiary has the right of action at law.

A bond in attachment must run to the sheriff who holds it in trust, and the plaintiff in attachment has no right to sue on it or transfer it until failure of execution, and then only in the sheriff's name, unless the latter has assigned the bond to him.

Act 75 of 1863 merely amended Comp. L. (1857) § 4159, permitting the assignee of a bond, note or other chose in action to sue in his own name, and was not meant to affect the special provisions on bonds for the release of property under attachment.

Error to Saginaw. Submitted Jan. 15. Decided Jan. 23.

ACTION ON BOND. Plaintiff brings error.

Michael Brennan for plaintiff in error. A bond in attachment ought to be liberally construed for the benefit of the beneficiary, *Claytor v. Anthony*, 15 Gratt., 518; assignment of a judgment in attachment carries the bond as an incidental security, *Conyngham v. Smith*, 16 Ia., 471; *Pattison v. Hull*, 9 Cow., 747; *Thomas v. Hubbell*, 35 N. Y., 122; *Bowdoin v. Colman*, 6 Duer, 182; *Irish v. Sharp*, 89 Ill., 261; the bond belongs to the beneficiary, and under an early statute he might sue on it in the sheriff's name, *Dorr v. Clark*, 7 Mich., 310; under Comp. L., § 5775, the beneficiary or purchasers of his rights can sue on it without using the sheriff's name and without a written assignment, *Draper v. Fletcher*, 26 Mich., 154.

J. H. McDonald and *B. M. Thompson* for defendant in error.

GRAVES, J. February 6, 1871, Hector A. Beaton sued out an attachment from the circuit court against McMullen and Porterfield, and delivered it to the sheriff, Alfred Avery, for service, and on the next day the officer seized a quantity of personal property found in the possession of the firm of Stephen Cromwell & Sons, and on the 10th of the same month they delivered to him a bond under Comp. Laws, § 6409, to prevent dispossession. The bond purported to be executed to him by the firm as principals and O'Donnell as surety, and was conditioned for the production of the property attached to satisfy any execution that might be issued on any judgment that should be recovered by Beaton in the attachment suit.

April 24, 1872, Beaton, the attachment plaintiff, recovered judgment for $189.82, besides costs, and on the first of May thereafter sued out execution returnable on the 2d of July, and the sheriff, Avery, returned it *nulla bona* on the 12th of that month.

While the execution was out, and on the 9th of May, 1872, the plaintiff Beaton assigned the judgment to the plaintiff in this suit. The assignment was drawn with great particularity, but it did not refer at all to the bond. I pass by the error about the date of the judgment and the slight inaccuracy in the amount.

July 8, 1872, being two months later, the sheriff assigned the bond to Beaton. Subsequently Forrest, the assignee of the judgment, brought this suit upon the bond against O'Donnell, the surety, and the circuit judge on motion at the trial, excluded the bond, and the plaintiff was thereby defeated. He now asks a revision of the ruling.

The declaration averred an assignment of the bond by the sheriff Avery to Beaton on the 8th of July, 1872, and an assignment of the judgment and bond also from Beaton to the plaintiff on the 9th of May preceding.

Now as no other assignment was made to Forrest except that of the 9th of May, which did not allude to the bond, it is first of all material to ascertain whether the instrument passed by that assignment; because, if it did not, the ruling objected to cannot be disturbed, and the points agitated relative to the execution of the obligation become unimportant.

It is a general rule of the common law that the action must be brought in the name of the party in whom the legal interest is vested, and that the courts will not in general take notice of mere equitable titles and rights of action, as contradistinguished from the strict legal title and interest, so as to invest the equitable or merely beneficial claimant with the ability to adopt legal proceedings in his own name, although the equitable right embrace the most extensive or even the exclusive interest in the benefit to be derived from the contract. The ground of distinction between legal and equitable remedies requires this principle to be observed. If the beneficiary were permitted to sue at law in his own name, the protection and advantage intended to be secured by the intervention of a trustee clothed with the legal title, might be lost, and the salutary benefits arising from giving courts of equity control over matters of trust would be defeated. Besides it would be impracticable without departing from the common principles of jurisprudence, to exclude the power of the trustee to sue in respect of his legal right; and it would be highly mischievous and unjust to permit the defendant to be harassed by two actions on the same contract. The right of action at law has therefore been vested solely in the party having the strict legal title and interest, in exclusion of the mere equitable claim. If a bond be given to A conditioned for the payment of money to him for the use or benefit of B, or conditioned to pay the money to B, the action must be brought in the name of A, and B cannot sue for or release the demand. In such case A is evidently a trustee, and the obligatory part of the instru-

ment and the acknowledgment of legal responsibility are to him. Such is the doctrine as laid down by Chitty, and the authorities support him. 1 Chitty Pl., 2, 3, and notes (16th Am. ed.).

Admitting the law to be as stated, the next considera tion is whether the strict legal title and interest in the bond was transferred by Beaton to Forrest by the assignment of the judgment.

Does the law contemplate the instrument as belonging to the judgment? It is not between the parties to the suit. It must run to the sheriff, and some at least of the obligors are expected to be strangers to the action. The judgment is made up without reference to it and is in no way dependent on it. The suit is not to be "in any way affected" by it. Comp. L., § 6411. The sheriff holds it in trust. It rests in his hands for the time being as a passive obligation, and it confers no title to sue until failure occurs to produce the property in answer to an execution. When that happens the plaintiff in attachment may sue upon it, but only in the name of the officer or his successor, unless the legal title and interest are transferred to him by the officer. The provision is particular in requiring the suit to be in the name of the officer and not in that of the party equitably entitled, unless a regular assignment is made. If the legal title is conveyed to the plaintiff he may sue in his own name. But the statute looks upon the instrument as non-actionable in the plaintiff's name without such assignment. All the provisions tend to show that the instrument is a mere collateral incident.

It must be admitted, I think, that the judgment is a distinct matter, and that the assignment of it did not convey the legal title and interest in the bond. But it may be said that the assignment, in consequence of the broad language used in it, may be construed as intended to embrace the bond, and that an equitable title at least, which ought to be deemed sufficient under our statute for the assignment of rights of action, was actually trans-

ferred. The case can derive no aid from the general statute for the assignment of rights of action. The act of 1863 was a mere amendment of Comp. L. 1857, § 4159 (Laws 1863, p. 102) and was not intended to affect the special provisions concerning proceedings on bonds for the release of property in attachment. This is manifest from the title of the act and the general principles of construction. But if the view suggested could be supposed to merit acceptance under any circumstances, it appears to me that the facts in the record sufficiently repel it. If Beaton had possessed any title to the bond when he assigned the judgment, it might perhaps be made a question whether he did not mean to transfer it. But he had no title at that time and he knew it, and his assignment, although carefully and elaborately drawn, did not refer to it or import any undertaking to procure its transfer to Forrest. For nearly two months it remained in the sheriff's hands unassigned and out of Beaton's power to convey, and he could do nothing more than to agree that it should be conveyed, and there is no evidence of his having done that, even.

Moreover, there is no evidence that at the date of the assignment of the judgment on the part of Beaton there had accrued any right to an assignment from the sheriff. The statute does not contemplate the existence of any right of the plaintiff in attachment to the bond until there is default, and there is no evidence that any had occurred on the 9th of May when the judgment was assigned.

Upon the whole I am forced to conclude that the assignment of the judgment conveyed no right to Forrest to sue as plaintiff on the bond, and that the ruling of the circuit judge must therefore stand.

Judgment affirmed with costs.

The other Justices concurred.

ROBERT WATSON v. ROBERT P. TOMS, EXECUTOR.

42 561
95 70

42 561
147 381

Attachment—Notice by publication—Amendment of return.

Comp. L., § 6414 provides that within thirty days after the return of a writ of attachment, notice by advertisement may be given to absent defendants. *Held* that the date of the return as indorsed upon the writ and signed by the sheriff may properly be taken as the date from which to compute the time for advertising, though the writ is not actually filed until after notice is given.

Where action has to be taken by an attorney on the return of a writ of attachment, it is permissible for the sheriff, after indorsing the return of a writ not personally served, to leave the writ and return with the attorney instead of filing it with the clerk.

A sheriff's return never becomes part of the record until actually on file with the clerk, and he may amend it without leave at any time before filing.

Error to Wayne. Submitted Jan. 15. Decided Jan. 23.

ATTACHMENT. Defendant brings error.

T. C. Prosser and *George Gartner* for plaintiff in error.

Wisner & Speed for defendant in error. The provision in Comp. L., § 6414, for notice of publication within thirty days after the return of a writ of attachment not personally served, means after the *return day* of the writ, *Millar v. Babcock*, 29 Mich., 526.

COOLEY, J. The only question in this case is whether a notice for the appearance of defendant in an attachment case was sufficient to answer the requirements of the statute.

The attachment was sued out May 14, 1878, and was returnable June 4, 1878. Property was attached, but the defendant was not found. The sheriff made full return, which bears date June 5, 1878. The notice which was published for the appearance of the defendant was given June 15, 1878. It was not until nine days after this

notice that the attachment was actually filed in the clerk's office, and it is claimed that for this reason the notice was premature.

The statute provides that "if it appear by the return of such writ that any property has been attached thereon, and that neither of the defendants could be found, the plaintiff shall, within thirty days after such return, unless the defendants, or some of them, shall sooner appear in the suit, cause a notice to be published in some newspaper," etc. Comp. Laws, § 6414. But this notice, it is said, was published before there was any return whatever.

A sheriff's return never becomes a part of the record until actually on file with the clerk, and he may therefore amend it without asking the leave of the court at any time before the filing. *Nelson v. Cook*, 19 Ill., 440. But for many purposes the return may be regarded as made when it is indorsed upon the writ and signed; and where action is to be taken by the attorney upon the basis of the return, it may be proper and is probably customary, to leave the writ and return with him, instead of handing them to the clerk.

The case of an attachment not personally served is one in which this course is entirely proper. The notice to be published is to be given, not by the sheriff or clerk, but by the attorney, and the writ may well be left with him for the purpose. The statute probably intends that the thirty days shall be computed from the return day, and not that either the sheriff or the attorney shall be at liberty to extend the time indefinitely by delaying to put the writ on file. If the sheriff should neglect to return the writ until it should be necessary to take proceedings against him, a question might arise presenting other considerations.

The judgment must be affirmed with costs.

The other Justices concurred.

42 563
68 179
42 563
76 233
42 563
d145 616

IRA JEFFERY AND JOHN JEFFERY BY LOUISA JEFFERY, THEIR GUARDIAN AND NEXT FRIEND v. ELIZABETH HURSH, ROBERT HILLOCK AND JAMES N. VANSICE.

Ejectment—Grantee's right of action under a deed absolute.

A deed absolute gives the grantee the right of possession and will sustain ejectment, even though it was meant as a mortgage, if nothing appears to show that intent.

Error to Isabella. Submitted Jan. 15. Decided Jan. 23.

EJECTMENT. Plaintiffs bring error.

Spaulding & Cranson for plaintiffs in error. If a deed is intended as a mortgage, the fact must be shown by evidence outside the papers before it can be so treated, *Swetland v. Swetland*, 3 Mich., 482.

Brown & Leaton and *Fancher & Dodds* for defendant in error. The intent of the parties to writings should be carried out and may be ascertained from circumstances, *Cornell v. Hall*, 22 Mich., 383; *Russell v. Southard*, 12 How., 139; *Walton v. Cronly*, 14 Wend., 63; *Emerson v. Atwater*, 7 Mich., 12; *Campbell v. Dearborn*, 109 Mass., 142; *Paddack v. Pardee*, 1 Mich., 424; *Norris v. Showerman*, 2 Doug. (Mich.), 25; *Brown v. Dewey*, 1 Sandf. Chy., 57; it may be shown at law that a deed absolute on its face is simply a mortgage, *Fuller v. Parrish*, 3 Mich., 211; a conveyance with a bond back for reconveyance makes the transaction *prima facie* a mortgage, *Erskine v. Townsend*, 2 Mass., 494; *Nugent v. Riley*, 1 Met., 119; *Carey v. Rawson*, 8 Mass., 160; *Roach v. Cosine*, 9 Wend., 230; *Stewart v. Hutchins*, 6 Hill, 143; *Clark v. Henry*, 2 Cow., 324; *Peterson v. Clark*, 15 Johns., 205; *Brown v. Dean*, 3 Wend., 208; *Palmer v. Gurnsey*, 7 Wend., 249; *Blaney v. Bearce*, 2 Greenl., 132; *Bennock v. Whipple*, 12 Me., 346; *Rice v. Rice*, 4 Pick., 349; *Newhall*

v. Burt, 7 Pick., 157; *Saxton v. Hitchcock*, 47 Barb., 220; where there is doubt as to whether a conveyance is a deed or a mortgage, it should be treated as a mortgage, *Holmes v. Grant*, 8 Paige, 248; *Robinson v. Cropsey*, 6 Paige, 480; *Conway v. Alexander*, 7 Cr., 218; *Edrington v. Harper*, 3 J. J. Marsh., 354; *Secrest v. Turner*, 2 id., 471; *Skinner v. Miller*, 5 Litt. (Ky.), 84; *Longuet v. Scawen*, 1 Ves. Sr., 402; 4 Kent's Com., 143; *Glover v. Payn*, 19 Wend., 518.

GRAVES, J. The plaintiffs in error, who are the sole heirs at law of John Jeffery, deceased, brought this action of ejectment to recover certain premises some years previously conveyed by the defendant Elizabeth Hursh to their father, the said John Jeffery. The defense was that the plaintiffs were not entitled to recover possession because the before mentioned grant from Mrs. Hursh to plaintiffs' father, although an absolute conveyance on its face, was in fact only a mortgage. And there are no questions presented which are independent of the validity of this defense. The points agitated relate to the right to defend against the ejectment on this ground, and to the character of the evidence adducible to prove the fact.

That the grant in question was apparently an absolute conveyance is admitted and is certain; and it is equally certain that no written defeasance is shown. The bond to John M. Hursh, the husband and attorney in fact of the grantor, does not purport to be a defeasance. Parol evidence would be necessary to stamp the arrangement as a mortgage transaction.

The plaintiffs requested an instruction that they were entitled to a verdict. But this was refused, and the circuit judge left it to the jury to find a verdict for the defendants if satisfied on the whole evidence that the deed referred to was intended as a mortgage, and they found for the defendants.

The ruling was erroneous. The jury should have been instructed as requested by plaintiffs' counsel. In

Wetherbee v. Green, 22 Mich., 311, it was strongly intimated that an absolute deed, though intended as a mortgage and permitting redemption, would confer a right of possession on the grantee wholly unaffected by the statute prohibiting ejectment by a mortgagee before foreclosure, and in the later case of *Bennett v. Robinson*, 27 Mich., 26–30, it was distinctly laid down that although as between the parties such a transaction is a mere security, attended by a right of redemption and requiring foreclosure to cut it off, it is one which "places the right of possession in the grantee or mortgagee." This is decisive. For admitting that in fact the absolute deed from Mrs. Hursh was intended as a mortgage, it was no defense against the plaintiffs' action for possession, and they were entitled to prevail, notwithstanding according to her construction of the transaction, her remedy would be in equity and not by ejectment.

The case comes up after a general verdict, and no judgment can be given here on the final issue.

The judgment of the circuit court must be reversed with costs and a new trial granted.

The other Justices concurred.

GEORGE S. ENGLE AND ELBRIDGE F. BACON v. MERLIN CAMPBELL.

42 565
70 461

Evidence under the common counts in action upon contract.

If a declaration on a contract is on the common counts and there is no bill of particulars, the parties have a right to go to the jury on any contract that will sustain a right of recovery, and are not confined to a particular contract as sworn to by the plaintiff, if that varies from the one actually performed by him.

Error to Huron. Submitted Jan. 15. Decided Jan. 23.

ASSUMPSIT. Plaintiffs bring error.

Geo. S. Engle and *J. C. Shields* for plaintiff in error.

Winsor & Snover and *H. B. Carpenter* for defendant in error.

CAMPBELL, J. Plaintiffs sued defendant for commissions on a sale of land which they claimed was made according to his agreement, but which he refused to ratify.

Upon the trial below Engle testified to an agreement for a commission of 5 per cent if the land was sold on certain terms, which he says were complied with. The defense disputed the terms, and the agency as described by Engle, and also set up in proof a different contract, which was also claimed by Engle to have entitled him to some compensation if complied with. Performance of either was disputed.

We have no means of knowing whether the finding of the jury was based on a disbelief of the contract as alleged by Engle, or on a belief that it had not been carried out. They found against plaintiffs. The only important error alleged is that the court confined the right of recovery to the particular contract as sworn to by Engle, and precluded recovery if that varied from any other contract if one was made and performed.

This would be proper if the suit had been on a declaration or bill of particulars distinctly describing it. But the declaration was on the common counts, and we are not informed that there was any bill of particulars. Upon the conflict of testimony on various points plaintiffs had a right to go to the jury upon any contract which made out to the satisfaction of the jury a fulfillment giving a cause of recovery.

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

The other Justices concurred.

JOHN MINK v. ARCHY MORRISON.

Account stated—Settlement by agent.

One who sues on an account stated can only recover on proof of a settlement made with defendant or his authorized agent, or, if made by an unauthorized person, on proof of defendant's ratification thereof with a full knowledge of the facts.

Where an authorized agent settles an account and gives an order on third parties, acceptances and payment by them binds the party liable on the account; but if it was not authorized and was not made with a view of enabling the creditor to get his pay or a promise to pay from the debtor, he is not bound by it.

Error to Huron. Submitted Jan. 15. Decided Jan. 23.

ASSUMPSIT. Plaintiff brings error.

Geo. S. Engle and *J. C. Shields* for plaintiff in error.

James H. Hall, Winsor & Snover and *H. B. Carpenter* for defendant in error cited to the point that the action could not be sustained as on an account stated, *Stevens v. Tuller*, 4 Mich., 387; *Gooding v. Hingston*, 20 Mich., 441.

MARSTON, C. J. This action was brought upon an account stated, claimed to have been received by the plaintiff upon a settlement made with the agent of defendant for work and labor performed.

The authority of the agent was denied, and upon this subject evidence was introduced by both parties, and the question fairly submitted to the jury, who were instructed to find for the plaintiff, if satisfied that authority was given to settle such accounts, or the defendant afterwards, having knowledge of the fact that such a settlement was made, ratified it.

It is urged that the court erred in giving the fifth subdivision of his charge to the jury and thereby under the evidence virtually took the case from them.

We do not think so. The court had just charged the

jury that in case they found a settlement was made and a balance struck by any person authorized by the defendant, the plaintiff would be entitled to recover, and the effect of this instruction, it is very evident, the court did not intend, in what was subsequently said, to destroy.

The portion complained of was upon the assumption that no settlement had been made with a view of binding the defendant thereby, and if such were found to be the fact, then defendant could not be held liable under such a settlement unless he afterwards ratified such settlement by a promise to pay the amount specified. When this so-called settlement was made, a written order was given, not upon the defendant, but upon Hubbard & Co. If the object of this settlement was so that plaintiff might present this order to Hubbard & Co., and receive the amount thereof from them, "and not with a view of getting his pay or a promise to pay" from defendant, the latter could not be bound thereby. If defendant's son had authority to make settlements and give such orders on Hubbard & Co., acceptance and payment thereof by them would, in their settlement with defendant, have been binding upon him. View the case as we may, the result must be that plaintiff, having sued upon an account stated, could only recover by proving a settlement with defendant or his authorized agent; or if not authorized, then a ratification of the settlement made after full knowledge of the facts.

The judgment must be affirmed with costs.

The other Justices concurred.

ORLANDO B. WEIMER ET AL. v. JAMES B. PORTER.

42 569
97 587

Tax receipts—Lien for taxes and improvements.

Tax receipts are not evidence to prove a lien for taxes paid on land held under a tax-title; the fact to be proved calls for the assessment rolls.

The lien given by Comp. L., § 1131, for taxes paid on land held under a tax-title, cannot be tried at the same time with an action of ejectment based on the right given by the title. The invalidity of the tax-title must be determined and there must be a judgment for the recovery of the land as against the holder of the title, before the holder can enforce a lien upon the premises for subsequent taxes paid in reliance on it.

Where a tax-title is adjudged invalid in an action of ejectment based thereon, *it seems* that the lien given by Comp. L., § 1131, for taxes paid by the holder of the title, and for improvements, is to be enforced in a supplementary proceeding in chancery.

Error to Clinton. Submitted Jan. 15. Decided Jan. 23.

EJECTMENT. Plaintiffs bring error.

Randolph Strickland for plaintiff in error.

O. L. Spaulding for defendant in error.

GRAVES, J. The plaintiffs in error sued in ejectment on certain tax titles, and the case being tried by the circuit judge without a jury, he ruled that they were not valid.

The plaintiffs in error then offered evidence to show that they had paid certain taxes assessed against the land subsequent to their tax-titles, and claimed the right to recover therefor on the trial of the ejectment, under Comp. L., § 1131.[1] The evidence so offered consisted

[1] (1131.) SEC. 165. If any conveyance, made by the Auditor General pursuant to a sale made for non-payment of taxes, shall prove to be invalid and ineffectual to convey title, for any other cause than such as are enumerated in the preceding section, the lien which the State had on such land for its rightful proportion of taxes for State, county, township, and all lawful purposes, shall remain in full force, and shall be transferred by such deed to the grantee and vested in

wholly of tax receipts, and on objection the judge refused to receive it. The ruling was correct. Apart from other objections the treasurer's receipts to the plaintiffs in error were not evidence to charge the defendant in error. The fact to be proved called for the assessment rolls. But there was another difficulty. The claim was not triable at the same time with the ejectment. The statute contemplates that the tax-title asserted by the claimant shall be adjudged against him before he can enforce a lien upon the premises; and it does not imply that in the same proceeding and at the same time when he is asserting an absolute and exclusive title which the law deems *prima facie* valid, he may set up and enforce a lien upon the land for a demand against another.

There must first be a judgment for the "recovery of such land," or against the person holding the tax-title, as preliminary to any other proceeding; and of course the right to prosecute or litigate a claim for subsequent taxes is postponed until the rendition of the judgment. Such claim cannot be prosecuted in the same trial which is terminated by the judgment. The law apparently intends that it shall be a supplementary proceeding and be conducted on the equity side. It is provided that in case default is made in payment, the court shall decree a sale, etc.

---

him, his heirs and assigns, who shall be entitled to recover from the owner of such lands the amount of such legal taxes, together with all the lawful charges, with interest at twenty-five per cent from the date of such sale, and also the amount of all subsequent taxes paid by the person holding such title from the Auditor General, with like interest; and such claim shall be a lien upon such lands, and the same shall be bound for the payment thereof; and, in case judgment shall be rendered against the person holding title from the Auditor General, as aforesaid, for the recovery of such land, in any action of ejectment, or other action, either at law or in equity, the court shall ascertain the amount due to the party holding such tax-deed, for principal and interest, and for all improvements made by him on such lands, and shall decree the payment thereof within such reasonable time as may be determined by such court; and in default of such payment, shall decree that such lands be sold therefor, or sufficient thereof to pay the amount of such improvements, principal and interest, due to the party having such Auditor General's deed: *Provided*, That there shall be no right of redemption of such property after the date of sale.

The relief is to be specific, and the nature of the regulation indicates quite clearly that the remedy was meant to be in chancery, and on the foot of the adjudication against the tax-title.

There was no case before the court for trying any claim for taxes paid by the plaintiffs in error, and the ruling was correct on this ground also.

The judgment must be affirmed with costs.

The other Justices concurred.

CATHARINE GRIFFIN v. FULTON IRON & ENGINE WORKS.

Evidence—Contract—Agency.

Where a contract for material is made independently of plans and specifications, the latter cannot be put in evidence in an action on the contract merely because a third person, who was agent for neither party, after using them when making an estimate upon the work and failing to get his employer to take it, brought the actual contracting parties together.

Error to the Superior Court of Detroit. Submitted January 15. Decided January 23.

ASSUMPSIT on common and special counts for the price and value of certain iron columns furnished by the Iron & Engine Works to Catharine Griffin for the construction of the Griffin Market. Defendant pleaded the general issue with notice of recoupment for non-performance of the contract, and sought to introduce in evidence certain plans and specifications for the building, claiming that they had been used by one Wayne in making estimates on the work to be furnished. It appeared also that Wayne brought the contracting parties together, though not an agent for either. The offered evidence was excluded, plaintiff recovered, and defendant ant brings error.

Brennan & Donnelly for plaintiff in error.

George W. Bates for defendant in error.

CAMPBELL, J. The Fulton Iron & Engine Works sued Mrs. Griffin for a balance due on the price of a quantity of iron columns, and tie bars, and for labor in putting them up. They made out a case showing that the columns were ordered and the price agreed upon. The other work they furnished on orders from Mrs. Griffin's agents, and the main and perhaps the only important question was whether they acted as contractors to furnish and put up work according to the plans and specifications of a building for which the iron was furnished, or whether they merely agreed to furnish the iron work which they did furnish as a distinct bargain.

The testimony on their part was unambiguous of a distinct contract, having no reference to any plans or specifications, and simply being a bargain for columns of sizes and patterns given them. There is no testimony which in our opinion shows or tends to show that they made any arrangements whatever on the basis that they were to be governed by those documents or ever examined them.

The only basis for any such inference is in the fact alleged that one James W. Wayne who had been figuring on the iron work and who is claimed to have had access to the plans and specifications was the person through whose intervention the Fulton Works became induced to contract. It is disputed how far James W. Wayne had any such information, and it does not appear that he ever was informed any bid was desired beyond the mere making of the columns, although it is claimed he was supposed to be figuring on all the iron work. It is not very clear that the plans and specifications themselves give any indication that the making of the columns involved anything further.

But it appears distinctly that Wayne was neither agent nor employer of the Fulton Works. He had made estimates and went to his own employers, the Safe Works,

who refused to deal with Griffin at all. Wayne told him he could get it done at the Fulton Works. All the dealings with the Fulton Works were between Griffin and Mr. Grosvenor their agent, and not with Wayne for them, and in the transactions with Grosvenor no mention was made of any other contract, and no agreement shown to have been made beyond the columns.

While it is possible parties made some assumptions, yet agreements cannot be made out without proof of a distinct understanding. We think there was nothing to authorize the admission of the papers ruled out.

The judgment must be affirmed with costs.

The other Justices concurred.

42 573
100 333

JOSIAH E. JUST v. THE TOWNSHIP OF WISE.

Mandamus to compel payment of township orders—Adoption of signature—Affixing a mark.

Mandamus lies, not assumpsit, to compel a township board to pay a valid order given by the highway commissioners on the township treasurer.

No question can arise in the Supreme Court upon a point of law not passed upon in the finding of the court below.

A township clerk has no authority by virtue of his office to sign the names of highway commissioners to an order on a township treasurer.

An order on a township treasurer to pay for labor is incomplete without a certificate that the labor is performed, and the actual signature of the highway commissioners to the certificate, where that is indorsed upon the order, is sufficient to adopt as signatures their names attached to the order, though attached thereto by some one else.

A mark attached to a signature is evidence of the intention to adopt it; but this may also be done by any other act expressed clearly.

Where one who cannot write, directs another person to sign for him and the latter signs in his presence, the signature is binding whether the former does or does not attach his mark.

Error to Isabella. Submitted Jan. 15. Decided Jan. 23.

Assumpsit. Plaintiff brings error.

A. A. Ellis for plaintiff in error.

Wheaton & Perry for defendant in error. Mandamus lies to enforce a valid township order, and not assumpsit, *People v. Wayne County Auditors*, 5 Mich., 223; *Marathon v. Oregon*, 8 Mich., 372; *People v. Porter Township*, 18 Mich., 101; *Dayton v. Rounds*, 27 Mich., 82; *McArthur v. Duncan Township*, 34 Mich., 27; and even if the order is not regularly drawn, mandamus lies if the claim has been liquidated, *Peterson v. Manistee*, 36 Mich., 8, and if the claim has been adjusted but no order has been drawn, *People v. Macomb Supervisors*, 3 Mich., 475; where a certificate is necessary to the validity of a township order, and is only signed by the proper officers, their action adopts the signatures to the order itself, even though affixed by some one else, *Gardner v. Gardner*, 5 Cush., 483; where a husband signs his wife's name to her deed in her presence and by her direction, it is sufficient, *Frost v. Deering*, 21 Me., 156; where a wife in her husband's absence signed a deed in his name, his acknowledgment ratified it, *Bartlett v. Drake*, 100 Mass., 175; *Wood v. Goodrich*, 6 Cush., 117; *Burns v. Lynds*, 6 Allen, 309; *Videau v. Griffin*, 21 Cal., 392; *Kime v. Brooks*, 9 Ired., 219; *McKay v. Bloodgood*, 9 Johns., 285; *Ball v. Dunsterville*, 4 Term, 313; *King v. Longnor*, 4 B. & Ad., 647.

Marston, C. J. Plaintiff commenced an action of assumpsit against the township and declared upon the common counts with a notice that upon the trial he would give in evidence one accepted highway order a copy of which is set forth. The defense relied upon was that mandamus and not assumpsit was the proper remedy. The cause was tried by the court and a finding of facts made.

The court found that in 1872 Patrick Holden entered into a contract with the commissioners of highways, and performed work and labor thereunder amounting to between eight and nine hundred dollars, and that the same was accepted by the commissioners; that on December 25, 1872, a board acting as commissioners of highways, found due on this contract $323.50, and while the board was in session an order was drawn by the township clerk in proper form for the amount allowed. A copy of this order is given in the finding, and it purports to have been signed by George M. Quick and Henry J. Taylor, as highway commissioners, and signed across the face "G. Dehart, treasurer."

The court further finds that on the back of the order is the following:

"We hereby certify that the labor and material for which the within order is given has been performed and furnished to our satisfaction.

GEORGE M. QUICK,
HENRY J. TAYLOR,
Highway Commissioners;"

that the signatures of Quick and Taylor as appearing on the face of the order, were made by John F. Skying, township clerk, while all were present acting as a board; that Quick authorized the clerk to sign his name to the order, and that the testimony did not show whether Taylor expressly authorized the clerk to sign his name or not, or that he knew his name was signed to the face of the order, except as it may be inferred from the fact that it was done in his presence and he signed the certificate on the back himself; that there was no positive evidence showing that Taylor was commissioner of highways in fact, only that he acted as such; nor was there any evidence to show that the commissioners passed any resolution authorizing the clerk to sign their names to said order; that the certificate on the back of the order was signed by them while acting as such commissioners, and the words "highway commissioners", were printed thereon; that this order and the contract

were duly assigned to plaintiff; that the work done under the contract has never been paid for except by this order; that the plaintiff claims this order is invalid, and seeks to recover under the original contract, claiming $323.50 and interest thereon; that all the evidence concerning the meetings of the board was oral. No township records were introduced.

Upon this finding the court held that mandamus was the proper remedy, and judgment was rendered accordingly.

It will thus be seen that the material and only question presented is as to the validity of the order, and this depends upon the manner in which it was executed by the commissioners, as under the finding no question can arise in this case as to Taylor's right to act as one of the commissioners.

The statute provides that no money shall be drawn by the commissioners of highways from the township treasury, in payment of any labor contract, or materials furnished, except by an order signed by a majority of them, and accompanied by their certificate that the labor has been actually performed, etc. Comp. Laws, § 1245. The township clerk is made the clerk of the board of commissioners of highways, and it is his duty under their directions to record their proceedings, to keep an account of orders drawn by them, and perform other duties as prescribed by the statute. § 732.

The clerk, by virtue of his office as such, had no authority to sign the names of the commissioners to this order. Whether he could bind the town by signing their names to orders in their presence and under their directions, we need not in this case determine. The practice at all events, would be one not to be encouraged.

This case however goes farther. After the order was signed as stated, the commissioners with their own hands signed the certificate on the back thereof "that the labor and material for which the within order is given,

has been performed." The order given purported to be signed by them. It was signed in their name and presence, if not under their express direction. By the certificate made by them on the back of the order they thereby adopted what purported to be their genuine signatures on the face of the order as their own. In no other way can any force or effect whatever be given their certificate. Without this certificate the order was and could be of no possible force; it was incomplete, even although they had personally signed the same. By their farther act they sought to and did give force and currency to it as a completed transaction. This must have been their intention; if not, their certificate to and delivery of the order were meaningless. If either had been unable to sign his name and had directed another to sign for him, and this had been done in his presence, the act would have been good, whether he made his mark thereto or not. The mark is only evidence indicative of his act and intention to adopt the signature as his own. But this may as well be shown by any other clearly expressed act as by his mark.

We are of opinion that the order was valid and that the court was right in holding assumpsit not the proper remedy.

The judgment must be affirmed with costs.

The other Justices concurred.

THOMAS FLETCHER v. WILLIAM W. MOORE.

Escrow—Conditional sale of land.

Where the only allegation of error is that the facts do not support the judgment, the Supreme Court will not entertain the objection that there is no regular finding.

A deed was deposited in escrow with a written agreement by the grantor that the sale might be abandoned if the title to be conveyed should not be found by the depositary to be a full title in fee simple and free from all encumbrances. *Held* that this paper referred to the title as it stood when the arrangement in escrow was made, and did not bind the grantee to accept any future rectification.

Error to Wayne. Submitted Jan. 16. Decided Jan. 23.

ASSUMPSIT. Plaintiff brings error.

Stewart & Galloway for plaintiff in error.

Ward & Palmer for defendant in error. A sale conditioned on the satisfaction of a party cannot be enforced if he is not suited with it, *Gibson v. Cranage*, 39 Mich., 49.

CAMPBELL, J. Fletcher sued Moore to recover the purchase price of certain land which he claimed to have sold to Moore. Moore claimed a set-off for money advanced towards the purchase, which he insists failed.

The facts found were in substance as hereinafter set out. An objection that there is no regular finding cannot be entertained, because the only error alleged is that the facts do not support the judgment. The court allowed Moore a set-off as claimed of $200.

Fletcher and Moore agreed verbally for the sale of a parcel of land in Wayne county for $2700 cash. A deed was made and left in escrow, with a written agreement from Fletcher, which is the only writing in evidence made by him to Moore except the deed. In this writing he acknowledges receipt of $200 on account of the agreement of sale, and proceeds as follows: "A deed having been executed of said land by myself and wife to said Moore and left with Ward & Palmer awaiting the examination of the title of said parcel of land by said Ward & Palmer, the sale to be perfected if the title to be conveyed shall be found and appear to them to be a full title in fee simple, and free from all incumbrances, and shall so appear of record. If the title is not found to be such, the sale to be abandoned and said sum returned. A deed executed by myself and wife to said Moore, of

the above described parcel of land is left with said Ward & Palmer for delivery, subject to the title being found satisfactory to them, to stand as security in the case the title shall not be accepted by them."

Ward & Palmer found a land contract on record made by Fletcher and wife to Samuel and Emma Briggs. The existence of such a contract, although not legally recorded, was admitted, but it was asserted to have been cancelled by mutual consent and the money refunded. Mr. Ward stated that he regarded that as a cloud upon the title, and defendant would not take it unless Ward was satisfied it was perfect. Fletcher proposed to turn out some securities, but Moore refused to accept anything but a clear title. Plaintiff sent to England for a quit-claim deed, but Mr. Ward refused to accept it, claiming the sale had been abandoned. Plaintiff was informed that the title was not satisfactory when the contract was discovered, as well as when he offered to give security, and not being perfected up to that time negotiations were abandoned.

The quit-claim was made by Mrs. Briggs on her own behalf and as administratrix of her deceased husband. The administration is a foreign administration.

It is not important to inquire to what extent this quit-claim may have operated to terminate or affect the contract made to Mr. and Mrs. Briggs. The only written contract made by Fletcher, and therefore the only agreement which bound him under the statute of frauds, referred to the title as it stood when this arrangement in escrow was made, and did not bind him to make or Moore to accept any future rectification. The title was not to be forced upon Moore unless approved by Ward & Palmer. They disapproved it, for good reasons, and Moore had a right to regard the agreement as ended, and reclaim his advance of $200.

The judgment below was correct, and must be affirmed with costs.

The other Justices concurred.

42 580
f158 271

SOLOMON P. CRESSINGER v. WILLIAM L. DESSENBURG, ISAAC MORSE ET AL.

Delivery of Mortgage—Witnesses.

A mortgage left with a third party to be delivered when a prior mortgage had been discharged and other conditions performed, was assigned by the mortgagee named in it, to the depositary, before they had been fulfilled. It was afterward assigned to another party before it fell due, and the assignee sought to foreclose it. *Held* that there had been no delivery.

There is no injustice in declining to give controlling force to the testimony of a witness as against his positive assertions and acts to the contrary, whereby he claims to have deceived another.

Appeal from Montcalm. Submitted January 16. Decided January 23.

FORECLOSURE. Bill dismissed. Complainant appeals.

Vosper Brothers for complainant. A deed left in the hands of a third party until a certain event has taken place, is a present grant unless it is expressed as an escrow, 3 Washb. R. P., 585; *Shirley v. Ayres*, 14 Ohio, 307; *Crompton v. Pratt*, 105 Mass., 255; *Jackson v. Catlin*, 2 Johns., 248; *Souverbye v. Arden*, 1 Johns. Ch., 240; *Hathaway v. Payne*, 34 N. Y., 92; *Hosley v. Holmes*, 27 Mich., 416; if the grantee assigns it before it is delivered to him he is estopped from disputing delivery, *Moore v. Metropolitan National Bank*, 55 N. Y., 44; *Dezell v. Odell*, 3 Hill, 215; a subsequent assignee in good faith is entitled to enforce his rights under the conveyance even if the depositary violated his trust, *Burson v. Huntington*, 21 Mich., 415.

Mitchel & Pratt and *Geo. P. Stone* for defendants. If a bargain is abandoned by the parties before the performance of conditions precedent to the delivery of the papers left in charge of a third person, the papers become void, *Powell v. Conant*, 33 Mich., 396; *Dawson v. Hall*, 2 Mich., 390; Jones on Mortgages, §§ 616, 683.

COOLEY, J. This is a bill to foreclose a mortgage given by defendant Dessenburg to Isaac Morse for the sum of $1,425, and bearing date November 17, 1877. The mortgage purports to be collateral to Dessenburg's notes of $50 and $1,375 respectively, the first of which was payable the first of January, and the second the first of May following. The defense is that the mortgage was never delivered, and that the second note is a forgery, as is also the reference to notes in the mortgage.

It is conceded by all parties that at the date of the mortgage Morse owned the land which is described in it, and that he bargained to sell it to Dessenburg at the price of $1,425, of which $50 was to be paid on the first day of January following, and the remainder was to be secured by a mortgage on the land, and be payable four months later. There was at the time an existing mortgage on the land for $750, but Dessenburg was not to take the land subject to this. The parties, when they had agreed upon the terms of sale, went together to the place of business of John H. Cressinger, who they say they supposed had the prior mortgage, and there had the papers drawn by him. According to the statements of Morse and Dessenburg the papers consisted of a deed from Morse to Dessenburg, a mortgage back for $1,425, and a note for $50 by Dessenburg to Morse. All these were put into an envelope, which was sealed up and left with Cressinger, and the package was to remain with him until Dessenburg had paid the $50, and until the parties should come together to take them away. Cressinger, on the contrary, says that there was further executed by Dessenburg and left with the other papers a note of $1,375, and that the understanding was that as soon as the small note was paid, either party was to be at liberty to take away the papers which were executed to him. Dessenburg sent money to Cressinger to pay the $50 note before it fell due. In March following Cressinger got possession for collection of a demand against Morse for $330, and managed to get

from Morse an assignment to himself of the Dessenburg mortgage, in the arrangement of the claim. To bring this about he represented to Morse that Dessenburg had given no note for the $1,375 secured by the mortgage, and that consequently the demand might be garnished by Morse's creditors. To convince Morse of this, Cressinger says he manufactured a fictitious mortgage, which did not purport to secure a note, and exhibited it as the one executed by Dessenburg; while Morse insists that the one exhibited was the real mortgage. In order to make the assignment from Morse to Cressinger, the envelope was broken open, and the papers were then left with a third person. Meantime the prior mortgage had not been taken up, and if the one given by Dessenburg had become a valid security in Cressinger's hands, the land would be charged with the two mortgages, amounting to $2,125, and Dessenburg would be personally liable for $1,375. No one pretends that there was ever any understanding that Dessenburg should be placed in this predicament in making a purchase of land which he was to have a clear title of for $1,425. Both Dessenburg and Morse say that Cressinger gave them to understand he held the prior mortgage, and that it was to be taken up before the arrangement was completed; while Cressinger says it was owned in Detroit, and in the hands of agents at St. Johns, and all he was to do was to procure a discharge for the parties when they were ready to make payment. When Dessenburg found what had taken place between Morse and Cressinger, he refused to have anything further to do with the purchase, and it was agreed between him and Morse that the transaction should be considered at an end; Morse repaying the $50, and allowing Dessenburg to occupy the premises for a season. Cressinger subsequently procured a discharge of the prior mortgage, which he tendered to Dessenburg, who refused to receive it. The Dessenburg mortgage was then assigned to complainant and this suit instituted. The assignment to

complainant was made before the mortgage debt fell due.

The above are all the facts we think it important to notice here. On a review of all the proofs we are not satisfied that complainant has made out by a preponderance of evidence that the mortgage was ever delivered. If the understanding was as Morse and Dessenburg testify, there was certainly no delivery, and even on Cressinger's evidence it is inconceivable that Dessenburg understood his mortgage was to become an effective instrument before the prior mortgage was out of the way. The reasonable probabilities all favor the theory that Dessenburg's mortgage was not to be delivered to Morse until a discharge of the prior mortgage was obtained.

The question remains whether the $1,375 note is genuine. If it is, complainant may claim and does claim that Dessenburg under all the circumstances is estopped from disputing its delivery, as one who has purchased it in good faith before it fell due. *Burson v. Huntington*, 21 Mich., 415; *Comstock v. Smith*, 26 Mich., 307. But we are of opinion that the case is no more made out on this branch than on the other. There is no doubt whatever that Morse assigned the mortgage to Cressinger in the full belief that no note was given by Dessenburg except that of $50. If he had understood in the first place that one was to be given, the fault in not obtaining one must be attributable to Cressinger, who had been entrusted with drawing the papers, and some complaint on his part that Cressinger had blundered or had deceived him would naturally have been expected. But Cressinger does not pretend that any complaint was made or fault found, or that any dispute arose respecting the fact; and under all the circumstances it is quite as reasonable to believe that the original mortgage contained no reference to such a note, as that Cressinger manufactured a mortgage and exhibited it for the purposes of deception, and that it did deceive Morse in respect to so important a part of a transaction which had taken

place so recently. There is certainly no injustice to Cressinger in declining to give controlling force to his evidence that a note was originally given, as against his positive assertions and acts to the contrary whereby, as he says, he deceived Morse into assigning to him the mortgage.

The decree will be affirmed with costs.

The other Justices concurred.

42 584
71 95

42 584
94 606

42 584
95 176

DAVID M. COOPER ET AL. v. THE CITY OF DETROIT, THE DETROIT BOARD OF PUBLIC WORKS ET AL.

Municipal corporations—Vacation of streets—Use of streets for market by the city—Rights of adjacent owners barred by statute of limitations.

History of the central market place of Detroit reviewed.

It seems that the rights of the public in city streets may be extinguished by legislation.

The general highway laws of Michigan provide for vacating as well as laying out ways, and for vacating public highways by non-user as well as by direct proceedings.

Where any part of a highway has been extinguished and turned to other uses, it cannot be renewed without the same methods of dedication or user which would turn other lands into public ways.

Where a highway is vacated conditionally, it is not re-established by the suspension of the conditional occupation.

Where a city charter does not require the purpose of vacating a highway to be expressed, nor make the expression of it obligatory on the subsequent occupation, the expression of a specific purpose in the proceedings to vacate it, is surplusage.

The occupation of land by a city for market purposes is not a public easement, but a proprietary occupation, and private adverse rights will be barred by the same lapse of time as if the occupation was by a private person.

Where the right of a city to certain property has been established by the statute of limitations, specific allegations that its use for

a specified purpose that is not unlawful will have a bad effect on neighboring property, can have no bearing on a proceeding to enjoin its use therefor.

An injunction does not lie where the complaint is not that a new grievance is created, but that an old one is not stopped.

Appeal from Wayne. Submitted January 16. Decided January 23.

INJUNCTION. Dismissed. Complainants appeal.

James W. Romeyn and *Theodore Romeyn* for complainants, cited as to the powers vested in the Governor and Judges to lay out a plan of Detroit, 2 U. S. Stat. at Large, 398, 438; 1 Terr. Laws, 283-9; *Ready v. Kearsley*, 14 Mich., 222; *Riggs v. Board of Education*, 27 Mich., 267; *Cincinnati v. Cameron*, 33 Ohio St., 366; Amer. State Papers, 5 Pub. Lands, 452; 6 id., 270-7; as to the allotment and platting of the city and sale of lots according to the original plan, *People v. Carpenter*, 1 Mich., 273; *People v. Jones*, 6 Mich., 176; *Hinchman v. Detroit*, 9 Mich., 103; *Board of Education v. Detroit*, 30 Mich., 505; *Park Commissioners v. Common Council*, 28 Mich., 228; as to rights of persons in connection with the streets of Detroit, *Cooper v. Alden*, Har. Ch., 72, 85, n *c*; *Devaux v. Detroit*, id., 98; *People v. Jackson*, 7 Mich., 432: 9 Mich., 111, 124, 127; *Tillman v. People*, 12 Mich., 401; *Detroit v. Blackeby*, 21 Mich., 84; *Paul v. Detroit*, 32 Mich., 108; public markets erected in the street are nuisances, Dillon's Mun. Corp., §§ 509, 316, 531; public squares are different from highways, *Baker v. Johnston*, 21 Mich., 319; as to the power of the Common Council in regard to streets and markets, L. 1827, pp. 570, 578, 582; Rev. Charter 1836, p. 25; Rev. Charter 1855, pp. 20-29; L. 1857, pp. 100, 104; Rev. Charter 1867, p. 60, § 26; p. 66, § 47; amendments of 1871, p. 55; and of vacating a highway, L. 1827, p. 578; L. 1832; Rev. Charter of 1836, p. 25; L. 1846, p. 20, § 5; the Legislature cannot authorize a common council to place a market in a street without compensating adjacent owners, *Davis v.*

Mayor, 14 N. Y., 517; a deed bounding the property conveyed by a public road is designed to give title to the middle of the road, *Purkiss v. Benson*, 28 Mich., 538; *Bissell v. N. Y. Cent. R. R.*, 23 N. Y., 61; *Sherman v. McKeon*, 38 N. Y., 267; *Norris v. Hill*, 1 Mich., 202; see *Fearing v. Irwin*, 4 Daly, 385; *Miner v. Mayor*, 37 N. Y. Sup'r Ct., 171; *Banks v. Ogden*, 2 Wal., 68; *Hammond v. McLachlan*, 1 Sandf. Sup'r Ct., 344; *Perrin v. N. Y. Cent. R. R.*, 36 N. Y., 120; *Wallace v. Fee*, 50 N. Y., 694; *Adams v. Saratoga R. R.*, 11 Barb., 452; *White's Bank of Buffalo v. Nichols*, 64 N. Y., 70; equity can compel the abatement of a nuisance, *Robinson v. Baugh*, 31 Mich., 290; the sale of lots according to the recorded plan of the city entitles buyers of lots to have the street by which they are bounded to be kept up as a highway, *Stack v. St. Louis*, 85 Ill., 377: 28 Amer., 621; lapse of time is no defense to an encroachment on a public right, Dillon Mun. Corp., §§ 528–533; as to title by adverse possession in favor of city, Tyler on Ejectment, pp. 883-9; *Watson v. N. Y. Cent. R. R.*, 6 Abb. Pr. (N. S.), 91; *Bedell v. Shaw*, 59 N. Y., 46.

City Counselor *F. A. Baker* for defendants. The fee to the streets of Detroit was vested in the city or in its council as a land board, provided lots were not so conveyed as to carry the title to the middle of the streets, 5 U. S. Stat. at Large, 541; they were not so conveyed, *Grand Rapids & Ind. R. R. v. Heisel*, 38 Mich., 62; the statute of limitations runs against the State (Rev. Stat. 1846, p. 600; Comp. L., § 7147; *Wayne County v. Miller*, 31 Mich., 447) and adjacent owners, *Mills v. Hall*, 9 Wend., 315; complainants in this case are too late to be entitled to equitable relief, *Campau v. Van Dyke*, 15 Mich., 377; *Attorney General v. Railroad Company*, 24 N. J. Eq., 49; *Archbold v. Scully*, 9 H. L. Cas., 388; equity will not restrain an erection that may or may not prove to be a nuisance, *Dunning v. Aurora*, 40 Ill., 481; *Butler v. Rogers*, 9 N. J. Eq., 487; *Phœnix v. Com'rs*, 1 Abb. N.

Y., 466; *Kirkman v. Handy*, 11 Humph., 406; *Rhodes v. Dunbar*, 57 Penn. St., 274; *Irwin v. Dixion*, 9 How., 10; the effect of a certain use of property upon the value of neighboring property cannot alone warrant equitable interference, *Barnes v. Hathorn*, 54 Me., 124; a city that has used property for market purposes for 46 years has gained a prescriptive right to continue to do so, *Dana v. Valentine*, 5 Met., 8; Wood on Nuisances, 717-746; what the State authorizes it cannot prosecute as a nuisance, *Chope v. Det. & Howell P. R. Co.*, 37 Mich., 195.

CAMPBELL, J. The bill in this case is filed to enjoin the city of Detroit from building a market building and continuing similar buildings on a strip of land in the center of what was once, as laid down on the Governor and Judges' plan of Detroit, an avenue 200 feet wide, known as Michigan avenue.

The facts, so far as material, are that in 1807 the plan of that part of Detroit including these premises, was laid out, and lots sold upon this street at various periods thereafter, which are now owned by complainants.

In 1834 the principal public market, which had up to that time been situated in the middle of Woodward avenue fronting on the south side of Jefferson avenue, was superseded by a brick building 50 feet in width fronting on the military square and covering the premises now in dispute for a distance not far from 80 feet in depth. The land now in dispute runs to Randolph street 50 feet in width except as crossed by Bates street. This brick building was used as a city hall and market, and was torn down in 1872, after the new city hall was built. In 1848 it was found desirable to extend the market buildings, and a question having arisen concerning the rights of the city in the lands, steps were taken to vacate the entire strip in question, which appear to have been regular in all respects. Subsequently various buildings were put up, mostly of a less substantial char-

acter, covering the whole space. The purpose of the vacating was expressed to be for market purposes.

In 1838 the city undertook to lease the premises back of the city hall for railroad purposes to the State internal improvement commissioners. The adjacent lot-owners obtained a preliminary injunction which on a motion to dissolve for want of equity was ordered to stand; and the case is not shown to have proceeded to a final hearing.

In 1873 a proposition to lease by the city the lands just vacated by destroying the city hall and some adjoining land was stayed by a preliminary injunction and never proceeded further. Some other similar proceedings seem to have been dealt with in the same way.

In 1875 the Legislature empowered the city to borrow money to build a central market, and in 1879 a contract was let and the building commenced, which is the subject of the present controversy.

The parties have presented a great many questions very ably and fully. Many of them, in our opinion, are not necessary to the disposition of this case.

It is unquestionable that the lot owners on these streets have valuable rights, and it is not unlikely, in view of other legislation and the peculiar origin of the titles, that they have rights subordinate to the public easement within the street lines. That question, however, is not a vital one here, and need not be considered.

It is not maintainable, as we have frequently decided, that the rights of the public in city streets are any more sacred than elsewhere, or that they cannot be extinguished by legislative authority. In *Devaux v. Detroit*, Har. Ch., 98, and *People v. Jones*, 6 Mich., 176, this was recognized. In *People v. Supervisors of Ingham*, 20 Mich., 95, the power of supervisors under legislative enactment to discontinue state roads was asserted as unquestionable.

The city of Detroit has had granted to it at various

times both general and special authority over these streets. In 1827 (Laws, 182; 2 Terr. Laws, 344) it was given plenary power to entirely remodel that part of the plan in which these premises are situated, and change its whole arrangement, and compel lot-owners to accept money or land compensation as they might elect. The laws in force in 1848 are admitted to have authorized such proceedings as were had, and a succession of charter provisions to that effect existed beyond the special one already referred to. 2 Terr. Laws, 224, 344, 345.

Our general highway laws have provided always for vacating, as well as laying out ways, and for the vacation of public highways by non-user as well as by direct proceedings. We have found no authority, and we think none can be sustained on principle, which holds that when a highway or any part of one has been actually extinguished and turned to other uses, there is any way of renewing it without the same methods of dedication or user which would turn any other lands into public ways. See *Tillman v. People*, 12 Mich., 405; *Field v. Village of Manchester*, 32 Mich., 279; *County of Wayne v. Miller*, 31 Mich., 447.

It is now 45 years since most of the land covered by the new building has been used for highway purposes, and 31 years since the whole strip was taken into the possession of the city under claim of right. Even if the act of vacating could be regarded as conditional, the land would not become a highway again by the suspension of the conditional occupation, whatever else might be the result. But we find nothing in the old city charter which requires the purpose of vacating the highway to be expressed, or which would make the expression of any such purpose obligatory on the subsequent occupation. It was for this particular purpose at least merely a piece of surplusage. See *Hinchman v. Detroit*, 9 Mich., 103.

Occupation of land for such purposes as this land was desired for or applied to, is in no sense an easement.

It is a proprietary occupation as much as if a private owner and not the city had so occupied it. See *Horn v. People*, 26 Mich., 223. And private adverse rights will be barred by the same lapse of time. *Ib.*

Whether the vacated lands strictly belonged to the city or the bordering proprietors, the city in 1848, if not earlier, asserted a title which was proprietary, and which covered the whole premises vacated. There has been no break in the full possession of this land, and no cessation of claim of possession of any of it. All persons interested knew that the city proposed to use it in the first place, and that it proceeded to enforce that user. Whether they were or were not estopped by their acquiescence in the proceedings of 1848 when taken, the statute of limitations long since made the city title impregnable. A peaceable and notorious possession for more than 30 years cannot now be disturbed.

The special allegations concerning the bad effect of the market on neighboring property can have no bearing on this case. It is one of those consequences which if true is a misfortune of locality. But even if pertinent, which it is not, the mischief really complained of is not that a new grievance is created, but that an old one is not stopped. That furnishes no ground of complaint.

We see no grounds on which equitable relief can be asked. The court below dismissed the bill, and we think it committed no error in doing so.

The decree must be affirmed with costs.

The other Justices concurred.

EX REL. SAMUEL GUNZBERG ET AL. v. KENT CIRCUIT JUDGE.

Garnishment of judgment.

Mandamus to compel a circuit judge to stay proceedings for the collection of a judgment was denied where it appeared that he had refused the stay on the ground that the judgment had been assigned before the commencement of the proceedings in garnishment, was subject to a lien for attorney's fees, and was not garnishable by law.

MANDAMUS. Submitted January 23. Denied January 23. The petition alleges that the relators suffered judgment in a suit brought against them by Samuel Miller (see 41 Mich., 90); that afterwards the City Bank of Grand Rapids began suit against Miller and another on a promissory note given by them to the bank, and brought in as garnishees, among others, the relators, who disclosed the recovery of the judgment against them; that they afterwards, upon a showing that Miller was not responsible, moved in the circuit court that he be required to show why proceedings should not be stayed until the final determination of the proceedings in garnishment, and that the judge heard the motion on petition and answer and certain affidavits and denied it on the ground that before the commencement of the proceedings in garnishment, the judgment had been assigned and that the petitioners had due notice of the assignment; that Miller's attorneys had a lien on the judgment for their fees; and that the judgment debt was not garnishable under the statutes of this State.

Simonds & Fletcher for relators.

PER CURIAM. We have examined this application and the relator's brief, and find nothing to convince us that the discretion of the circuit judge was improperly exercised, and the writ of mandamus will be denied.

BENJAMIN H. RUBERTS v. A. L. HATHAWAY AND JOSEPH FINSTERWALD.

Justice's courts—Absence of justice at time for opening court.

Where, on the adjourned day of a cause, a justice was absent half an hour over time in the performance of official duties not pertaining to his judicial office, and on his return, upon defendant's refusal to appear, adjourned the cause in his absence and gave him notice of the adjournment, and on the next adjourned day gave judgment against him in his absence, it was *held* that the judgment must be reversed.

Error to Mason. Submitted Jan. 23. Decided Jan. 23.

ASSUMPSIT. Plaintiff brings error.

Hiram A. Sutherland for plaintiff in error. If there is any reasonable excuse for the absence of a justice beyond the hour appointed for trial, such as engagement in official duties, he may proceed and give judgment, *Hunt v. Wickwire*, 10 Wend., 102; *Barber v. Parker*, 11 Wend., 52; *Cornell v. Bennett*, 11 Barb., 657; *Chamberlain v. Lovet*, 12 Johns., 217; *Wilde v. Dunn*, 11 Johns., 459; *Myer v. Fisher*, 15 Johns., 504; *Baldwin v. Carter*, id., 496.

Fitch & Samuels for defendant in error Finsterwald. As to what constitutes a public office the duties of which will excuse the absence of a justice at the time for trying a cause, see *Bradford v. Justices*, 33 Ga., 332.

MARSTON, C. J. Upon the adjourned day of a cause the justice was absent in the performance of duties as superintendent of the poor. He returned to his office about half an hour after the expiration of one hour from the time to which the cause had been adjourned. The defendant was not then present, but the justice found him near by and informed him that he was then ready to proceed with the trial of the cause. The defendant

refused to appear. The justice then adjourned the case and caused notice to be served on the defendant of such adjournment. On such adjourned day, the defendant not appearing, the cause was tried and judgment rendered against him.

The justice was not absent in the performance of any official duty as justice, but in the performance of the duties of another office held under an appointment of the board of supervisors.

The case does not come within *Stadler v. Moors*, 9 Mich., 268, nor within the reason of that and kindred authorities.

The judgment of the circuit court reversing the justice's judgment must be affirmed with costs.

The other Justices concurred.

---

42 593
107 99

JOHN K. VLIET v. CONRAD WESTENHAVER.

Justice's Court—Jurisdiction—Notice to defendant.

A justice acquires jurisdiction when proper service is made or defendant appears. But the fact of actual notice without any appearance will not give it, and is no reason for refusing or dismissing a writ of certiorari to bring up the proceedings.

CERTIORARI to George B. Willoughby, justice of the peace. Submitted and decided January 23.

S. J. Scott for plaintiff in certiorari.

MARSTON, C. J. It is conceded in this case that the justice acquired no jurisdiction over the defendant, because of a want of proper service, there being no appearance. It is claimed however that the defendant had actual knowledge of the pendency of the suit, and because thereof the writ in this cause ought not to have been

allowed, and if allowed yet ought to be dismissed, as the defendant had another remedy, and a motion to dismiss is made upon these grounds.

The justice can acquire jurisdiction either where proper service has been made or where the defendant appears. Actual notice where there is no appearance will not give the court jurisdiction, and cannot even be considered as a reason for refusing or dismissing the writ of certiorari.

The judgment of the justice must be reversed without costs. *Adams v. Abram*, 38 Mich., 302, 304.

The other Justices concurred.

42 594
72 292

42 594
75 72

42 594
106 129

42 594
135 ^{2}650
135 ^{2}651

42 594
139 ^{1} 68

42 594
d143 ^{2}305

42 594
e157 ^{2}282
157 ^{2}283

EUGENE STEELE v. OLIVE THOMPSON.

Civil Damage Law—Exemplary damages—Liability.

Exemplary damages cannot be imposed on a liquor-seller, under the Civil Damage law, if it does not appear that any request or suggestion had been made to him to refuse liquor to the injured person, or that he knew that the latter had any family.

Damages under the Civil Damage law of Michigan cannot be lessened, nor can the liability be apportioned, merely because the injury was due in part to the acts of others than defendant.

In an action under the Civil Damage law, if the jury do not find that defendant's act in supplying liquor was so closely connected with the injury for which the action was brought as to have been effective in causing it, they cannot find for the plaintiff.

Error to Oakland. Submitted Jan. 7. Decided Feb. 11.

TRESPASS ON THE CASE. Defendant brings error.

Fred P. Watrous and *Crofoot, Burtt & Crofoot* for plaintiff in error.

E. J. Bissell and *F. A. Baker* for defendant in error.

GRAVES, J. The defendant in error brought this action to recover damages under the legislation of 1875 and 1877 to control the disposition of intoxicating drinks in certain cases, and afford remedies for violations of the provisions. Pub. Acts 1875, p. 283, and Pub. Acts 1877, p. 212. The particular matter of complaint was that the plaintiff in error contributed to the loss of Mrs. Thompson's means of support by furnishing her husband with liquor which helped to cause his death. The jury found a verdict for $800 and the defendant alleges error.

It was expressly admitted on the argument that according to the rules of law Mrs. Thompson was entitled, under the evidence adduced to the jury, to recover some amount, but it was contended that the circuit judge allowed the jury to estimate damages on erroneous principles.

The case presents two main grounds for consideration, *first*, the instructions permitted the jury to award exemplary as well as actual damages, and the inference is unavoidable that they found both, and it becomes a question whether the case afforded any foundation for the former; *second*, the circuit judge ruled that, although the catastrophe was helped on through the acts of others in furnishing liquor, still the amount recoverable for actual damages could not be lessened on that account; that there could be no apportionment of the liability among the separate contributors to the injury; and this ruling is questioned.

First as to the allowance of more than actual damages. There is much room for contending that the declaration itself restricts recovery to mere compensation for the loss of means of support incurred by Mrs. Thompson, but it is unnecessary to decide whether that is so or not. The tenor of the evidence is sufficient for the purpose of the point made. According to the case, her husband was an habitual drunkard, and on the afternoon in question carried a bottle in his pocket. During the evening he was sitting in Steele's saloon, Steele himself being

absent and a bar-tender being in attendance. A customer came in, and after some time invited Thompson and another person to drink, and the bar-tender waited upon them and all three then went out. This was about ten o'clock in the evening. Thompson immediately drank at two other places. He carried a lantern and was last seen during that evening going towards the mill, and the next morning he was found drowned in the mill pond. The whole particulars do not require statement. There was no evidence of any request or suggestion to Steele to refuse liquor to Thompson, and the case is silent as to whether Steele was aware that Thompson had any wife or family. We think the case is governed by *Kreiter v. Nichols*, 28 Mich., 496; *Gansly v. Perkins*, 30 Mich., 494, and *Kehrig v. Peters*, 41 Mich., 475, and that no ground was laid for exemplary damages. There was no showing which could be possibly carried further than to authorize a finding of a constructive liability, if any at all.

Second. On this part of the case I think the circuit judge did not err. The question is one of construction, and whatever opinion may have been found in other states, of provisions having some resemblance to ours, we must attend to the sense and spirit of our own enactments and judge accordingly. Now the statute we are considering proceeds upon the idea that there has been an injury which the defendant, by some of the means indicated, has contributed to produce, and that he shall be liable for the whole injury and not merely for such portion as a jury, if able to agree upon any scale of apportionment, may assign as his actual share or quota. Such is the view held by the Supreme Court of Ohio of their statute, of which ours is very nearly a copy (*Boyd v. Watt*, 27 Ohio St., 259); and besides being a natural interpretation, and one which accords with the apparent policy of the legislation, it has the merit of relieving the remedy of much complication and embarrassment.

But, before parting with the question, we deem it

proper to add that in cases of this description it is necessary to bear in mind that the act of a defendant may belong to a class of acts which in their nature are capable of taking place so as to contribute to results of the character of that for which this action is brought, whilst in reality and in reference to the transaction in question it stands so much apart from the catastrophe, either in time or in bearing, or is so small in its causative power in the actual circumstances, as to forbid its being regarded as an actionable fault; and it is essential that the jury look at the alleged act of part cause and compare it with the imputed effect, and then say whether, according to reason, observation and experience, it was so connected with the latter and so near it in influence and of such force as to be seen to have operated as an efficient aid in causing the alleged result; and if they are unable on a common-sense construction of the case to find on this affirmatively they cannot return a verdict for the plaintiff. In dealing with the case we carefully abstain from discussing points not urged.

For the error in permitting exemplary damages the judgment must be reversed with costs and a new trial granted.

The other Justices concurred.

42 597
71 7
42 597
86 560

42 597
105 621

42 597
108 318

JOHN W. KING v. THOMAS M. HUBBELL.

Attachment of mortgaged chattels—Right of possession—Good faith of mortgage—Execution sale.

A man began business on money borrowed from his father shortly before, and although neither had reason to suppose he had made money, the father sold him at par a quantity of worthless railroad stock, took a mortgage on his stock in trade for an amount that would have nearly exhausted it, and left him in possession

to sell the goods in the course of business. The goods were seized on an attachment by the son's creditors and the father brought replevin for them. *Held* that on these facts the case should have gone to the jury on the question of the good faith of the mortgage.

The fact that part of a mortgage debt is valid and unquestioned does not necessarily preclude any question as to the good faith of the mortgage.

It is a badge of fraud if a chattel mortgage is given and received for much more than is due the mortgagee; and it is fraud in law if the purpose is to protect the debtor's interest from other creditors.

Under Comp. L., § 6401, personal property covered by a mortgage may be taken on an attachment against the mortgager.

It is not a condition precedent to the sale on execution of property mortgaged by the defendant therein, that the execution creditor should have paid off the mortgage and thus acquired the mortgager's interest.

Where execution is levied on mortgaged chattels, sale must be so made as to preserve the mortgagee's lien; the property cannot be sold in parcels, but must be sold altogether, subject to the mortgage.

Where mortgaged chattels are attached in a suit against the mortgager, the rights of the attachment creditor and of the mortgagee must be protected as far as possible without interfering with each other. The officer need only take temporary possession for the purpose of making an inventory and appraisement, which perfects his lien, and his right to take such possession cannot be defeated by any stipulation in the mortgage that the mortgagee may take possession when he deems himself insecure. But the mortgagee has the first lien, and having a right to foreclose at a definite time, is entitled to possession, which the officer should then surrender to him on demand unless he believes the mortgage to be fraudulent or satisfied, in which case he may refuse to recognize it. If he surrenders it, the mortgagee must also respect the subsequent lien, and the mortgager's release to him would be ineffectual.

Where a mortgagee secures future liabilities and the mortgaged property is attached, the creditor increases his demands at his peril, for the attachment is of the mortgager's interest as it then stands, and he cannot diminish that interest to the creditor's detriment.

Authority from the mortgagee of chattels to the mortgager to go on and make sales of the mortgaged goods in the usual course of business would be ended by the levy of an attachment on them.

Error to Iosco. Submitted Jan. 8. Decided Feb. 11.

REPLEVIN by Hubbell for goods seized by King under a writ of attachment. Hubbell claimed them under a chattel mortgage given him by his son two days before the attachment issued, to secure him for indorsements and for the purchase price of a quantity of railroad stock which he had shortly before sold his son at par. The goods constituted the latter's stock in trade. Plaintiff recovered and defendant brings error.

Seth G. Huckins, Horace E. Burt and *Atkinson & Atkinson* for plaintiff in error.

D. P. Foote and *Benton Hanchett* for defendant in error.

COOLEY, J. We are not satisfied that the circuit judge was justified in taking this case from the jury on the facts. It cannot be said that there were no facts and circumstances in evidence calculated to cast suspicion on the *bona fides* of the mortgage. The mortgagor was the son of the plaintiff below, and according to his own evidence had started in business on money borrowed from the plaintiff but a short time before, and there is nothing in the case to show that either father or son had reason to believe that the son had made money in his business. Under these circumstances that the father should sell to his son $1500 of railroad stock at par when it had no market value, and apparently no intrinsic value, and take for it a mortgage on his son's stock in trade, was certainly a very extraordinary transaction, and might have been expected to result as it did, in the father soon claiming the goods on his mortgage, while the parties who supplied the goods on credit were left to look to the worthless railroad stock for their satisfaction. The trade may have been perfectly honest, and it is not our province or intention to raise any question of that; but if a jury were to conclude that it was entered into for the purpose of relieving the father of his railroad investment at the expense of the son's creditors, it could not be said that there were no cir-

cumstances favoring that view. This, and some other circumstances which we need not refer to, fairly entitled the defendant to go to the jury on the facts.

The circuit judge was laboring under a misapprehension when he assumed that if any portion of the mortgage debt was valid and unquestioned, that fact must put an end to all controversy as to the validity of the mortgage. That fact would by no means preclude the *bona fides* of the mortgage being called in question. This mortgage was upon a merchant's stock in trade; and the nominal amount seems to have been sufficient to exhaust the stock or nearly so. It was sufficient, at any rate, to deter creditors from any attempt to collect their debts unless they believed they could successfully assail its validity. If the mortgage was in fact given and received for any considerable sum more than was fairly and honestly due to the mortgagee, this of itself would be a badge of fraud, and if the purpose was to keep the debtor's interest in the goods from being reached by other creditors, it would be fraud in law. And the fact that the debtor was allowed to remain in possession of the goods and make sales in the ordinary course of business would be a circumstance tending to show that the mortgage in its inception had a purpose beyond securing the mortgagee's demand. And this view would be strengthened rather than weakened by the plaintiff's explanation of his claims on his son; for this, if accurate, would show that the son must from the very start have been unable to meet his engagements, and that any credit which his father's assistance to him gave was deceptive.

The principal question in the case, however, is whether personal property covered by a chattel mortgage is subject to be taken on attachment against the mortgagor. The circuit judge held that it was not.

No question is made that property thus situated is subject to be taken in execution. The statute expressly

provides that "when goods or chattels shall be pledged by way of mortgage or otherwise, for the payment of money, or the performance of any contract or agreement, such goods or chattels may be levied upon and sold on execution against the person making such pledge, subject to the lien of the mortgage or pledge existing thereon" (Comp. L., § 6097); and although the statute provides further that the execution creditor may pay off the mortgage or satisfy the terms and conditions of the pledge, and thereby acquire the interest of the mortgagor or pledgor, yet this is not intended to be and is not a condition precedent to an execution sale. *Cary v. Hewitt*, 26 Mich., 228.

But it is contended on behalf of the plaintiff below that this statute is expressly limited to levies and sales on execution and cannot be extended by construction; that a levy by virtue of an attachment is not within its terms, and if the statute were by construction extended to cover the case, the levy would be wholly inconsistent with the legal interest of the mortgagee or pledgee, and in many cases would result in serious injury to if not destruction of his lien. The levy of an execution must be followed immediately by a sale, and can therefore only displace the mortgagee's or pledgee's right to possession for a brief period, and at most only subject him to temporary inconvenience. On the other hand it is justly said that when property is seized upon attachment the law fixes no time within which it must be brought to sale, and it may never be brought to sale, as judgment may never be rendered against the defendant. If the officer can detain the property after a breach of the condition of the mortgage, and after demand therefor, there is no practical limit to the time he may detain it, since the parties to the suit—in which the mortgagee cannot be heard—may delay a judgment as long as they please.

There is much force in these objections. In *Lyon v. Coburn*, 1 Cush., 278, which is cited in support of a

strict construction of the statute, it was held that a statute authorizing the levy of an attachment on mortgaged chattels would not justify their being taken in execution. But as an attachment would be worthless unless it conduced in some manner to the collection of the debt for which it was levied, it may be doubted if the court would have so held if it had not appeared that under the laws of Massachusetts there were other means of rendering the levy available. It was in fact found that the intent of the legislature in permitting the mortgaged property to be attached could be fully effectuated, without extending in the least its express terms.

But the attachment law of this State expressly provides that the writ of attachment "shall command the sheriff, or other officer to whom it may be directed, to attach so much of the lands, tenements, goods, chattels, moneys, and effects of the defendant not exempt from execution, wheresoever the same may be found within the county, as will be sufficient to satisfy the plaintiff's demand." Comp. L., § 6401. The case is therefore clearly within the terms of the statute; for if the section is applied literally, and according to its apparent meaning, the officer has only to look for property subject to execution, and he may attach whatever he finds. It is said, however, that this provision came into our law in 1846, while the statute authorizing a levy on mortgaged property was only passed in 1861, and that the former must be construed in the light of statutes regulating levies on execution when it was adopted. But as this very provision in the attachment law was amended and re-enacted in 1869, the argument that might otherwise have been plausible falls to the ground. It plainly, as we think, intends that whatever is subject to execution is subject to attachment also.

We fully appreciate the difficulties that may arise in protecting the interest of the mortgagee when the levy of attachment is made; but it is not uncommon that a statute giving a new or further remedy introduces sim-

ilar difficulties. If a new or further right is clearly given, it becomes the duty of the court to give effect to the legislative intent with as little disturbance as possible to the rights of others, and to harmonize all so far as may be practicable. Even in the case of execution levies, it has been found that the peculiar relations of the parties to the property would necessarily modify the officer's course of proceeding to a sale, and that he must so sell as to keep intact the mortgagee's lien. This he could not do if he sold the property in parcels; and he must therefore sell the whole subject to the mortgage. *Worthington v. Hanna*, 23 Mich., 530; *Haynes v. Leppig*, 40 Mich., 602.

The difficulty that the levy by attachment introduces is, that it may be a long time—perhaps several years—before a judgment will be obtained and execution issued, and the mortgagee's interest must be seriously impaired or perhaps destroyed if in the meantime he is excluded from possession. And it is not clear that the mortgagee, when the mortgaged property is taken from the mortgagor, can have it returned to him on giving bond; for the statute appears to contemplate the giving of a bond for that purpose only by "the defendant or any other person in whose possession such property may have been found." Comp. L., § 6409. But we do not think that it is absolutely essential for the purposes of his levy that the officer should take more than a temporary possession. It is true that the statute apparently contemplates that he shall do so in all cases (Comp. L., § 6402); but as is said above, the various provisions of the statute must be so harmonized as to protect all rights; and when the officer's possession, if taken, must continue indefinitely, it is clear that the mortgagee's rights cannot be fully protected if such provision is allowed.

There is no doubt of the right of the officer to take possession of the property so far as may be necessary for the purposes of an inventory and appraisement. This establishes and perfects his lien, and no provision

in the mortgage whereby it is stipulated that the mortgagee may take possession when he deems himself insecure can defeat this right. *Wing v. Bishop*, 9 Gray, 223. If the officer believes the mortgage to be fraudulent or satisfied, he may then refuse to recognize it (*Angier v. Ash*, 26 N. H., 99); but if he concedes its validity, it will not be necessary for his protection that he should retain possession. The mortgagee, as having the first lien, and as being entitled to foreclose it at a definite time, is fairly entitled to the possession, and the sheriff should surrender it on demand. But the levy must necessarily to some extent modify the mortgagee's rights. He must respect the subsequent lien in whatever he shall do in regard to the property afterwards. A release by the mortgagor to him afterwards would of course be ineffectual. *Wentworth v. Leonard*, 4 Cush., 414. And if the mortgage is given to secure, wholly or in part, liabilities to accrue thereafter, the creditor would at his peril increase his demands further; for the attachment is of the mortgagor's interest as it then stands, and he can have no power to diminish that interest afterwards to the creditor's detriment. *Ladue v. D. & M. Railroad Co.*, 13 Mich., 380. And in respect to anything done by the mortgagee afterwards which would injure the lien of the attaching creditor, the latter, or the officer representing his interest, would be entitled to whatever remedy would be appropriate.

The case does not call for any further discussion of the relative rights of the parties, and it would be premature to assume to anticipate difficulties. We think the property was attachable, because the statute makes it so. But we also think that, unless the attaching creditor disputed the validity of the mortgage, the officer was under obligation to surrender possession to the mortgagee on demand, after his inventory and appraisal were completed. From that time the respective parties must each so assert and exercise their rights as not needlessly to injure the interest of the other. Of course

any authority in the mortgagee to permit the mortgagor to go on and make sales in the usual course of business would be terminated by the levy of attachment.

These views are to some extent foreshadowed in *Haynes v. Leppig*, 40 Mich., 602, to which we refer.

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

The other Justices concurred.

JOSEPH SAGER v. NELSON TUPPER, LORENA J. TUPPER AND EDWIN H. TUPPER.

Evidence—Weight given to conclusions of trial judge—Reversal of decree—Signatures by proxy.

The conclusions of the trial judge as to the preponderance of evidence are entitled to respect where the testimony was taken out of court, and is evenly balanced.

A decree should not be reversed unless the appellate court is satisfied that it is wrong.

A signature to a note made in the owner's presence and by his direction is sufficient.

Appeal from Kalamazoo. Submitted January 9. Decided February 11.

FORECLOSURE. Complainant states that the mortgage was given by defendants Nelson and Lorena J. Tupper to secure two promissory notes made by Nelson and Edwin H. Tupper, one for $1100 and the other for $400. Defendants answer that the notes and mortgage were obtained as follows: Complainant desired to sell defendant Nelson Tupper a lot of old mill-irons and machinery in a saw-mill of his that had lately burned down, and it was finally agreed between them that if defendant would take them for $1100 complainant would also fur-

nish him with enough new irons and machinery to place them in good running order and would put them in a mill which defendant was to build, and would also furnish them with an oscillating pitman to run the saw in the new mill, and if the engine was insufficient to supply the necessary power, would procure a new one. He consented to take in security a mortgage on the mill for $1100, of which sum he would receive a large portion in sawing and lumber. Defendant proceeded to put up his mill, but failing to obtain the money necessary to complete it was about to abandon it when complainant promised to get the money for him if he would give him a mortgage on his land. Tupper assented, and Sager raised $400, which he proposed to include with the $1100 due for machinery, in one mortgage, but Tupper objected, finally consenting, however, in consideration of Sager's promise to release the land when the mill was completed, and to leave only the mill property encumbered. After the mill was ready for the machinery and mill-irons, Tupper gave Sager notice to furnish them, but Sager neglected to do so, and Tupper finally got them by his consent at his own expense. Sager only put in a main shaft and the oscillating pitman, which latter contrivance Tupper could not manage, and as it afterwards broke, he had to procure other machinery to replace it. Complainant alleges that Sager had brought suit at law on an alleged account containing the items for which he was secured by the notes and mortgage. See *Sager v. Tupper*, 38 Mich., 258. He also sets forth that he has done $250 worth of sawing for complainant and had asked the latter to indorse the amount upon the mortgage, but that complainant had neglected and refused to do so. He also demanded a release of the mortgage according to agreement, after the mill was in running order, but complainant had refused it. He claims that he has been injured by complainant's course to a greater amount than the indebtedness, and accordingly asks that the notes be cancelled and the mortgage discharged of record.

Defendant Edwin H. Tupper afterward asked leave to amend his answer by an averment that the notes were signed by Nelson and not by himself. The motion was denied, but at a later stage in the case was granted, and a motion by complainant to vacate the order allowing the amendment was denied. The bill was dismissed as to Edwin on the amended answer, but a decree was rendered against the other defendants for the amounts due and unpaid on the notes and mortgage, but with an allowance of $500 in recoupment of their damages. Complainant appeals.

Edwards & Sherwood for complainant.

Oscar T. Tuthill for defendants.

MARSTON, C. J. We have no doubt whatever but that Nelson Tupper signed his son Edwin's name to the notes in question, in his presence and under his direction.

As to whether Sager agreed to make any repairs to the mill-irons, or assist in putting up the mill, or to furnish an oscillating pitman and other articles, there is some doubt. The defendants testify positively that such was the agreement, and they are corroborated by a number of witnesses, and it would be very difficult indeed as to many of them to assign any motive they could have in coloring or shaping their testimony in the defendant's interest. If such was the agreement, that there was a breach thereof is clearly proved.

The complainant is very clear and positive in his statement that he made no such agreement, and he also is corroborated by reputable witnesses who testify to admissions made by the defendants.

Under such circumstances much respect and weight should be given to the opinion and conclusion of the learned circuit judge, who we may well assume was at least acquainted with some of the principal witnesses, although the evidence was not taken in open court. At all events the decree below should not be reversed unless we are satisfied that it is erroneous.

There are some things in this case which seem to lend considerable weight to the theory of the defendants. Their claim is that complainant was to furnish the machinery of the burned mill, besides other mill machinery he had in Allegan, to make a geared mill. He was also to furnish and do certain other things which need not be here enumerated.

The complainant's version was that Nelson Tupper and one Ingersoll came to him for the purpose of looking at the burnt mill-irons, with a view to a purchase thereof; that they went into the grounds and looked them over; examined the irons. "Mr. Ingersoll asked me what my price for the irons would be *as they lay on the ground. I told him I would take $1200 for them.* * * * Nelson Tupper told me before they left there that they (the Tuppers) would like to purchase the irons and build a mill on their premises, and I told him before Ingersoll if he would buy the mill-irons and put the mill on his premises, for the sake of having a mill there in the neighborhood, I would let them have it for a hundred dollars less."

There is no dispute but that eleven hundred dollars was the price agreed upon, and complainant concedes that he was to put in part of the Allegan machinery.

Complainant's version that he asked $1200 and agreed to take from defendants $100 less for the irons of the burnt mill "as they lay on the ground," is not correct. The Allegan machinery neither of defendants had at that time seen and, to say the least, it would have been somewhat difficult, with the knowledge these parties then had, to have specified what other machinery should be added, as it is conceded there was to be, except as claimed by defendants, what would be necessary to "make a geared mill."

There are many facts and circumstances pointing to a conclusion that all the machinery required for a complete mill of the kind or class to which this belonged was bargained for, and that it was not contemplated by any of the parties that the defendants would have to

purchase any other or additional machinery to complete their mill, or be at any considerable expense farther than the erection of the necessary mill building. We also think the weight of testimony shows that the idea of an oscillating pitman originated with the complainant; that he agreed to put one in, and that the one put in was a failure. Under the evidence in this case we are of opinion that the decree of the court as to this part of the agreement and the reduction to be made on account thereof, should not be disturbed. That part of the decree dismissing the bill as to Edwin Tupper must be reversed, and a decree will be entered in favor of complainant and against all the defendants, for the amount found due by the court below, with interest at ten per cent, to be paid within ——— days from the date hereof, and in default thereof that the mortgaged premises be sold, with costs to complainant.

The other Justices concurred.

MARY TWOGOOD v. MARGARET HOYT AND ELIJAH HOYT.*

42 609
66 337

42 609
102 432

42 609
106 147

42 609
150 2224

42 609
1145 2124
145 2210

Ejectment—Testimony impeaching recorded plat—Riparian lands may be platted to the channel bank—No recovery of lands not described.

The title to property claimed under a recorded plat cannot be unsettled by the testimony of a surveyor who had scaled the plat, that the scale was incorrect.

Where streets have been opened, used and acquiesced in by the parties interested, or by the public authorities, they become permanent boundaries and form new starting points for later surveys.

In Michigan the proprietor of lands bordering on a meander stream owns to the center of the stream, and in platting his lands may extend his plat to the channel bank.

In ejectment the plaintiff cannot recover lands not described in his declaration.

Testimony that defendant in ejectment had put plaintiff's grantor in possession of the premises sought, as the premises described in his deed, would be admissible as tending to show the location of the lands described in the declaration, but not to support a recovery of other lands than those therein described.

Evidence that the owner of land had intended in platting it, that streets laid out by some other plan to which his own was an addition, should at some time be extended, and had laid out certain lots with reference to such streets, and that the streets had been extended, is admissible in an action of ejectment as bearing upon the true location of the lands described in the declaration.

The location of lands claimed in ejectment is a question of fact for the jury, and may be proved by any kind of evidence that would be admissible to prove any fact.

Error to Calhoun. Submitted Jan. 15. Decided Feb. 11.

EJECTMENT. Plaintiff brings error.

John C. Patterson and *Wm. H. Brown* for plaintiff in error. A plat is made part of a deed by reference, *Morgan v. Moore*, 3 Gray, 319; *Davis v. Rainsford*, 17 Mass., 211; *Johnstone v. Scott*, 11 Mich., 239: 2 Washb. R. P., 638; no survey can be correctly based on anything but the plat, *Bower v. Earl*, 18 Mich., 376; the testimony of an expert who has scaled a plat is admissible to show that the scale is incorrect, 1 Greenl. Ev. (Redf. ed.), § 301, p. 347, n; courses and distances on a plat are to be regarded in ascertaining the true description of premises, *Cook v. Hillsdale*, 7 Mich., 115; *Watson v. Peters*, 26 Mich., 508.

W. S. Geer and *Miner & Stace* for defendants in error. A description in a deed is controlled by the most certain calls, *Cudney v. Early*, 4 Paige, 209; *Jackson v. Camp*, 1 Cow., 605; *Doe v. Thompson*, 5 Cow., 371; if sufficient particulars are fixed to designate the grant, it will not be defeated by the addition of a false indication, *Jackson v. Clark*, 7 Johns., 217; the natural or artificial monuments or boundaries primarily control the plat, and distances will be lengthened or shortened to conform to

them, *Bruckner's Lessee v. Lawrence*, 1 Doug. (Mich.), 19; *O'Farrel v. Harney*, 51 Cal., 125; *Fleischfresser v. Schmidt*, 41 Wis., 223; the parties to a deed that refers to a plat are bound by the plat, *Thomas v. Patten*, 13 Me., 329; riparians own to the thread of the stream, *Dovaston v. Payne*, 2 Sm. Lead. Cas., 216; *Varick v. Smith*, 9 Paige, 547; *Luce v. Carley*, 24 Wend., 451; *Norris v. Hill*, 1 Mich., 202; *Lorman v. Benson*, 8 Mich., 18; *Rice v. Ruddiman*, 10 Mich., 125; the location of a monument outside of a city block cannot be shown to control the subdivision of the block, *Ginn v. Brandon*, 29 Ohio St., 656; *Behler v. Weyburn*, 59 Ind., 143; a surveyor's opinion will not confer title or control the construction of a plat, *Stewart v. Carleton*, 31 Mich., 270; the proper boundary of a lot is a question for the court, to be settled by inspection of the deed, *Clark v. Wagoner*, 70 N. C., 706; *Abbott v. Abbott*, 51 Me., 576; recovery in ejectment cannot be had for premises not described in the declaration, *Cain v. Hunt*, 41 Ind., 466; *Fenwick v. Floyd*, 1 Harr. & Gill., 172; nor can it be maintained against parties not in possession of the land in dispute, *Van Horne v. Everson*, 13 Barb., 526.

MARSTON, C. J. The plaintiff brought ejectment to recover "a piece of land four rods front and rear and of equal width across block one hundred and one, next to and adjoining lot twenty-one, on the north of said lot twenty-one, in said block one hundred and one, on the Warner addition to the village of Albion, according to the recorded plat thereof. It being understood to convey a piece of land four rods by eight rods formerly sold by Margaret Morgan to Eunice Pryor and designated on said plat as lot number twenty-two in said block one hundred and one." That the plaintiff proved a record title to lot twenty-two was not controverted on the trial, the dispute in fact being as to the proper location of said lot, and the defendants claiming that they were not in possession of the premises described in the plaintiff's declaration.

A memorandum on the margin of the plat under which plaintiff claimed, stated that "the lots are four rods by eight, except fractions and subdivisions. The streets are four rods wide except Erie street,—that is six rods wide. Scale, eight rods to an inch." The plaintiff claimed that a number of the lots in the block in question were less than four rods in width, and this he sought to show by a surveyor who had scaled the original plat.

This clearly was correctly excluded. Parties would hold their lands in cities and villages by a very uncertain tenure if the proper location thereof was dependent upon such evidence. No matter what scale a map or plat may be drawn to, it can rarely be sufficiently accurate to be used for any such purpose. The errors, inaccuracies or unskillfulness of the draughtsman cannot be permitted to change or affect the rights of parties. The width of a line upon the plat, where drawn upon a scale of eight rods to an inch, would be quite material, and we would be quite likely to find one lot fall short while the next would exceed the average or proper width. It is also well known that lands have been laid off into lots and blocks and platted, before being cleared, and that by reason of inequalities in the surface of the soil, logs and other obstructions, strictly accurate surveys were not and could not be made at the time. Where the blocks and streets were staked out at the time, no very serious inconvenience could arise, as such monuments would be fixed and permanent, leaving the excess or shortage in any particular block to be dealt with by itself. So where the streets, although not so designated, have by the parties interested or by the public authorities been opened, used and acquiesced in, they thereby become permanent boundaries, and form new starting points in subsequent surveys of the premises.

A survey was made in this case for the purpose of locating the premises. It was made upon the assumption that the owners when platting could not have platted up to the channel bank of the river, but only to the

meander line thereof. The plat did not purport to stop at the meander line, nor was there any showing made that such was in fact the case, farther than as claimed by the plaintiff, that the proprietors did not own the legal title up to the channel bank, and could not therefore have platted it. This however was an erroneous theory. The law is well settled in this State that the proprietor of lands bordering upon a meandered stream owns to the center of the channel, and that in platting his lands he may plat up to the channel bank.

Evidence was sought to be introduced to show that the defendant Margaret Hoyt, through whom plaintiff claimed title, had put plaintiff's grantor in possession of the premises in dispute, at the time of the conveyance thereof, as being the premises described in the deed. In certain cases such evidence would be admissible, while in others it clearly could not be. No person could claim under a deed describing lands according to the governmental subdivision, and bring ejectment therefor, and be permitted to recover an entirely different description by proof showing that his grantor, the defendant, had put him in possession of the premises sought to be recovered, as and for those described in his deed. In ejectment, the plaintiff cannot recover lands that are not described in his declaration. The evidence offered upon this point would however be admissible as tending to show the location of the lands described in the declaration. So it would have been proper to show, for the same purpose, that the proprietors when platting intended that certain streets laid out according to some other plan to which this was intended as an addition, should or might at some time, be extended, and that certain lots were laid out in front of, and of the width of such streets, or over which the same were to be extended, and that such streets had been so extended.

The proper location of a designated lot is a question of fact for the jury. There is no ambiguity apparent on the face of the deed; the description is full, clear

and specific, and the question is one of location of the premises described, which may be proved by any kind of evidence which is competent to prove any fact. 3 Washburn on Real Property, 348; *Purkiss v. Benson*, 28 Mich., 540.

All the evidence fairly bearing upon this question should be submitted to the jury. As this was not done the judgment must be reversed with costs, and a new trial ordered.

The other Justices concurred.

JASPER N. MCKAY v. HENRY KILBURN.

Estoppel by judgment—Creditor's right to intervene for fraud.

A judgment in replevin against an officer holding goods under an attachment, does not estop the same or prevent any other officer from levying execution on the same goods in a different suit brought by another creditor of the party against whom the attachment was issued, where such creditor had had no interest in the replevin suit nor right to intervene therein. Nor would it be conclusive of the title as against a purchaser at the execution sale.

A sheriff in making levy and sale merely exercises a power in the interest of a party whose writ is delivered to him for execution; and a purchaser at the execution sale does not stand in the sheriff's right, but is the privy of the party under whose execution the sale was made.

Fraud in a sale by a debtor is a matter as to which only attaching creditors have any legal interest in the trial of it in a replevin suit by the purchaser against an officer holding under the attachment, even though the latter had collusively suffered judgment: and no other creditors could have their rights conclusively determined by the result of such a suit.

Appeal from Huron. Submitted Jan. 15. Decided Feb. 11.

REPLEVIN. Plaintiff brings error.

George S. Engle and *J. C. Shields* for plaintiff in error. Judgment in an action for the recovery of specific property may be pleaded in bar to a suit for the same property or its value where no new right has been acquired by the plaintiff, *Owens v. Rawleigh*, 6 Bush, 656; *Prentiss v. Holbrook*, 2 Mich., 372; judgments *in rem* are binding not only upon parties and privies but upon strangers, *State v. Cent. R. R.*, 10 Nev., 47; *Woodruff v. Taylor*, 20 Vt., 65; 1 Greenl. Ev. (Redf. ed.), § 525, n; Herman on Estoppel, § 103; where there is perfect identity in both suits as to the plaintiff's right and damages and defendant's wrong, the record of the former is a complete bar whether pleaded as an estoppel or put in evidence, *Jones v. Lavender*, 55 Ga., 228; even though the subject matter of the suits differs, judgment on a particular point is conclusive, *Wales v. Lyon*, 2 Mich., 282; *Hudson v. Smith*, 39 N. Y. Sup'r Ct., 454; *Kingsland v. Spalding*, 3 Barb. Ch., 341; *Hardy v. Gascoignes*, 6 Port. (Ala.), 447; *Evans v. Birge*, 11 Ga., 265; a purchaser pending suit is bound by a decree against the holder of title, Herman on Estoppel, § 58; *Thurston v. Spratt*, 52 Me., 202; *Castle v. Noyes*, 4 Ker., 329; and is privy to him, *Hunt v. Haven*, 52 N. H., 162; *Doty v. Brown*, 4 Comst., 71.

Winsor & Snover and *H. B. Carpenter* for defendant in error. In executing writs of different creditors the sheriff is an agent for each, *Davidson v. Dallas*, 8 Cal., 227; Herman on Executions, 222, 463; *Wickliff v. Robinson*, 18 Ill., 145; 3 Pars. Cont., 11, n. 8; in order to determine whether a past judgment is a bar to another suit, one must consider whether the subject matter of a suit has been in issue and adjudged before, between the same parties or their privies in the same right, by a court of competent jurisdiction to decide the whole controversy, *Bigelow v. Winsor*, 1 Gray, 299.

COOLEY, J. The only question of importance in this case is one of estoppel by judgment.

The action is replevin for a span of horses and a set of harness. The plaintiff claims title to the property through successive purchases from the Alpena Salt & Lumber Company, the former owner. The defendant claims that the sale by that company was fraudulent and void as against its creditors, and that one William Ward, a creditor, afterwards levied upon the horses and harness as the property of the company, by virtue of an execution issuing out of a justice's court, and caused them to be sold on the execution by William H. Merrick, sheriff of Huron county, and that defendant has acquired the right of the purchaser at such sale. To meet this defense the plaintiff attempted to show that previous to the sheriff's sale just mentioned the sheriff had had the same property in possession under another attachment against the Alpena Salt & Lumber Company, and that the plaintiff had replevied it from the sheriff, claiming it as his own, and in the replevin suit had established his title and recovered judgment. This judgment, he insisted, would estop the sheriff and any one subsequently claiming under a purchase at a sale made by him, from disputing his title. The circuit judge held otherwise, and rejected the evidence of the former suit, and judgment passed for the defendant on the issue of fraud in the sale under which the plaintiff claimed.

A few dates are important to an understanding of the legal question, but some of them do not appear to be brought into the case by any proofs, and the circuit judge in his charge no doubt proceeded in part upon facts orally agreed upon by the parties as uncontested. The following appears to be the sequence of important events:

The property was first seized by Merrick, the sheriff, on an attachment against the Alpena Salt & Lumber Company, issued at the instance of George W. Hill and others. Jasper N. McKay, the plaintiff in this suit, then replevied it, claiming it as owner under a previous sale made by the Salt and Lumber Company. While that

replevin suit was pending, the sheriff again seized the property under an execution against the Salt & Lumber Company in favor of William Ward, and proceeded to make sale thereof, and one Carrington became purchaser, and transferred his title to Kilburn, the defendant in this suit. The replevin suit of McKay against Merrick was tried in January, 1877, and resulted in verdict and judgment for the plaintiff. McKay then again replevied the property from Kilburn, and it is this second replevin suit that is now before us.

Is the judgment in favor of this plaintiff against the sheriff conclusive of the plaintiff's title as against a party claiming by purchase at a sheriff's sale under the circumstances? The plaintiff claims that it is, because any such purchaser must necessarily stand in the right of the sheriff, and can acquire no better right than the sheriff himself would have had, if the property had remained in his possession when the judgment was rendered against him. It is to be observed, however, that Kilburn was in no manner a party to the suit instituted by McKay against the sheriff, and had no right to intervene in that suit, or to be heard therein in any way. Neither was the sheriff in any manner his representative or agent in that suit; but the whole proceeding was one to which in law he was an entire stranger. The question of fraud involved in the sale under which McKay claimed was necessarily a question of interest to all the creditors of the Salt and Lumber Company, but none of them except the attaching creditors had any legal interest in the trial of it in that case, or could possibly have except through the institution of new proceedings. It seems difficult to understand, therefore, how any other creditors could have their rights conclusively determined by the result of the replevin suit against the sheriff, when not one of them could be heard in it, or could legally control or in any way shape its course. Indeed, had the sheriff collusively suffered judgment to pass against him in that case, only the attaching creditors

could have had any ground of action, or any legal right to complain of his conduct.

On the other hand, when Ward caused his execution to be levied, a new party in interest appeared. The sheriff in making levy acted not in his own right or his own interest, but as the agent, in the interest and under the orders of Ward. The judgment on which that execution issued was rendered by a justice of the peace, and execution might have been issued to and served by a constable. Had it been so issued and served, it will not be pretended that the constable or any one claiming the property at constable's sale, would be bound by a judgment in the replevin suit against the sheriff: but there would be quite as much reason why he should be, for the constable and the sheriff in serving the same writ would stand upon the same right, and the accidental circumstance that the one officer instead of the other was invited to serve the execution can make no difference whatever with the rights of Ward or of any one claiming rights under the sale made in his interest.

The error of the plaintiff consists in his assuming that the defendant claims in the right of the sheriff, and stands in the position of privy to him. In fact the sheriff, in making the levy and sale, is exercising a power merely, and acting in so doing in the interest of the party whose writ is delivered to him for service.

The defendant in this case is the privy of Ward, under whose execution he purchased. Ward's levy was made before the judgment against the sheriff, but as the case stands it is not important to consider what influence, if any, that fact might have had upon the case had the sheriff been a party to both suits. The circuit judge was clearly right in holding that the judgment in the suit of McKay against the sheriff was a matter foreign to this controversy. The right acquired by Ward's levy, which is the right involved here, was not and could not have been tried in the other case.

The case has no analogy to proceedings *in rem* in

which all parties interested have a right to intervene. *Hunt v. Haven*, 52 N. H., 162, referred to in the brief of plaintiff, fully covers the ground of our decision, and supports our views.

The judgment must be affirmed, with costs.

The other Justices concurred.

CHARLES D. BLANCHARD v. GEORGE W. POWERS.

42 619
75 186

Tax-titles—Impeachment of supervisor's certificate of valuation.

The validity of a tax-title, especially if it be of long standing, cannot be impeached in an action of ejectment against the holder by parol evidence to show the falsity of the supervisor's certificate of valuation attached to the assessment roll.

The absolute illegality of a tax may be shown in proceedings to enforce it, and it cannot be cured by proof that if the valuation had been correct, the tax would have been legal.

A supervisor's official certificate of valuation is legal evidence in Michigan in collateral proceedings involving the validity of the tax, and cannot be contradicted by parol evidence.

It is the policy of the law in Michigan that after the holder of a tax-title has recorded it and held possession for many years, the holder of the original title cannot question the tax-title in collateral proceedings as in an action of ejectment.

Error to Kent. Submitted Jan. 16. Decided Feb. 11.

EJECTMENT. Plaintiff brings error.

Henry M. Duffield for plaintiff in error. All assessments on property shall be at its cash value, Const., art. xiv., § 12; *Motz v. Detroit*, 18 Mich., 517; the supervisor in assessing land is confined to the mode prescribed by law, *Treadwell v. Com'rs*, 11 Ohio St., 183; *Com'rs v. Cox*, 6 Ind., 403; *Hoover v. Hoover*, 5 Blackf., 182; *White v. Conover*, id., 462; *Murphy v. Napa County*, 20

Cal., 497; *Church v. Hubbart*, 2 Cr., 187; *Bank of Augusta v. Earle*, 13 Pet., 587; *Thomson v. Lee County*, 3 Wal., 327; statutes for the assessment and collection of taxes are mandatory in what they prescribe for the protection of tax-payers, *Clark v. Crane*, 5 Mich., 151; *Smith v. Crittenden*, 16 Mich., 152; *Wall v. Trumbull*, id., 228; *Case v. Dean*, id., 12; *Scofield v. Lansing*, 17 Mich., 437; *Hoyt v. East Saginaw*, 19 Mich., 39; a tax assessed on any but a cash valuation is void, *Schettler v. Fort Howard*, 43 Wis., 48; *Hamilton v. Fond du Lac*, 25 Wis., 490; *Milwaukee Iron Co. v. Hubbard*, 29 Wis., 51; *Hersey v. Supervisors*, 37 Wis., 75; *Marsh v. Supervisors*, 42 Wis., 509.

Mark M. Powers for defendant in error. The certificates required of an officer in the performance of official duty are to be taken as true in the proceeding in which they are made and cannot be attacked collaterally, Cooley on Taxation, 195-6; *Brown v. Davis*, 9 N. H., 81; *Eastman v. Bennett*, 6 Wis., 243; *Benjamin v. Hathaway*, 3 Conn., 530; *Saxton v. Nimms*, 14 Mass., 314; an agreement among the assessors of a district to assess property at about one-third its value, if faithfully carried out, is not unjust to the tax-payers and furnishes no ground for restraining the collection of the tax, *Dean v. Gleason*, 16 Wis., 1; parol evidence was admitted to contradict a sheriff's return in a bill to enjoin the collection of an execution (*Owens v. Ranstead*, 22 Ill., 161) but not in a proceeding to divest the title of third persons obtained many years before in reliance on a judicial decree, *Rivard v. Gardner*, 39 Ill., 129; neglect to have the tax-roll corrected amounts to acquiescence in the assessment, *New Orleans v. Rousseau*, 11 La. Ann., 195; if errors are not pointed out in the mode and within the time prescribed by law, the assessment will be enforced, *State v. Louisiana Mut. Life Ins. Co.*, 19 La. Ann., 474; and errors cannot be corrected after judgment and sale, *Daily v. Newman*, 14 La. Ann., 581; *State*

v. Smith Steamboat Co., 13 id., 497; the remedy for errors in valuation is by appeal to the commissioners, *State v. Danser*, 23 N. J. L., 552; *State v. Platt*, 24 N. J. L., 108; *State v. Powers*, id., 406; *Wharton v. Birmingham*, 37 Penn. St., 371; and one who appeals is bound by the judgment of the statutory authorities, Cooley on Taxation, 529; *Williams v. Holden*, 4 Wend., 227; a supervisor's certificate of equalization cannot be disputed, *Attorney General v. Sanilac Supervisors*, 42 Mich., 72; a tax-payer cannot complain of a valuation which, though incorrect, charges him with a just proportion of the tax assessed, *Chicopee v. Com'rs*, 16 Gray, 38.

GRAVES, J. Blanchard brought ejectment for the west half of the northeast quarter of section nineteen, in township nine north of range eleven west. The case was tried before a jury in July last, and under the instruction of the court the jury found for the defendant. A review is asked on writ of error and bill of exceptions.

The plaintiff proved a chain of title to himself from the United States. The defendant gave in evidence the record of a deed from the Auditor General to one Simpson for the taxes of 1857, and also evidence of the transfer of Simpson's interest to himself. The Auditor General's deed had been on record over nineteen years. To rebut the defense based on this tax-title the plaintiff called to the stand the gentleman who was supervisor in 1857, and who identified the assessment roll and the certificates attached, both of which were in due form, and offered to show by him that he estimated all the property, including the land in question, and placed it on the roll at one-third its full cash value, and spread the taxes with that valuation as the basis. The circuit judge excluded the offered evidence, and this ruling presents the only question in the record.

The tax proceedings were under the act of 1853 (Laws 1853, p. 128), and by the twenty-fifth section the supervisor, after reviewing and completing the roll, was required

to attach his certificate that he had estimated the real estate at what he believed to be the true cash value thereof, and by subsequent sections the board of supervisors, after correcting descriptions and seeing that the relative valuation in the respective townships was equally and uniformly estimated, were required to certify by their chairman their ratification of the roll in the particulars confided to them. As already suggested, the roll in question was accompanied by certificates in precise conformity to the statute.

Was it competent on the issue between these parties in ejectment, to dispute and impeach by parol evidence the public record, and show that the certificate made by the supervisor under his oath of office was false? The plaintiff's counsel urges that it was, and he cites several cases as authority. The first is *Wattles v. The City of Lapeer*, 40 Mich., 624. This case has no application. The city sued to collect an alleged tax, and Wattles resisted on the ground that the claim against him was illegal and that he was not indebted for any tax, and it appeared his position was correct. Comparing the attempted levy with the valuation on which it was based and it appeared that it exceeded the charter limit and was a piece of usurpation. The right of the defendant to resist the action brought to enforce the alleged tax by showing its illegality is self-evident. It came out incidentally that instead of complying with the law and estimating the property at the true cash value, the assessors set it down at one-fourth of such value, and that if they had obeyed the law the tax would not have been excessive. But this circumstance could not aid the proceeding. One fault could not be mended by another.

The other authorities chiefly relied on are cases by the Supreme Court of Wisconsin. They have been examined, and they are found not to sustain the position now taken. Expressions are noticed in some of them which if wrested from the context might possibly afford some countenance to the claim here. But when they are con-

sidered in connection with the issue presented and the bias of the discussion, they cannot afford any aid. In every instance the contention was between the proprietary and the public authorities, and the action or suit or whatever it should be called, was instituted or maintained or carried on to annul or enjoin the alleged tax for some kind of illegality of the public agents, and the issue was directly upon the validity of the proceedings, and where consequently the matter of the proceedings could not be set up to prove validity. Moreover, the question was not only between the property-holder and the public authorities who were seeking to fasten a burden upon him, but it was raised seasonably and without laches, and before the attaching of any rights of third persons. It belonged to the very object of the inquiry to see whether what purported to be a lawful record was in truth one having the property of verity, or whether it was invalid and not entitled to credence.

There is a striking analogy between such a proceeding which directly questions the legal fitness of the thing to exist, and the proceeding by writ of error and bill of review, and the distinction is well marked between the right to impeach proceedings when so assailed, and when attacked collaterally and after the transaction has become closed and time has run upon it and new rights have grown up on the faith of its rectitude. Every system of jurisprudence has recognized the principle, and it pervades the whole policy of our laws. Our revenue code has always been shaped with reference to it.

The case before the court stands on entirely different ground. After the lapse of more than twenty years from the sale, and after the deed had been on record nearly that period, and after the holder of the tax-title had gone into possession and held for some time, the holder of the original title began this action of ejectment, and he asserts therein the right to do away with the sworn official certificate of the supervisor by his present recollection as a witness.

There is no general rule of law which will permit this to be done. On the contrary the course of decision is opposed to it. Cooley on Taxation, 195. And there is no case by this court to lend it countenance, and no statutory provision to warrant it. So far from it, that the policy of the act of 1853, as that of the later statutes, favors the stability and repose of tax-titles, and discourages their being brought into question by collateral proceedings. The importance and sanctity accorded to the certificate of the supervisor are implied in the statute and acknowledged by our decisions. *Clark v. Crane*, 5 Mich., 151; *Warren v. Grand Haven*, 30 Mich., 24.

The statute contemplates that there shall be written evidence of record, and in the form of this official certificate, that the estimate of the real estate has been at what the supervisor believed to be the true cash value, and when such evidence has been made and preserved in the manner prescribed by law, it is the legal medium of proof in collateral proceedings, and is entitled to prevail therein to the exclusion of oral evidence in contradiction. To permit the contrary would amount to a surrender of the kind of evidence provided by statute, in favor of another and very inferior kind and of most uncertain character. The effectiveness of official certificates and the stability of titles would depend upon what after many years could be shown against them by the recollections of witnesses. As serving to illustrate the policy of the act of 1853, against the right of parties to lie by and then question the validity of proceedings to the injury of purchasers and the detriment of the public, and not to intimate any opinion whatever respecting its force or validity, a part of the 89th section is noticeable. It is there provided that in case a sale is not canceled pursuant to law by the Auditor General, or annulled by some court of competent authority, the deed after being on record five years shall be positive evidence of title.

Without extending the discussion further, I am of opinion that the circuit judge committed no error, and that the judgment should be affirmed with costs.

The other Justices concurred.

JOHN N. GOTT, RELATOR v. THE JUDGE OF THE SUPERIOR COURT OF DETROIT.

Election between counts of declaration—New trial.

A party who has been compelled to elect between the common and special counts of his declaration, is at liberty, on a new trial, to proceed upon the other counts.

A new trial is a rehearing of the cause before another jury, but with as little prejudice to either party as if it had never been heard before.

A ruling requiring a party to elect between the counts of his declaration, and the practice thereon, would not bind the judge upon a new trial of the case if brought to trial in the same shape as before.

MANDAMUS. Submitted Jan. 20. Decided Feb. 11.

Beakes & Cutcheon for the writ.

Griffin & Dickinson against.

GRAVES, J. The present controversy is whether sufficient cause is shown against the relator's application for mandamus. A reference to the facts is necessary in order to understand the question.

September, 1878, Sophronia Brigham commenced a suit by summons against the relator in the Superior Court, and in due time filed a declaration in the case, consisting of a special count in assumpsit together with the common and money counts, and to the last was joined, according to the statute and in the usual manner, a

copy of a promissory note. The relator appeared and pleaded the general issue with notice of set-off, and February 14, 1879, the issue came on to be tried in said court before the Recorder, sitting as judge therein, and a jury. After the testimony on both sides had been given, and before the case went to the jury, the relator's counsel moved the court that the plaintiff, Mrs. Brigham, be required to elect whether she would seek recovery on the first count or on the common counts, and supported the motion by argument: upon which her counsel objected to being required to make an election. The court, however, overruled the objection and directed the plaintiff's counsel to decide whether he would claim under the special count or under the general counts. The plaintiff's counsel thereupon observed: "We protest against the order of the court and except to the ruling, and, without waiving our protest or exception, for the purpose of this trial we elect to proceed upon the special count." The pleadings remained unaltered, and there was no other compliance with the order of the court than as here expressed. The case was submitted to the jury upon the special count alone, and they returned a verdict for Mrs. Brigham, and the court entered judgment accordingly.

The relator then brought up the case by writ of error, and finding that the special count on which the verdict had been given contained no cause of action, we reversed the judgment and awarded a new trial. 41 Mich., 227.

This result being certified to the Superior Court, Mrs. Brigham's counsel entered a rule for discontinuance of the special count, and gave notice to relator's counsel. They at once took the position that the act of electing at the first trial by Mrs. Brigham's counsel, to submit the case to the jury on the special count, had irrevocably cut off recourse, at least in the same suit, to the general counts, and seeing that the special count was now discontinued, they assumed that the plaintiff had in law withdrawn all claim, and that relator was

consequently entitled to judgment for costs. Acting on this theory they moved the court for such judgment, which being refused this application is made to require it.

We have considered the application and think it ought not to be granted. The former proceedings in the Superior Court before the jury were matters relating wholly to the course of trial and were confined to that occasion. The plaintiff's written claims in the record were not changed, but remained the same. The plaintiff at relator's instance, but against her objection, was compelled by the court to choose between the claims as she had preferred them, and to submit her case upon the one to the exclusion of the other.

In this proceeding, by which she was brought to waive for the occasion part of her declaration, her act was not a voluntary one, and was not sufficient to bind her beyond the operation of the ruling which compelled it, and not of force to bind her on a future trial as an equitable estoppel founded on a free election of courses or remedies. It is an essential element of equitable estoppel in such a case, or rather an indispensable condition of the groundwork of it, that the party has acted freely. But if while leaving him to select which one he may, the court still compels him to choose and exclude one, he is not a free actor in a sense to estop him on other trials. Now on the trial when this ruling was made, it was the ruling and not an estoppel which bound the plaintiff and influenced the proceedings. Had the court reversed its ruling, as it was able to do, the plaintiff might have recalled her action. The pressure being taken off, she might have resumed her former position. The order of this court granting a new trial has obviated that ruling and restored the parties to their first situation, subject only to our opinion relative to the special count.

A new trial is a rehearing of the cause before another jury, but with as little prejudice to either party as if it had never been heard before. 3 Stephen's Com., 626.

There is no law for the position that the ruling at the last trial, requiring the plaintiff to go to the jury upon part of her declaration, and her submission thereto has become a settled and controlling principle of the action. Were the case again brought to trial in the same shape as before, the former ruling and practice would not of its own force be binding upon the judge. He would be at liberty to rule differently.

The writ must be denied with costs against relator.

The other Justices concurred.

---

42 628
68 629
42 628
89 273
42 628
e128 290

DAVID M. BENJAMIN, RELATOR v. MANISTEE RIVER IMPROVEMENT COMPANY.

River improvement companies—Tolls for use of navigable streams—"Channel"—Free navigation.

The navigable waters of the United States, though forever free, are nevertheless subject to State control and regulation and may be improved by the States or bridged or dammed under their legislation.

"Free navigation" is not necessarily the unobstructed navigation of a stream in its natural condition.

The policy of Michigan is against the improvement of highways for trade and commerce by taxation of the people.

Tolls for the navigation of an improved stream are not taxes, duties or imposts on the use of the stream, but are tolls for the enjoyment of improvements by which it has acquired a new value and increased navigability.

Comp. L., ch. 85, in authorizing corporations formed for improving the navigation of rivers, to charge tolls for the use of the improved stream, is not in violation of the provisions of the Ordinance of 1787 or of the State Constitution, securing free navigation.

In proceedings by quo warranto against a corporation authorized by law to deepen the channel of a river, it pleaded that it had removed obstructions by cutting channels through jams, and by confining the water at various points. *Held* on demurrer that it could not be said as matter of law that this was not an exercise of the power given to deepen the channel.

The channel of a stream is the bed over which its waters run, or the passage way between banks through which they flow.

Fixing the amount of tolls is not a judicial act, but is only prescribing in advance a law for the government of those who may be brought within its provisions; and a hearing for the purpose of fixing tolls is not a judicial hearing of which all parties that may be interested are entitled to receive notice.

Comp. L., § 2730, requires a river improvement corporation to file with the Board of Control an annual affidavit of a director as to the probable amount of traffic through the improved portions of the river during the year, and that he had made due inquiry from lumbermen and otherwise; but it does not give the affidavit any peculiar force as evidence and leaves the board to choose its own methods of getting information, and the Board can avail itself of the personal observation of its members if it sees fit to do so.

Administrative questions are not in their nature judicial and are not subject to review.

The Board of Control of St. Mary's Falls Ship Canal has exclusive and discretionary authority under Comp. L., ch. 85, to determine the plan of river improvements, and on evidence satisfactory to itself decide when tolls may be properly levied, and grade and change them thereafter.

QUO WARRANTO. Submitted Jan. 21. Decided Feb. 11.

Attorney General *Otto Kirchner* and *Hughes, O'Brien & Smiley* for the relator. The Ordinance of 1787 secures the free navigation of navigable streams, *Hogg v. Zanesville Canal Manuf'g Co.*, 5 Ohio, 410; Cooley's Const. Lim., 25 *n;* the respondent to an information in quo warranto has the burden of showing that he has complied with the law, *Larke v. Crawford*, 28 Mich., 88; High Ext. Leg. Rem., § 712; the statute providing for the improvement of rivers is void in not providing for evidence on which to determine its necessity, *Butler v. Supervisors*, 26 Mich., 22; *Hibbard v. People*, 4 Mich., 125; *Campau v. Detroit*, 14 Mich., 276; *People v. Brighton*, 20 Mich., 57; *Ehlers v. Stoeckle*, 37 Mich., 261; *Thomas v. Gain*, 35 Mich., 155; Wade on Notice, 505.

B. M. Cutcheon, Benton Hanchett and *G. M. Stark* for defendant. Each state can provide for the improvement of streams within its boundaries so long as there

is no federal legislation, *Gilman v. Philadelphia*, 3 Wal., 713; *Crandall v. Nevada*, 6 id., 41; *Cooley v. Wardens*, 12 How., 316; *Veazie v. Moor*, 14 How., 568; *Moor v. Veazie*, 31 Me., 360; *Withers v. Buckley*, 20 How., 93; *Kellogg v. Union County*, 12 Conn., 7; *Thames Bank v. Lovell*, 18 Conn., 500; *Ill. River Packet Co. v. Peoria Bridge Association*, 38 Ill., 467; *Chicago v. McGinn*, 51 Ill., 266; *Depew v. Trustees*, 5 Ind., 8; state legislation may authorize corporations to improve navigable streams and collect tolls for the use of the improvements, *La Plaisance Bay Harbor Co. v. Monroe*, Walk. Ch., 155; *Hutchinson v. Thompson*, 9 Ohio, 52; the Ordinance of 1787 ceased to be of binding force upon the States of the Northwest Territory when they were admitted to the Union, *Pollard v. Hogan*, 3 How., 212; *Permoli v. First Municipality*, id., 589; *Strader v. Graham*, 10 id., 82; *Dred Scott v. Sandford*, 19 id., 490.

COOLEY, J. The purpose of the information in this case is to test the right of the respondent to exercise the franchise of taking tolls from persons using certain portions of the Manistee river in running, rafting or floating logs or timber down said river.

The information is general, and charges usurpation of the franchise in question. The respondent filed a plea setting up the following facts:

That the respondent is a corporation, organized under and in pursuance of an act of the Legislature of the State, entitled "An act to authorize the formation of corporations for the purpose of improving the navigation of rivers," approved April 5, 1869 [Comp. L., ch. 85]; the incorporation having been perfected April 4, 1870, by proceedings which are set forth at length.

That after its organization respondent prepared a map of the section of the Manistee river, the navigation of which respondent proposed to improve, and a plan for the improvement of the same, which showed and set forth the several points in said stream where improvements were proposed to be made by respondent, and pre-

sented the same to the then Governor and Attorney General of the State, and said improvement was in writing assented to by them. That afterwards, on July 6, 1870, respondent submitted the map and plan to the Board of Control of the St. Mary's Ship Canal, at a meeting of said board then held, whereupon said board examined the map and plan, and were then and there of opinion that the construction of the proposed improvement would be a public benefit, and that respondent was a proper company to make such improvement, and did approve of said map and plan, and did assent to the construction of said proposed improvement, and endorsed upon the map and plan their approval thereof and their assent to the proposed improvement, and then and there fixed the time within which the improvement should be completed to be on or before December 31, 1874.

That said proposed improvement consisted in deepening the channel of the Manistee river by removing obstructions from the river by cutting channels through twenty-two several places in said river, designated as jams and numbered consecutively on said plan from one to twenty-two, both inclusive, by confining the waters of the river within the channel at the points designated on the plan, and in constructing two dams upon said river at places designated.

That afterwards the Board of Control on good cause shown from time to time extended the time for the completion of said improvement to the 31st day of December, 1882, the first extension of the time being made September 16, 1873.

That the Board of Control afterwards consented to the alteration of the plan so as to dispense with one of the proposed dams.

That in the years 1870 to 1876 inclusive, the respondent completed the improvement with the exception of the construction of the dam, beginning at the point lowest down the river and advancing up stream, and completing the work as it went forward.

That a portion of the work was completed to the sat-

isfaction of the Board of Control in the year 1871, and was in the opinion of said board useful, and the said board was of opinion that tolls should be paid for the use of such portion, and thereupon on February 26, 1872, the board fixed and determined the tolls to be paid for the use thereof upon the logs which should be put into and run upon such portion of said stream. Other portions of said work were also completed in like manner subsequently and from year to year, until the entire of said improvement except the dam had been completed, and the portion of said work so completed from time to time was completed to the satisfaction of the board, and was in the opinion of the board useful, and in their opinion tolls ought to be paid for the use thereof, and tolls were from year to year, and in each of the years from 1872 to 1878, fixed by said Board of Control for said years for that portion of the work completed to such times respectively upon the logs put in and run upon such portion, and such tolls have been accordingly and in pursuance of such action of said board collected by respondent. And said improvement completed as aforesaid was on the 26th day of February, 1879, adjudged and determined by said board to be completed and the same was by said board accepted, and the said board also then determined that in the opinion of the board such improvement is useful, and that tolls should be paid for the use thereof, and afterwards and on April 11, 1879, the said board fixed the tolls which should be paid for the use of such improvement for the ensuing year upon logs put into and run upon that portion of said river which was improved as aforesaid; whereby said respondent has the right to collect such tolls.

To this plea a general demurrer was interposed, and in support of this it is insisted, *first*, that the statute under which the respondent claims to be incorporated is invalid; and *second*, that if valid, the plea shows no such compliance with its provisions by the respondent as authorizes the imposition of tolls.

I. The first objection to the statute is that it is in conflict with that article of compact in the Ordinance of 1787 which provides that "the navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways, and forever free, as well to the inhabitants of the said Territory, as to the citizens of the United States, and those of any other states that may be admitted into the Confederacy, without any tax, impost, or duty therefor." These articles were expressly declared to be perpetual, and the Constitution of the State recognizes the right secured, in the provision that "no navigable stream in this State shall be either bridged or dammed without authority from the board of supervisors of the proper county, under the provisions of law. No such law shall prejudice the right of individuals to the free navigation of such streams, or preclude the State from the further improvement of the navigation of such streams." Const. Art. 18, § 4.

It is conceded that a legislative act in violation of the true intent of the constitutional provision would be invalid. It is also conceded that the article copied from the Ordinance of 1787 was intended to give permanent and inviolable rights, and that whether superseded by the Constitution of the State or left according to the terms of the Ordinance as a "perpetual compact," is not matter of importance in this case, since either by the Ordinance or by the Constitution the use of the navigable streams of the State is free to all the people. The important question is what is meant by free navigation, and whether the taking of tolls for the use of improvements is a violation of the compact or of the Constitution in the true intent and meaning of either.

It cannot be seriously contended that the intent of the Ordinance of 1787 was that the navigable streams of the Northwest Territory should remain forever unimproved in order that they might be freely navigated in their natural condition and not otherwise. Such a con-

struction would make the compact a curse rather than a blessing, and while preserving the natural highways would perpetuate a state of things which must eventuate at length in their use being superseded by improved conveniences. But as the compact was made for the perpetual advantage of the people, we must suppose that there was no purpose to limit this advantage to a minimum, or to preclude either the territorial legislature or the new states which should come into the Union from increasing the benefits of the compact by improving the highways the ordinance secured, so as to make them accomplish their purposes as avenues of trade and commerce for all time. In other words, the navigable waters of the territory were placed on the same footing with the navigable waters of the United States, the use of which is forever free, but which are nevertheless subject to State control and regulation, and may be improved by the states, or bridged or dammed under their legislation whenever the convenience of trade, traffic and travel in all its infinite forms shall seem to require it. This proposition was determined as early as the case of *Willson v. Black Bird Creek Marsh Co.*, 2 Pet., 245, and though often contested since, has invariably been reaffirmed. It is sufficient to cite the Federal decisions on this subject, as they are full to the point, and all speak the same language. *Spooner v. McConnell*, 1 McLean, 353; *Palmer v. Cuyahoga Co.*, 3 McLean, 226; *Columbus Ins. Co. v. Peoria Bridge Association*, 6 McLean, 70; *v. Terre Haute Bridge Co.*, 6 McLean, 237; *Woodman v. Kilbourn Manuf. Co.*, 1 Biss., 546; s. c., 1 Abb. U. S., 158; *Pound v. Turck*, 95 U. S. 459.

The states may therefore improve the natural highways by water, and they may improve the intersecting highways even though the result may be that the use of the highways by water is thereby to some extent impeded. Free navigation, therefore, does not necessarily mean navigation of the streams in their natural condition unobstructed and unimpeded. It remains to

be determined whether the free use of the natural streams, without tax, duty or impost, implies also a free use of the improved streams to the same extent and with the like exemption.

If the State improves its streams, it must of course in some manner provide a revenue to meet the expense. This might be done by a state tax levied upon all the people of the State, and the improved stream be then left perfectly free to the use of all. But the settled policy of this State is now against this method of making improvements in highways for the use of trade and commerce. The early experience of the State in the construction of railroads was most unfortunate, and came near prostrating the credit of the State and permanently injuring its prosperity at the very beginning of its history. To retrieve its fortunes the State early took steps to dispose of its public works, and the Constitution of 1850 undertook to guard against future dangers of the same sort by declaring that "the State shall not be a party to, or interested in, any work of internal improvement, nor engaged in carrying on any such work, except in the expenditure of grants to the State of land or other property." Art. 14, § 9. But for this provision there can scarcely be a doubt that it would have been competent for the State to improve the Manistee river, and to impose the burden on the people at large as a portion of the general State expenses, or to levy tolls for the use of the improvement, if that method of reimbursing the State should seem most expedient and just. The tolls would not be taxes, duties or imposts on the use of the navigable streams in their natural condition, but they would be tolls for the enjoyment of that which the State has expended in giving a new value to the stream, and producing a navigability which did not exist before. *Wisconsin River Imp. Co. v. Manson*, 43 Wis., 255. But empowering a corporation to make the improvement and to collect tolls for its use is only a different method of accomplishing the same result. The tolls are still collected for the use of the improvement only, the bur-

den upon commerce and navigation is the same, the State in adopting this method adheres to its settled policy, but without thereby in any manner imposing restraints or burdens which are beyond or different from those which would be imposed by the State itself if it constructed the improvements and collected a reasonable charge for their enjoyment. We therefore discover nothing in the provision for collecting tolls that is in any manner forbidden.

II. It is next objected that the improvement which the plea describes is not such an improvement as is intended by the statute. The statute authorizes the improvement of rivers "by deepening the channel thereof, and the construction of dams therein, and canals to connect therewith." The plea admits that no dams have been constructed, and it is insisted that the proposed improvement which the plea describes, "by removing obstructions from the river, by cutting channels through twenty-two several places in said river, designated as jams and numbered consecutively on said plan from one to twenty-two, both inclusive, by confining the waters of the river within the channel at the points designated on said plan," is not such a deepening of the channel as the statute intends. It is truly said that an obstruction may be a very slight affair; no more perhaps than a log or a stump in the stream, the removal of which could never be any just ground for charging tolls, or in any proper sense be called a deepening of the channel, and that deepening of the channel would be an improper term to apply to the taking out of any mere obstructions; and also that confining the waters within the channel would not be a deepening of the channel, and indeed as stated in the plea does not profess to be.

There is plausibility in this objection, but we do not understand how we can say that as matter of law the cutting through an obstruction is not a deepening of the channel of the river. An obstruction may be slight or considerable, temporary or permanent; but when it

acquires that degree of stability that the annual floods are not likely to remove it, we cannot with much propriety speak of the channel of the river as being the same thing it was before; as being the old channel with merely obstructions in it; but the obstructions themselves if upon the bottom of the river create a new channel, or make the old one shallow, so that to restore the channel to its former condition may be as properly called a deepening of the channel as though the channel were never otherwise than as the obstruction makes it. The improvement consists in deepening an existing channel, and it can be of no importance that there was once a time when the old channel was as deep as the improvement makes it. It would be a senseless construction of the statute that should provide for the deepening of the channel where it was always shallow, but not where the gradual accumulation of sand, rocks, stumps or logs had deprived it of navigability.

Nor can we say as matter of law that confining the water of the river within the channel will not deepen the channel. The confinement of the water must almost of necessity deepen it as it flows, because it keeps it together instead of allowing it to spread out over the adjacent territory. If a channel can only be deepened by excavating the bottom, then these banks cannot be said to deepen it, and whether it can be deepened otherwise or not may depend on what we understand by channel. Strictly speaking the channel is the bed of the stream over which its waters run, or it may be said to be a passage-way between banks through which flow the waters of the stream. But why this may not be deepened by raising the banks, as well as by excavating the bottom, when the effect is to deepen the flow, is not apparent. Indeed that it is thus deepened is self-evident. And when this method of deepening accomplishes the substantial purposes of the statute, as in many cases it undoubtedly will, we cannot say that it is not within the intent of the statute. We have no doubt whatever that it is. We say nothing now of the effect in deepening

the channel, of the increased flow within the new banks.

III. But it is said that the statute under which the respondent is incorporated is invalid because it confers upon the Board of Control the power to fix and establish tolls, but does not require its members to make any personal inspection of the river proposed to be improved, or provide any means for evidence upon which the board may determine the necessity for the improvements, or when the works are completed or so far constructed as to entitle the respondent to collect tolls, or give any hearing to parties interested, or contemplate that the board shall act upon anything but the *ex parte* statement of one of the corporate officers.

It must be admitted that the statute provides for no hearing of the parties whose interests may be affected by the improvement except when the board meet to consider the plan proposed for the improvement. Comp. L., § 2720. Section thirteen of the Incorporation Act (Comp. L., § 2728,) gives the corporation power to enter upon the work of improvement when the plan is approved. Section fifteen (Comp. L., § 2730), upon which the question here made arises, is as follows:

"Whenever any portion of said work shall be completed to the satisfaction of said Board of Control, and it is so far useful that in the opinion of said Board of Control tolls should be paid for the use thereof, said board may fix the tolls to be paid for the use of such portion until the whole of said work is completed; and whenever said improvements have been completed and accepted by said Board of Control, the rates of toll which any company organized under this act may charge for running rafts, timbers, logs, or lumber through said improved stream shall be fixed by said Board of Control, and may be graduated with reference to the distance run upon the portion of said stream improved by said company, and shall not be increased without the consent of said board, but may be changed from time to time by said board; but such toll shall not at any time be increased so that the sum shall amount to more than fifteen per cent a year upon the actual cost of such improvements after deducting the necessary expenses and repairs; and the said board shall, as far as may be practicable, so fix the rates of toll on timber, logs, and

lumber, that the same shall not at any time exceed the sum of twenty-five cents per thousand feet, board measure, on any stream where ten millions of feet or less are run in any one year; twenty cents per thousand feet, board measure, on any stream where thirty millions of feet or less are run in any one year; nor more than fifteen cents per thousand feet, board measure, on any stream where from thirty to fifty millions of feet are run in any one year; nor more than ten cents per thousand feet, board measure, on any stream where from fifty to one hundred millions of feet are run in any one year; nor more than five cents per thousand feet, board measure, on any stream where from one to two hundred millions of feet or more are run in any one year; and the collection of such tolls shall be confined strictly to that part or portion of a river or stream so improved, and to that class of floatables benefited by the improvement; and nothing in this act shall be construed to give jurisdiction to any corporation over any portion of a river or stream other than the portion specifically improved by such corporation. Such corporation shall cause to be made out and filed with said Board of Control, at or before its meeting on the last Wednesday in March, each year, the affidavit of its president or one of its directors, setting forth in detail, upon his best information and belief, what amount of timber, logs, and lumber will be run through any section or sections of the river improved by the company during that year, and that the official has made due and reasonable inquiry on the subject from persons lumbering on the river, and otherwise."

It was argued for the relator that the hearing for the establishment of tolls was in its nature a judicial hearing, of which all parties concerned were of right entitled to have notice. If that were the case it would obviously be impossible to give notice except in some general form of publication, since it could never be known in advance who the parties interested would be. The parties concerned in the tolls would be the parties who might have occasion to make use of the river for purposes of navigation, and these might or might not be the owners of the banks or persons living near them, or even persons living in the State. But in truth the fixing upon the amount of tolls is no more a judicial act than is the fixing of rates of fare or transportation by railroad, or the weight of a bushel of grain, or the speed of trains

through towns, or the rules for the going at large of animals. A judicial act implies a controversy between parties to which the law is applied, but the fixing of tolls is only prescribing a law in advance for the government of those whose occasions may bring them within its provisions.

As to the method in which the board shall be satisfied what tolls are proper, the statute is not specific, and beyond requiring a report from the corporation and an estimate of the year's business made under oath by one of the corporate officers, it does not point out the methods by which the board shall obtain the necessary information to enable them to perform their duties intelligently and justly. But the statute does not give to the report and affidavit any peculiar force as evidence, and it is undoubtedly within the province of the board to select its own methods of obtaining such information as may be important. As in the case of all other administrative duties, information may be gathered without being hampered by strictly legal rules, and the personal observation of the members may be availed of if they shall so choose. On this subject all we can say is that the statute has confided a discretionary authority to the Board of Control, which in the first place will determine the plan of the improvement, and afterwards on evidence satisfactory to themselves decide when the period has arrived when tolls may properly be levied, and grade these tolls and change them at discretion afterwards. Over all these matters we have no control, because the law has given none, and administrative questions are not in their nature judicial questions.

We find, then, in the law itself no inherent infirmity, and the Board of Control on whom the whole power is conferred having passed upon all the other questions which are presented by the demurrer, nothing remains for us to do but to give judgment for the respondent. It will be ordered accordingly.

The other Justices concurred.

INDEX.

ABANDONMENT
of sales on condition: CONTRACTS, 7.
of homestead, by widow and heirs: HOMESTEAD, 2.
ABSENT PARTY.
judgment affecting rights of: PRACTICE, 3.
ABSENT WITNESS.
introduction of former testimony of: EVIDENCE, 11.
ACCEPTANCE
of orders drawn by agent: ACCOUNT STATED, 4.
of work done on contract: CONTRACTS, 5.
ACCESSION.
improvements on land of another: FIXTURES, 2.
ACCOMMODATION.
signature to NEGOTIABLE INSTRUMENTS, 10.
ACCOUNT CURRENT.
evidence to free account from STATUTE OF LIMITATIONS, 2.
oral admissions relating to: ESTATES OF DECEASED PERSONS, 9.
ACCOUNTING.
allowing for Sunday payments: PAYMENT, 2.
between relations: DEBTOR AND CREDITOR, 6, 7.
ACCOUNT STATED.

1. An account stated may doubtless be worked out without any written undertaking or acknowledgment, and may be proved by unsigned writings; but it cannot overcome the bar of the Statute of Limitations unless it is supported by evidence of some writing signed by the party to be charged. *Sperry v. Moore's Estate*, 353.
2. A claim was made against an estate for a balance due on an open account, but an amendment to the demand only claimed a balance struck on an adjustment of mutual accounts by the decedent's oral admission of a specific balance. But the jury found against the claim. *Held* that it could not prevail unless evidence that might have changed the result was improperly excluded. *Id.*
3. One who sues on an account stated can only recover on proof of settlement made with defendant or his authorized agent, or, if made by an unauthorized person, on proof of defendant's ratification thereof with a full knowledge of the facts. *Mink v. Morrison*, 567.
4. Where an authorized agent settles an account and gives an order on third parties, acceptance and payment by them bind the party liable on the account; but if it was not authorized and was not made with a view of enabling the creditor to get his pay or a promise to pay from the debtor, he is not bound by it. *Id.*

5. A plaintiff declaring upon a written obligation which recited a settlement of accounts, gave evidence of its assignment to him, but did not show any consideration therefor. *Held* that he could not rely on equities that were not available to his assignor, and that the defendant was not estopped by the recital from contesting the settlement. *Ferguson v. Millikin*, 441.

ACKNOWLEDGMENT
of account stated, when necessary: ACCOUNT STATED, 1.
of articles of association: CORPORATIONS, 2.
certificate of existence of: EVIDENCE, 16.

ACQUIESCENCE
in claim of ownership: REPLEVIN, 3.

ACTION: *Elements*, 1; *Parties*, 2–5; *Election of remedy*, 6–10; *Equitable defense*, 11.

1. The elements of a cause of action are (1) a breach of duty to another, and (2) a damage to the latter resulting from it. *Post v. Campau*, 90.
2. One cannot be subjected to litigation except in such a way as will settle the controversy and leave him free from farther litigation for a similar purpose. *Reed v. Baker*, 272.
3. An action at law must generally be brought in the name of the party who holds the legal interest as distinguished from the equitable right, even though the latter embraces the exclusive interest in the benefit to be derived from the property. *Forrest v. O'Donnell*, 556.
4. The trustee and not the beneficiary has the right of action at law. *Id.*
5. The State of Michigan has never allowed itself to be sued in its own courts, and no officer of the State could lawfully subject it to suit. *Ayres v. State Auditors*, 422.
6. Courts must see that defendants are not prejudiced by plaintiffs' choice of one form of action rather than another. *Chandler v. Childs*, 128.
7. Where a vendor has been induced by the purchaser's representations to receive in part payment a mortgage which he afterwards found to be unavailable, it was *held* that assumpsit would lie upon the purchaser's representations, as well as an action of tort for fraudulent statements. *Id.*
8. Suit was brought in justice's court against the surety on a bond drawn in the sum of $2000. The plaintiff declared on the common counts in an action of debt on the bond, assigned breaches and claimed $300 damages. The bond contained no covenants. *Held* that the action was neither assumpsit nor covenant, but debt on the bond, in which, under the Justices' Act of Michigan, a justice has no jurisdiction if the sum sued for exceeds $150; that the proceedings were therefore void, and an execution title based on the judgment was illegal and would not justify an entry on the land. *Bishop v. Freeman*, 533.
9. One may waive trover and sue in assumpsit for property which defendant has appropriated, but he must show just what property has been so used. *Coe v. Wager*, 49.
10. Act 165 of 1875 permitting one to waive a trespass on lands and bring assumpsit, only applies to cases where damages have been sustained, and the declaration must show that the damages accrued from the trespass. The action cannot rest upon any theory of a contract, as for use and occupation. *Lockwood v. Thunder Bay River Boom Co.*, 536.

11. An equitable defense to a claim for money had and received must be one known to the law and recognized on principles which courts of equity administer. *Fraser v. Fraser's Estate*, 275.
splitting cause of action: JUDGMENTS, 6.
transitory actions,—residence: JUDGMENTS, 3.
on bond in REPLEVIN, 5, 6.
on replevin bond; showing of leviable interest: JUDGMENTS, 5.
on bond without covenants: COVENANTS, 2.
for breach of promise: HUSBAND AND WIFE, 1–5.
for breach of warranty: WARRANTY, 5.
right of action on note given for debt: DEBTOR AND CREDITOR, 1.
for injury to railway employee: NEGLIGENCE, 1.
to recover personal taxes: TAXATION, 17.
for value of goods sold; evidence: SALE, 9, 10.
against CORPORATIONS, 4.
limitation of. See STATUTE OF LIMITATIONS.
See ASSUMPSIT; EJECTMENT; REPLEVIN; TRESPASS and TROVER.

ADJOURNMENT
of creditors meeting: BANKRUPTCY, 7.
in defendant's absence, by JUSTICE OF THE PEACE, 2.

ADMINISTRATOR
can sue on bond to intestate: BOND, 5.
disposition of funds of ESTATES OF DECEASED PERSONS, 5, 6.
omission to revive suit: PRACTICE, 8.

ADMISSIONS
of party: EVIDENCE: 2–4, 10.

ADOPTION
of signature: SIGNATURE, 1, 2.
of signature to township order: TOWNSHIPS, 2.

ADULTERY.
See CRIMINAL LAW, 7–10.

ADVERTISEMENT
for absent defendants in ATTACHMENT, 7.
foreclosure by: MORTGAGE OF LANDS, 18–23.

AFFIDAVIT
in answer to order to show cause: MANDAMUS, 8.
of denial of notice of non-payment: NEGOTIABLE INSTRUMENTS, 13.
to fix rates of toll: NAVIGABLE STREAMS, 8.
for renewal of MORTGAGE OF CHATTELS, 13.
of sale on foreclosure; evidence: MORTGAGE OF LANDS, 22.
for taxation of COSTS, 5.
for writ of CERTIORARI, 2.
for writ, admissible in suit for wrongful ATTACHMENT, 14.

AGENCY
in settling accounts: ACCOUNT STATED, 3, 4.
for allowing timber to be cut: LICENSE, 3.
to contract for CORPORATIONS, 6.

AGREEMENT
to pay damages for bastardy: NEGOTIABLE INSTRUMENTS, 3, 4.

ALIBI,
proof of, in criminal cases: CRIMINAL LAW, 6.

ALIMONY,
how set apart: HUSBAND AND WIFE, 8.

AMENDMENT
to declaration: PLEADINGS, 1, 3.
of declaration in partnership action: PARTNERSHIP, 2.
of defense in court of JUSTICE OF THE PEACE, 3.
of record in Supreme Court: PRACTICE, 11.
of return of SHERIFF, 1.

APPEAL
from decree on bill of review: EQUITY, 16.
from order declaring assignment void: EQUITY, 2.
from justice: award of COSTS, 2.
discontinuance on: PRACTICE, 6.
surety on appeal bond, impleader of: INFANT, 2.
does not avoid bond to pay decree: BOND, 2.
APPEARANCE
gives jurisdiction: JUSTICE OF THE PEACE, 1.
in proceedings by MANDAMUS, 4, 5.
by unauthorized counsel: PRACTICE, 1.
ARREST.
See CRIMINAL LAW, 1–4.
ARTICLES
of association: CORPORATIONS, 2, 3.
ASSESSMENT.
assessment rolls evidence of taxation: TAXATION, 18.
of taxes; formalities: TAXATION, 1–10.
ASSIGNMENT
of claim, by husband to wife: EQUITY, 2.
of error, on exceptions: ERROR, 3.
of judgment, does not carry bond in ATTACHMENT, 6.
of mortgage before delivery: MORTGAGE OF LANDS, 3.
of mortgage while detaining chattels: MORTGAGE OF CHATTELS, 11.
of mortgage, priority of record: MORTGAGE OF LANDS, 9.
of obligation: ACCOUNT STATED, 5.
for benefit of one's creditors: DEBTOR AND CREDITOR, 8–11.
for creditors, presumed lawful: DEBTOR AND CREDITOR, 8.
ASSISTANCE, WRIT OF
when allowed: REAL PROPERTY, 8.
ASSOCIATION.
articles of: CORPORATIONS, 2, 3.
corporate dealings: MORTGAGE OF CHATTELS, 3.
recognition of corporate character, ESTOPPEL, 7–9.
detective associations: CONSTABLE, 2; CRIMINAL LAW, 20.
See BAR ASSOCIATION.

ASSUMPSIT: *When it lies*, 1, 2; *When not*, 4–6.

1. Where an order for merchandise was largely exceeded, and the consignee received the excess to be sold or held subject to the consignor's order, and advanced the freight in good faith and for the consignor's benefit, he could recover the amount so advanced in assumpsit against the consignor as for money paid to his use. *Larkin v. Mitchell & Rowland Lumber Co.*, 296.
2. Ejectment was brought against the grantee of land that had been deeded with a covenant of warranty, and at the grantor's request the grantee defended the suit. The plaintiff in ejectment prevailed and the grantee afterwards bought in his title. *Held* that he could recover against the grantor's estate as for money paid to the grantor's use. *Post v. Campau*, 90.
3. Assumpsit does not lie at common law to recover the value of chattels obtained by means of a trespass. *Lockwood v. Thunder Bay River Boom Co.*, 536.
4. An action for use and occupation will not lie except where there is an obligation to pay rent by virtue of a contract relation as of landlord and tenant. *Id.*
5. A lumber dealer gave an order for a lot of shingles and a larger quantity was forwarded to him than the amount called for. He received and held the excess subject to the consignor's order, advanced the freight charges and notified the consignor,

and immediately afterwards they were destroyed by fire without his fault. *Held* that assumpsit would not lie for for their value. *Larkin v. Mitchell & Rowland Lumber Co.*, 296.

6. Where mortgaged goods have been converted and sold, the mortgagee cannot bring assumpsit for the amount received. *Carpenter v. Graham*, 191.

on township order: MANDAMUS, 1.

as an alternative remedy: ACTION, 7–10.

ATTACHMENT: *Generally*, 1–4; *the bond*, 5, 6; *return*, 7, 8; *dissolution of writ*, 9–12; *wrongful*, 13, 14.

1. Under Comp. L., § 6401, personal property covered by a mortgage may be taken on an attachment against the mortgager. *King v. Hubbell*, 597.
2. Where mortgaged chattels are attached in a suit against the mortgager, the rights of the attachment creditor and of the mortgagee must be protected as far as possible without interfering with each other. The officer need only take temporary possession for the purpose of making an inventory and appraisement, which perfects his lien, and his right to take such possession cannot be defeated by any stipulation in the mortgage that the mortgagee may take possession when he deems himself insecure. But the mortgagee has the first lien, and having a right to foreclose at a definite time, is entitled to possession, which the officer should then surrender to him on demand unless he believes the mortgage to be fraudulent or satisfied, in which case he may refuse to recognize it. If he surrenders it, the mortgagee must also respect the subsequent lien, and the mortgager's release to him would be ineffectual. *Id.*
3. Where a mortgage secures future liabilities and the mortgaged property is attached, the creditor increases his demands at his peril, for the attachment is of the mortgagor's interest as it then stands, and he cannot diminish that interest to the creditor's detriment. *Id.*
4. Fraud in a sale by a debtor is a matter as to which only attaching creditors have any legal interest in the trial of it in a replevin suit by the purchaser against an officer holding under the attachment, even though the latter had collusively suffered judgment; and no other creditors could have their rights conclusively determined by the result of such a suit. *McKay v. Kilburn*, 614.
5. A bond in attachment must run to the sheriff, who holds it in trust, and the plaintiff in attachment has no right to sue on it or transfer it until failure of execution, and then only in the sheriff's name, unless the latter has assigned the bond to him. *Forrest v. O'Donnell*, 556.
6. An assignment of a judgment in attachment does not carry the legal title to the bond, if it does not expressly purport to do so. *Id.*
7. Comp. L., § 6414, provides that within thirty days after the return of a writ of attachment, notice by advertisement may be given to absent defendants. *Held* that the date of the return as indorsed upon the writ and signed by the sheriff may properly be taken as the date from which to compute the time for advertising, though the writ is not actually filed until after notice is given. *Watson v. Toms*, 561.
8. Where action has to be taken by an attorney on the return of a writ of attachment, it is permissible for the sheriff, after indorsing the return of a writ not personally served, to leave the writ and return with the attorney instead of filing it with the clerk. *Id.*
9. A writ of attachment is good if the party who sues it out has

good reason to believe that a proper cause exists for it; but in proceedings to dissolve it, the existence of reasons for his belief is not necessarily in issue, but the court inquires whether the defendant had actually done as plaintiff believed. *Blanchard v. Brown*, 46.

10. Attached property is under the control of the officer attaching it, and not of the plaintiff in attachment, and the latter is not responsible for its detention after dissolution of the writ; it is for the defendant to see to the enforcement of the order restoring the property. *Id.*
11. A distinct allegation of the ownership of attached property is enough to give jurisdiction to hear a petition for the dissolution of the attachment; but if it appears on the hearing that the right of possession was in third persons, the petition must be denied. *Zook v. Blough*, 487.
12. A circuit court commissioner has power to allow a writ of certiorari to bring up proceedings before a justice for a dissolution of an attachment, and a circuit court has jurisdiction to issue it, and hear the case. *Id.*
13. In an action for damages from a wrongful attachment, where malice is neither alleged nor shown, it is assumed that there was no wrong in issuing the writ. *Blanchard v. Brown*, 46.
14. In a suit for damages from a wrongful attachment, the affidavit for attachment and the other proceedings are properly put in evidence by the defendant. *Id.*

as an act effecting ESTOPPEL, 3, 4.
effect on debtor's assignment: DEBTOR AND CREDITOR, 10, 11.
effect on execution levy: ESTOPPEL, 5.
prevents sales of mortgaged goods: MORTGAGE OF CHATTELS, 8.
showing of leviable interest: JUDGMENTS, 5.
suit by assignee of bond: BOND, 6.

ATTORNEY AND CLIENT.

1. Conviction of such crimes as the law regards as infamous is sufficient ground for disbarring an attorney. *McCarthy's Case*, 71.
2. A bar association is not a recognized body, as such, in proceedings to disbar an attorney, and cannot control the prosecution; the proceeding is in the interest of public justice, and the Supreme Court will examine into and act on it as in other cases involving the position of its attorneys. *Id.*

appearance without authority: PRACTICE, 1.
right of challenge by additional counsel: TRIAL, 2.
directions of court as to conduct of case: TRIAL, 19.
answer drafted by attorney: MANDAMUS, 7.
statements to attorney: EVIDENCE, 4.
attachment left with attorney: ATTACHMENT, 8.
attorney's relations with assignee of his client's debtor: BANKRUPTCY, 9.
record cannot be amended by stipulation: PRACTICE, 11.
notice to attorney respecting fund in court: PRACTICE, 5.
payment to guardian's solicitor: GUARDIAN AND WARD, 7.
attorney fee on foreclosure: MORTGAGE OF LANDS, 15.
lien of solicitors on funds of estate: ESTATES ETC., 5.
lien for professional labors: GUARDIAN AND WARD, 8.

ATTORNEY GENERAL.

1. Whether the Supreme Court would require the Attorney General to file an information in the nature of *quo warranto* against his own judgment—*Q. Coon v. Att'y Gen.*, 65.

appearance for private relator: MANDAMUS, 5.

AUDITORS.

See STATE AUDITORS.

BAILMENT.
conversion of property in bailment: TROVER, 2.
removal of goods from; storage: SALE, 8.

BANKRUPTCY: *The assignee; neglect of duties*, 1–9; *distribution*, 10.

1. An assignee in bankruptcy who has sold goods supposed to belong to the bankrupt, and received the money therefor, is not damnified or delayed in the execution of his duty by a judgment in trover against the United States marshal for seizing them. *Hudson v. Judge of Superior Court*, 239.
2. Notice of meetings of a bankrupt's creditors must be given by the assignee to all known creditors, and he has no discretion to exercise except as to the mode of giving it. *Russell v. Phelps*, 377.
3. An assignee in bankruptcy is liable in damages to creditors of the bankrupt, if he willfully omits or improperly performs official duties that are clearly prescribed and do not involve the exercise of discretion or judicial powers, and does so with intent to injure such creditors; and *it seems* that the State courts have jurisdiction of the action against him. *Id.*
4. Whether, at common law, an issue could be framed and trial had in the Federal courts in an action for damages against a bankrupt's assignee for willful neglect of duty to the injury of creditors—*Q.* *Id.*
5. In an action against an assignee in bankruptcy for willful neglect to give notice by mail of creditors' meetings, it is for the jury to determine whether notice had been mailed; if so, it is unimportant whether it was received. *Id.*
6. In an action against an assignee in bankruptcy for willful negligence, it is admissible to show the custom in respect to those proceedings wherein he was at fault, if it tends to show that a uniform practice existed in conformity with the legal construction of the Bankrupt Law. *Id.*
7. In an action against a bankrupt's assignee for willful neglect to notify creditors of meetings in bankruptcy, it was shown that the second meeting of creditors had been adjourned. *Held* that although the Bankrupt Law does not provide for such adjournment it was not error to call the jury's attention to the want of any notice of the adjourned meeting in connection with the evidence as to whether notice was given of the regular meeting. *Id.*
8. In an action against a bankrupt's assignee for willful injury to creditors from his omission or improper performance of his duties as to notifying them of meetings, or retaining sufficient funds to provide for their known but undetermined claims, the plaintiffs must prove the bankruptcy proceeding and the appointment and qualification of the assignee and his entry on the discharge of his duties, and show that plaintiffs were creditors and that defendant knew it and willfully and with intent to injure them omitted or improperly performed the duties referred to as alleged. *Id.*
9. Unpleasant relations between a bankrupt's assignee and the attorney of a creditor may be shown in an action by the latter against the assignee for damages arising from his willful omission to notify the creditor of meetings in bankruptcy or to secure his claim as required by the Bankrupt Act. *Id.*
10. The Bankrupt Law (Rev. Stat. U. S., § 5092) provides that at the second meeting of creditors it shall be determined what part of the net proceeds of the estate shall be divided after reserving a sum to provide for all known undetermined claims.

Held that the assignee cannot divide all the proceeds then in his hands, but only so much as remains after reserving the fund for undetermined claims. *Id.*
assignee's neglect of duties: PLEADINGS, 4.
assignee may have writ of prohibition: PROHIBITION, WRIT OF, 2.

BAR
of subsequent proceedings by JUDGMENTS, 6, 7.

BAR ASSOCIATION
as prosecutor for disbarment: ATTORNEY AND CLIENT, 2.

BASTARDY:
1. Bastardy proceedings are special and not strictly criminal, and the judgment only involves civil consequences. *Semon v. People*, 141.
2. The requirement that a jury must be satisfied beyond a reasonable doubt, of the guilt of the accused before they can convict, is a principle of criminal jurisprudence only, and its application is determined by the nature of the prosecution and not the character of the act. It does not apply to bastardy cases. *Id.*

BILL OF COSTS
left out of enrollment: EQUITY, 9.

BILL OF EXCEPTIONS
not containing substance of evidence: PRACTICE, 12, 13.
taxation of costs for map: COSTS, 5.

BILL OF EXCHANGE.
See NEGOTIABLE INSTRUMENTS.

BILL TO SET ASIDE DEED:
DEEDS, 4.

BILL TO ENFORCE DISCHARGE
of MORTGAGE OF LANDS, 15.

BILL IN AID OF EXECUTION:
assertion of homestead: EXECUTIONS, 13, 14.
deed set aside for fraud: SURETYSHIP, 5.

BILL TO SET ASIDE EXECUTION
on judgment against wife as surety: SURETYSHIP, 6.

BILL OF PARTICULARS:
effect on notice of set-off: SET-OFF, 2.
notice of recoupment is not: PLEADINGS, 8.

BILL OF REVIEW:
practice concerning: EQUITY, 10, 13–17.
costs against subsequent encumbrancer: COSTS, 6.
for foreclosure: MORTGAGE OF LANDS, 29.
purchaser on foreclosure: EQUITY, 4.
objection of non-enforcement of decree: EQUITY, 10.

BILL OF SALE:
validity of: SALE, 1.
delivery: SALE, 1, 4.

BONA FIDE PURCHASER.
1. One who claims as a *bona fide* purchaser, but who has only given his notes, must also show that he had made payment thereon before notice of the defect in his grantor's title. *Matson v. Melchor*, 477.

BOND.
1. A bond given by the defendant in foreclosure to the complainant, and conditioned to pay any decree that might be obtained, if complainant would consent to the dissolution of a preliminary injunction issued in the case, is valid. *Rynearson v. Fredenburg*, 412.

2. A bond conditioned to pay any decree obtained in a specified suit, applies to the final decree obtained in the appellate court, and is not avoided by an appeal, nor superseded by an appeal bond designed merely to cover costs. *Id.*
3. A bond conditioned on paying any decree that may be obtained in a foreclosure proceeding is not discharged by a sale of the mortgaged premises for less than the amount of the decree. *Id.*
4. Where an obligor in a bond conditioned to pay any decree that might be obtained in foreclosure proceedings, was not fraudulently induced to sign it by the obligee, he cannot be released on the ground that he did not know of prior incumbrances when he signed it, nor by the fact that it remained undischarged and that the obligee refused to indemnify him against it in case he bid upon the premises in suit. *Id.*
5. Where a bond is drawn to the obligee, "his heirs and assigns," his administrator can bring suit upon it, and the bond need not contain formal words giving him the right to sue. *Id.*
6. Act 75 of 1863 merely amended Comp. L. (1857), § 4159, permitting the assignee of a bond, note or other chose in action to sue in his own name, and was not meant to affect the special provisions on bonds for the release of property under attachment. *Forrest v. O'Donnell*, 556.
7. The statutes of Michigan, like the common law, treat the penalty of a bond given to secure any sum exceeding $150 as the debt to be sued for in an action of debt on the bond. They require the plaintiff to assign breaches, and allow a recovery of the debt, but permit execution for only the damages and costs, the judgment standing as security for the satisfaction of farther breaches, for which damages are recoverable on *scire facias*, the breaches being alleged according to the facts. Comp. L., §§ 6155-61. *Bishop v. Freeman*, 533.
8. A finding in an action on a bond that defendants are liable for a sum greater than the penalty of the bond, is not invalid because of the excess, but will support a judgment in debt for the penalty, and for a like sum as damages found by the referee. *Odd Fellows v. Morrison*, 521.

action on bond in justice's court: ACTION, 8.
action on bond in REPLEVIN, 5, 6.
action on replevin bond; leviable interest: **JUDGMENTS, 5.**
on appeal; contemplates discontinuance: **PRACTICE, 6.**
on appeal; surety impleaded: INFANT, 2.
on appeal, protects what parties: **EQUITY, 10.**
in attachment: ATTACHMENT, 5, 6.
covenants not implied: SURETYSHIP, 1.
joint action on official bond: **SURETYSHIP, 2.**
to stay proceedings on EXECUTIONS, **2.**

BOARD OF STATE AUDITORS.
See STATE AUDITORS.

BOARD OF SUPERVISORS.
accounts of JUSTICES OF THE PEACE, **4.**
assessments: TAXATION, 1.

BOUNDARIES.
1. A boundary line acquiesced in for fifteen years ought not to be disturbed on a new survey. *Dupont v. Starring*, 492.
2. In a case of a contested boundary between two city lots, the jury were asked to find specially how long the old line fence had stood and been regarded as the boundary line. *Held* that as the establishment of a line by adverse claim and acquies-

cence was a subject of dispute, it was to be presumed that the jury supposed the questions contemplated such a state of things, and not merely a case in which no question as to the correctness of the line had ever arisen. *Id.*

3. Where streets have been opened, used and acquiesced in by the parties interested, or by the public authorities, they become permanent boundaries and form new starting points for later surveys. *Twogood v. Hoyt*, 609.
4. In Michigan the proprietor of lands bordering on a meander stream owns to the center of the stream, and in platting his lands may extend his plat to the channel bank. *Id.*

BREACH OF PROMISE.
suit for: HUSBAND AND WIFE, 1-5.

BREACH OF WARRANTY.
right of action for: WARRANTY, 5.

BRIEF.
neglect of appellant to file: EQUITY, 8.

BURDEN OF PROOF,
of joint offense: CRIMINAL LAW, 5.

BURGLARY.
See CRIMINAL LAW, 11, 12.

BURNING INSURED PROPERTY.
Evidence: INSURANCE, 6-8.

CAPIAS AD SATISFACIENDUM.
conditions to: EXECUTIONS, 2.

CERTIFICATE
to assessment roll: TAXATION, 4-6.
of county clerk as to tax-rolls: TAXATION, 11.
of highway commissioners on order: TOWNSHIP, 2.
of levy on real estate: EXECUTIONS, 8.

CERTIORARI.
1. Where a writ of certiorari has been properly allowed and issued, it should not be dismissed for any delay in suing it out within the statutory period allowed, unless meanwhile rights have arisen in reliance on the proceeding attacked. *Willson v. Gifford*, 454.
2. On certiorari to a justice, the circuit court cannot take notice of errors that were not assigned in the affidavit for the writ, nor presume errors that were not affirmatively shown by the return. *Witherspoon v. Clegg*, 484.
3. Comp L., § 7158, provides that if a judgment for the plaintiff is reversed on writ of error after the Statute of Limitations has run, a new action will lie at any time within a year. *Held* to apply also to reversals on writ of certiorari. *McOmber v. Chapman*, 117.

as to proceedings under HABEAS CORPUS, 3.
dismissal of: JUSTICE OF THE PEACE, 1.
to review proceedings to dissolve ATTACHMENT, 12.

CESTUI QUE TRUST,
his right of action: ACTION, 4.

CHALLENGE,
right to peremptory challenge: TRIAL, 2.

CHARGE TO THE JURY.
misapplication of: CRIMINAL LAW, 19.
presumed warranted by evidence: PRACTICE, 12, 13
See TRIAL, 20-22.

CIRCUIT COURT COMMISSIONER.
certiorari to review dissolution of ATTACHMENT, 12.
finding on complaint under FRAUDULENT DEBTORS' ACT.
CIVIL DAMAGES.
See LIQUOR LAWS.
CLAIMS.
against estates: ACCOUNT STATED, 2; ESTATES ETC., 7–9.
COMITY.
foreign appointment of guardian: GUARDIAN AND WARD, 1, 2.
COMMISSIONER OF HIGHWAYS.
See HIGHWAY COMMISSIONERS.
COMMON COUNTS.
notice of set-off corresponding to: SET-OFF, 2.
COMPARISON
of handwriting: EVIDENCE, 13, 14.
CONDITION.
of bond: BOND, 1–5.
to signing bond: SURETYSHIP, 3.
CONSIDERATION
for assignment: ACCOUNT STATED, 5.
for promissory note: NEGOTIABLE INSTRUMENTS, 3–5.
for surrender of land contract: STATUTE OF FRAUDS, 1.
recital of: DEEDS, 1, 2.
CONSTABLE.
1. The Constitution of Michigan contemplates that persons vested with the powers of constables shall be selected by the people at regular elections. *Abels v. Ingham Supervisors*, 526.
2. Acts 217 of 1859 and 55 of 1873 are invalid in giving the members of voluntary detective associations the powers of constables and authorizing them to require the assistance of the regular police. *Id.*
CONSTITUTIONAL LAW
against variance of CONTRACTS, 17.
CONSTRUCTION
of affidavits in answer to order to show cause: MANDAMUS, 8.
of charge to the jury: TRIAL, 22.
of covenants of warranty: DEEDS, 2, 3.
of deed, mortgage and contract as one bargain: VENDOR'S LIEN, 3.
of estoppel: LICENSE, 1.
of provisions in LEASE, 2, 3.
of mortgage: MORTGAGE OF LANDS, 1, 2.
of inconsistent statutes: CORPORATIONS, 4.
of statute as to judicial office, COURTS, 2.
of WILLS, 12, 13.
CONTRACTS: *Contract relations*, 1; *time*, 2; *delivery and acceptance*, 3–7; *proof to vary*, 8–16; *pleading*, 16; *State contracts*, 17, 18.
1. An adverse relation cannot be turned into a contract relation, either express or implied, unless some duty exists on the part of the party occupying it, upon which the law permits the fiction of a contract so as to simplify the redress. *Lockwood v. Thunder Bay River Boom Co.*, 536.
2. Where a promise is made to be performed when certain work is completed, but no time is stated for its completion, the law implies a reasonable time. *Bennett v. Beam*, 346.
3. Where a land contract was delivered on a week day, the mere fact that it was dated as if made on Sunday is not material and will not avoid it. *Lamore v. Frisbie*, 186.

4. Inability to produce a contract that has been fulfilled does not furnish any conclusive presumption against its existence. *Id.*
5. Acceptance of work done under a non-apportionable contract to erect an addition to a building, must be unequivocal, and cannot be presumed from ordinary acts done as owner of the realty. *Fildew v. Besley*, 100.
6. One cannot recover for work done and materials furnished under a non-apportionable contract to put up an addition to a building for a fixed sum, where the house and the addition were burned without the fault of either party before the contract was fully performed, and before any part of the work had been accepted or in any way appropriated by the owner of the main building. *Id.*
7. A deed was deposited in escrow with a written agreement by the grantor that the sale might be abandoned if the title to be conveyed should not be found by the depositary to be a full title in fee simple and free from all encumbrances. *Held* that this paper referred to the title as it stood when the arrangement in escrow was made, and did not bind the grantee to accept any future rectification. *Fletcher v. Moore*, 577.
8. An equity against the words of an express contract, where no want of capacity, illegality, fraud, or mistake in making it is shown, cannot be recognized. *Fraser v. Fraser's Estate*, 275.
9. Where a written agreement is made in express terms for the satisfaction of certain claims held by one party against the other, a letter previously written by the former to the latter and containing a statement of the amount paid out by the former for the benefit of the latter, is not admissible to vary the express terms of the agreement. *Id.*
10. Where dealings between parties consist of separate and distinct transactions, they cannot be referred to as establishing a usage that will govern another independent transaction between them, especially if the latter was carried on under express terms in writing. *Larkin v. Mitchell & Rowland Lumber Co.*, 296.
11. Where a contract for material is made independently of plans and specifications, the latter cannot be put in evidence in an action on the contract merely because a third person, who was agent for neither party, after using them when making an estimate upon the work and failing to get his employer to take it, brought the actual contracting parties together. *Griffin v. Fulton Iron Works*, 571.
12. Where one member of a firm of paving contractors makes an individual contract to pave a street, the fact that the firm as a firm has already made an agreement by which they are to receive a certain royalty upon the kind of pavement used, does not make any difference with the construction of the individual contract. *Detroit v. Robinson*, 198.
13. A contract whereby the owners of the right to use a patent pavement are to receive from a city a certain royalty for the use of the pavement, will not prevent their contracting to lay the pavement; nor would the paving contract affect the royalty contract unless it contained apt words for that purpose. *Id.*
14. One member of a firm, or one of a number of joint contractors, cannot by his subsequent individual contract vary or affect the joint obligations which have been already incurred; though he may bind himself thereby. *Id.*
15. In letting a contract for laying a patent pavement, the city of Detroit stipulated that it might withhold a certain fixed sum per square yard to protect itself from claims for royalty, and the bids were to include that sum. The city assessed and

collected a paving tax amounting to the entire contract price including the royalty, which it had made a separate contract to pay, but it afterwards appeared that the patent was void. *Held* that the contractors were not concerned in the city's liability for royalty, and were not entitled to receive the sum withheld to pay it. *Id.*

16. If a declaration on a contract is on the common counts and there is no bill of particulars, the parties have a right to go to the jury on any contract that will sustain a right of recovery, and are not confined to a particular contract as sworn to by the plaintiff, if that varies from the one actually performed by him. *Engle v. Campbell*, 565.
17. A State contract that is not made as the Constitution requires, is not within the protection of the constitutional provision which forbids it to be varied. *Ayres v. State Auditors*, 422.
18. The published notice for bids for printing and publishing the Supreme Court reports should inform bidders at what time the bids will be opened, so that the latter may be present and see that the contract is awarded to the lowest bidder as the law provides. *Id.*

by corporation: CORPORATIONS, 6, 7.
by infant and adult jointly: INFANT, 1.
to account for property used in common: LEASE, 5.
to pay for land: STATUTE OF FRAUDS, 1, 2.
for publishing Supreme Court Reports: COURTS, 5–8.
for sale of HOMESTEAD, 2.
for support of parents: DOM. RELATIONS, 2; GUARDIAN ETC., 3.
for use and occupation; elements: LEASE, 1.
necessary to action for use and occupation: ASSUMPSIT, 4.
bidders under State contracts: MANDAMUS, 5.
payment on Sunday: PAYMENT, 2.
damages for breach; evidence: HUSBAND AND WIFE, 3.
assumpsit for damages by trespass: ACTION, 10.
See AGREEMENT.

CONVERSION
of property levied on: TROVER, 1, 2.
by refusal to surrender machinery: TROVER, 3.
by retaining chattels and assigning MORTGAGE OF CHATTELS, 11.

COPY
of note attached to declaration: NEGOTIABLE INSTRUMENTS, 2.
of public documents: EVIDENCE, 16.

CORPORATIONS: *Organization*, 1–5; *powers*, 6; *director*, 7.

1. All private corporations must be organized under general laws and can be valid only when strictly conforming to all the conditions imposed on their completion. *Doyle v. Mizner*, 332.
2. Articles of association of a private corporation are invalid if not acknowledged, and are not entitled to be filed in the Secretary of State's office. *Id.*
3. Where corporations are organized under a general incorporation law, their powers and privileges depend on the law and on their articles of association, much as they would depend upon their charter if created by special act. *Dewey v. Cent. Car & Mfg. Co.*, 399.
4. Where an incorporation law contains provisions regulating the bringing of actions against corporations organized under it, they must be regarded as exceptions to earlier general provisions on the same subject, if inconsistent. *Id.*
5. Under Comp. L., § 3355, which permits the organization of private corporations for supplying water wherever the municipal authority shall resolve that it is expedient to have water-

works, but inexpedient for the town to build them, no such corporation can be organized until these conditions have been strictly fulfilled; and the municipality cannot waive them. *Att'y Gen. v. Hanchett*, 436.
6. A corporation cannot be held to have contracted unless by such agents or officers as have express or implied authority. *Lockwood v. Thunder Bay River Boom Co.*, 536.
7. Individual directors of a corporation cannot bind it. *Id.*
recognition as; estoppel thereby: QUO WARRANTO, 2.
recognition of corporate character: ESTOPPEL, 7–9.
as guardians: GUARDIAN AND WARD, 1.
for improving navigation: NAVIGABLE STREAMS, 3.
authority to give MORTGAGE OF CHATTELS, 1–3.
authority to make note: NEGOTIABLE INSTRUMENTS, 1.
service on: PRACTICE, 4.
suits against stockholders: STATUTE OF LIMITATIONS, 1.

COSTS.
1. Costs are not generally imposed on public officers and boards where they appear to have acted in good faith. *Scrafford v. Gladwin Supervisors*, 464.
2. Costs on appeal from a justice can be awarded only by the judge who tried the appeal. *Steinhauser v. Wayne Judge*, 463.
3. Costs are awarded only on error where a judgment by default for defendant's non-appearance is reversed. *Bagley v. Pridgeon*, 550.
4. The Supreme Court, on reversing a judgment recovered by a non-resident plaintiff, and remanding the case for a new trial, will not award costs under Comp. L., § 6133, against the surety for costs. *Ortmann v. Merchants' Bank of Canada*, 464.
5. An affidavit stating generally that the items of disbursements given in a bill of costs were "necessary to the proper preparation of the case for hearing" is not specific enough to support the taxation of the expense of drawing and engraving a map that had been returned in the bill of exceptions and printed in the record. *Maxwell v. Bay City Bridge Co.*, 67.
6. Costs are properly imposed against a subsequent encumbrancer who defends against a bill of review filed by a principal defendant, and maintains the supplemental litigation in opposition to the terms of a mortgage binding his lands. *Mickle v. Maxfield*, 304.
7. Where a mortgage was cut down on appeal by the mortgager on a bill to set it aside, complainant was granted costs of both courts, and was permitted to apply them, when taxed, as payment on the mortgage. *Bowe v. Bowe*, 195.
omission of, from enrollment: EQUITY, 9.

COURT RULES. SEE RULES.

COURTS.
1. Jurisdiction in a Federal court, so long as it is not exercised, does not necessarily deprive a State court of the right to proceed in the same matter. *Russell v. Phelps*, 377.
2. Act 76 of 1879 purported to establish the police court of Grand Rapids and repealed the act under which the police justice was acting, but continued him in office to the end of his term under the title of "police judge." *Held* that it did not confer a judicial office by legislation, but only abstained from legislating the police justice out of office. *Coon v. Att'y Gen.*, 65.
3. Process from the Superior Court of Detroit cannot be served outside of the county. *Dewey v. Cent. Car & Mfg. Co.*, 399.
4. The Supreme Court will not interfere with the discretion of the Governor, nor subordinate him to its process; nor will it review the exercise of political and executory functions when

they are not ministerial and would require the court to act outside of judicial authority. But State officers inferior to the Governor have many duties which the courts will compel them to perform. *Ayres v. State Auditors*, 422.

5. It is within the discretion of the Legislature to decide whether it will publish the Supreme Court reports at the expense of the State, but its decision will not bind its successors; if so published, it should be done by contract. *Id.*
6. History of the office of State Reporter and of the mode of publishing the Supreme Court Reports. *Id.*
7. The printing of the Supreme Court reports is not, under the laws of Michigan, printing for the judicial department, and until 1871 it was not included in the "State printing" contract, nor classed as printing "ordered by the Legislature." Const., Art iv., § 22. *Id.*
8. In advertising for bids for printing and publishing the State reports under Act 168 of 1879, it is not lawful to impose the condition that the work shall be done at the capital. *Id.*

conflict of jurisdiction: determined: PROHIBITION, WRIT OF, 2.
of municipalities, jurisdiction: JUDGMENTS, 3.
for trial of suit against assignee in BANKRUPTCY, 3, 4.
Supreme Court may issue writs of HABEAS CORPUS, 1.
must protect infant litigants: GUARDIAN AND WARD, 4–7.
notice of set-off in various courts: SET-OFF, 4.
control over pleadings: ACTION, 6.
quo warranto proceedings: QUO WARRANTO, **1.**

COUNTY CLERK:
certificate to tax rolls: TAXATION, **11.**

COVENANT.

1. A covenant runs with the land when its purpose is to give future protection to the title which the deed containing the covenant undertakes to convey, but not when it simply gives protection against something which immediately affects the title and causes present damage. *Post v. Campau*, 90.
2. An action of covenant does not lie in Michigan upon a bond that does not contain covenants, when it is given to secure anything but the payment of money, or when the amount secured exceeds $150. *Bishop v. Freeman*, 533.

in building lease; furniture: LEASE, 2.
of warranty: DEEDS, 2, 3.
not implied against surety: SURETYSHIP, **1.**
remedy on bond: ACTION, 8.

CREDIBILITY
of witness: EVIDENCE, **2.**

CREDITOR'S BILL:
proceedings in nature of: DEBTOR AND CREDITOR, 12; EQUITY, 2.

CRIMINAL LAW: *Arrest*, 1–5; *alibi*, 6; *adultery*, 7–10; *burglary*, 11, 12; *rape*, 13–16; *verdict*, 17; *penalty*, 18; *charge to jury*, 19; *private detectives*, 20.

1. One who is arrested on a criminal warrant can either insist upon or waive examination, and if he waives it, may be held for trial on the showing upon which the warrant for arrest was issued. *Stuart v. People*, 255.
2. Where a person under arrest waives a preliminary examination, the magistrate may bind him over for trial for the offense charged in the complaint and warrant, and the prosecuting attorney can file an information charging him with any offense covered by the warrant and sustained by the evidence on which it was issued. *Id.*

3. If a person is arrested on a warrant charging an offense including lower grades, he should not waive examination if he wishes the examining magistrate to specifically designate the offense committed. *Id.*
4. Where persons held for trial for a joint offense were arrested on separate complaints and warrants, they may still be joined in the information and jointly tried unless they claim separate trials under Comp. L., § 7960. *Id.*
5. An information as for a joint offense may be filed even though it does not appear from the return of the examining magistrate that it was committed jointly; but the burden of proving that it was jointly committed is on the prosecution. *Id.*
6. Proving an *alibi* does not impose the burden of showing that the accused was absent at the very time at which the evidence for the prosecution tends to show the offense was committed, nor need it absolutely preclude the possibility of his being at both places. *Id.*
7. Where the *particeps criminis* in adultery testified to the offense, and on cross-examination denied having had a certain obscene conversation with a man named, or having criminal intercourse with another specified person, it was *held* that though the questions might be asked her, other witnesses could not be called to prove her denial false. *People v. Knapp*, 267.
8. A prosecution for adultery is not like a case of seduction, in which the previous chastity of the woman is necessarily in issue. *Id.*
9. In a prosecution for adultery the defendant was asked on cross-examination whether his wife had not made a complaint against the other party for the alleged offense, and he replied that he had heard so. *Held* that this answer should not have been received in evidence. *Id.*
10. Comp. L., § 7693, which forbids any prosecution for adultery except on complaint of the husband or wife, contemplates that the wife may proceed without her husband's consent. *Id.*
11. In a prosecution for burglary, *it seems* that the mere possession of articles stolen is not *prima facie* evidence of guilt of the burglary. *Stuart v. People*, 255.
12. In a prosecution for burglary it was shown that the stolen property was found near the respondent and another person in a barn where they slept on the night it was taken, and that when the arrest took place, the other person resisted and escaped. *Held* that the resistance and flight might properly be commented on by the prosecuting attorney and considered by the jury. *Cummins v. People*, 142.
13. In a prosecution for rape the complaining witness may show that the accused is her father and a man of great strength, and had been abusive to his family and often beaten his wife, and at the time of the outrage he was in liquor and she in great fear. *Maillet v. People*, 262.
14. In a prosecution for rape, a question to the complaining witness as to whether she had told the priest or any one else of the outrage, is not objectionable. *Id.*
15. Whether it would be error to allow the prosecutrix on a charge of rape to state what she had told to others about the affair when she first disclosed it—*Q.* *Id.*
16. In a rape case an instruction that the time at which the victim made complaint of the outrage is a relevant circumstance "as tending to prove the truth of the charge, for the reason that it is natural for the woman ravished to make complaint as soon as possible," is not open to the objection that it makes

the time of complaint a circumstance to corroborate the accusation but not to weigh against it. *Id.*

17. A verdict in a criminal case may be set aside and a new trial granted if the officer who attended the jury remained in the jury-room during their deliberations. *People v. Knapp*, 267.
18. Where a penalty is within the statutory limit, it is not reviewable on the ground of being excessive. *Cummins v. People*, 142.
19. Error must be affirmatively made out in criminal as well as civil cases; it cannot be based on a misapplication of the judge's remarks that would exclude evidence that they were not intended to affect, particularly if the ambiguity is the fault of counsel in not making their offer of proof explicit. *Maillet v. People*, 262.
20. Private detectives, organized in voluntary associations under Comp. L., ch. 126, cannot compel the supervisors to allow their claims for voluntary services in pursuit of criminals. *Abels v. Ingham Supervisors*, 526.

CROSS-EXAMINATION.
absolute right to: TRIAL, 11, 12.
of plaintiff for breach of promise: HUSBAND AND WIFE, 3, 5.
to explain party's declarations: EVIDENCE, 3.
of subscribing witnesses to WILLS, 4.
cumulative testimony, admission of: TRIAL, 9, 10.

DAMAGES.
1. Courts will rarely interfere with any damages which a jury may give on account of seduction. *Bennett v. Beam*, 346.
2. Where defendants to an action on a note relied upon the recoupment of damages for an alleged breach of warranty, and there was no evidence to show a warranty, and the jury did not find that there was any, a modification of the defendant's request to charge on the subject of damages was immaterial. *Worth v. McConnell*, 473.

an element of cause of ACTION, 1.
for breach of condition: BOND, 7, 8.
for breach of covenant: DEEDS, 3.
for breach of duty by bankrupt's assignee: PLEADINGS, 4.
in suit for breach of promise: HUSBAND AND WIFE, 2, 4, 5.
by breach of warranty: WARRANTY, 5.
for cutting timber: TRESPASS, 3, 4.
for failure to pay a MORTGAGE OF LANDS, 8.
for failure in duty of assignee in BANKRUPTCY, 3–9.
for LIBEL, 1–3.
for opening highway; waiver: HIGHWAYS, 1, 2.
for opening street: LICENSE, 2.
from sale of liquor: LIQUOR LAWS, 1–3.
for taking property on defective MORTGAGE OF CHATTELS, 3.
from wrongful issue of writ: ATTACHMENT, 13, 14.
for bastardy, as consideration for NEGOTIABLE INSTRUMENTS, 3, 4.
alleged in declaration for trespass: ACTION, 10.
recoupment of, in actions of tort: RECOUPMENT, 1.

DEATH
of party, does not affect his deposition: EVIDENCE, 10.

DEBT.
action of debt on bond: ACTION, 8.
action on BOND, 7, 8.

DEBTOR AND CREDITOR: *Form of indebtedness*, 1, 2; *preference of creditors*, 3, 4; *lien*, 5; *settlement*, 6, 7; *assignment*, 8–11; *creditor's bill*, 12.

1. The fact that a man has recognized a debt as one for which he is responsible does not establish a right of action against him on a note purporting to bind him but given for the debt without his consent or acquiescence, though it might strengthen proof of his ratification of the note if there were any evidence to show it. *Carleton v. Jenness*, 110.
2. A debtor gave his creditor the notes of a third party, which the creditor discounted on his own indorsement, but had to take up when they fell due. The debtor then gave him other notes made by the same person, but with the name of a firm to which the maker belonged written across the back. *Held* that they must be supposed to have had the previous debt in view, and that the creditor therefore had notice that the firm name was a mere accommodation, and could not recover on the note against another partner without whose knowledge or consent it was used. *Moynahan v. Hanaford*, 329.
3. Where a husband is honestly indebted to his wife, he may satisfy her claim in preference to those of other creditors, by transferring the homestead to her, if its value does not exceed the amount exempt from execution and the debt taken together. *Brigham v. Fawcett*, 542.
4. A debtor may waive the Statute of Limitations as to a particular creditor, and other creditors cannot complain. *Id.*
5. Whether advancing the money to pay for an article gives one any other interest in it than as security for its price—*Q. Vanneter v. Crossman*, 465.
6. A man agreed with his daughter-in-law that certain property should be sold and that she should have what was left of the proceeds after certain deductions were made. When the property was sold, he directed what should be done with the proceeds and she received what he gave her. She afterwards brought a claim against his estate based on the agreement. *Held* that it was not to be inferred from her receipt of the money paid her that she had agreed to take so much in satisfaction of her claim, or that she supposed she was accounting with her father-in-law as strangers would account with each other. *Fraser v. Fraser's Estate*, 275.
7. Where a man had a written agreement with his daughter-in-law whereby she was to receive the proceeds of the sale of certain property after specified charges against it had been paid him, the fact that he had afterwards, and before sale, sent her a statement of an account between themselves containing items not covered by the agreement, will not bind her to the deduction of so much from the amount due her under it, in the absence of evidence that she had examined the account or consented to such deduction. *Id.*
8. An assignment for the benefit of creditors or by way of security will be presumed honest and lawful, if possible, and will not be adjudged fraudulent as a conclusion of law drawn from its form unless that construction is necessary. *Palmer v. Mason*, 146.
9. A debtor conveyed a specific portion of his real estate to trustees to pay certain debts. A transferee of some of the creditors protected thereby attached the property, and the trustees filed a bill to quiet their title as against his levy. *Held* that the conveyance was not a general assignment, and as such subject to the rules which determine that a general assignment is fraudulent in not conveying all the debtor's property or securing all his creditors, or in withholding a part of it for his own benefit. *Id.*

10. An assignment for the benefit of creditors is not avoided by a subsequent attachment levied before the assignment could be put on record. *Id.*
11. The rule that a voluntary assignment by a foreign insolvent debtor will be postponed to the rights of an attaching home creditor, does not apply to real property. *Id.*
12. Comp. L., ch. 203, providing for proceedings at law in the nature of a judgment creditor's bill, is criticised as inadequate to reach or protect third persons entitled to due process of law in cases where transactions are attacked for fraud or illegality. *Reed v. Baker*, 272.

conveyance in fraud of creditors: SURETYSHIP, 5.
debts of deceased persons: ESTATES OF DECEASED PERSONS, 1, 2.
execution on lot fraudulently conveyed: EXECUTIONS, 14.
gift to wife in fraud of creditors: HUSBAND AND WIFE, 6.
mortgage in excess of debt: MORTGAGE OF CHATTELS, 5.
See BANKRUPTCY; FRAUDULENT DEBTOR'S ACT; MORTGAGE OF CHATTELS.

DECLARATION
of party: EVIDENCE, 3, 4.
sufficiency of, in action of TRESPASS, 3, 4.
for breach of promise: HUSBAND AND WIFE, **1.**
must describe land in cases of EJECTMENT, 4.

DEDICATION
or user, necessary to renew vacated street: HIGHWAYS, **5.**

DEEDS: *Consideration*, 1, 2; *covenants*, 2, 3; *record*, 4.
1. The recital of a consideration in a deed is merely to give it effect as a conveyance; and for any other purpose parol evidence is admissible to show that it was actually more or less than the amount stated. *Strohauer v. Voltz*, 444.
2. A deed containing a covenant of warranty "against all lawful claims whatsoever subject to a certain mortgage given by the parties of the first part for one thousand dollars," merely leaves the title subject to be defeated by a failure to pay the mortgage debt, but does not bind the grantee to pay it. And the exception is not such a written contract as will exclude evidence to show that in addition to the consideration expressed, the grantee had also agreed to pay off the mortgage. The exception and the agreement are distinct. *Id.*
3. A deed contained the following covenant of warranty: "The said parties of the first part for themselves, heirs, executors and administrators, do covenant, grant, bargain and agree to and with the said party of the second part, his heirs and assigns, that they, the said parties of the first part, have not heretofore done, committed, or wittingly or willingly suffered to be done or committed any act, matter or thing whatsoever, whereby the premises hereby granted, or any part thereof, is, are or shall or may be charged, encumbered in title or estate or otherwise." *Held* a special covenant looking to the future and promising indemnity for damages that might at any future time result from the breach of it. *Post v. Campau*, 90.
4. A man made a deed, but did not record it or authorize it to be recorded. It was fraudulently put on record, however, and he filed a bill to have it declared void and the interest conveyed by it released. The court below refused a release, but held that he had reserved a life interest to himself which it enjoined defendant from disturbing. *Held* that he was entitled to a release. If he had delivered the deed, the grantee was the owner in fee simple; if not, she had no interest. *Ritter v. Ritter*, 108.

gives right of possession: EJECTMENT, 1.
describing house separately: HOMESTEAD, 1.
memoranda upon deed: EVIDENCE, 12.
set aside as against execution: SURETYSHIP, 5.
DEFAULT
by lessee; dispossession: LEASE, 3.
for non-appearance: COSTS, 3.
for non-appearance in transitory action: JUDGMENTS, 3.
res judicata on default: JUDGMENTS, 5.
vacated: PRACTICE, 2.
DEFICIENCY
on delivery of merchandise: SALE, 6.
on foreclosure of MORTGAGE OF LANDS, 25, 28.
DELIVERY
on condition: MORTGAGE OF LANDS, 3.
of bill of sale: SALE, 1.
of contract: CONTRACTS, 3.
of goods sold: SALE, 1–7.
DEMURRER
to insufficient declaration: PLEADINGS, 1.
for insufficiency of averment: TRESPASS, 3.
to petition for MANDAMUS, 7.
DEPOSITION,
stipulation for taking of: ERROR, 6.
introduced by stipulation: TRIAL, 18.
of party, not affected by his death: EVIDENCE, 10.
DESCENT
of real property: ESTATES OF DECEASED PERSONS, 1–4.
DESCRIPTION
of realty in levy: EXECUTIONS, 6, 8.
of lands bought on foreclosure: MORTGAGE OF LANDS, 30.
DETECTIVES:
powers of voluntary detectives: CONSTABLE, 2.
claims for services: CRIMINAL LAW, 20.
DETROIT.
1. History of the central market place of Detroit reviewed. *Cooper v. Detroit*, 584.
Superior Court of; process: COURTS, 3.
DIRECTORS
power, as individuals: CORPORATIONS, 7.
resolution authorizing MORTGAGE OF CHATTELS, 1–3.
DISBARRING ATTORNEY.
See ATTORNEY AND CLIENT, 1, 2.
DISCHARGE
of mortgage, enforcement of: MORTGAGE OF LANDS, 15.
DISCONTINUANCE
of appealed cause: PRACTICE, 6.
on appeal, as concerns INFANT, 2.
as to infant maker of note: NEGOTIABLE INSTRUMENTS, 7.
omission to enter order: TRIAL, 3.
DISCRETION:
refusal to allow testimony without questioning: TRIAL, 4.
in issue of writ of prohibition: PROHIBITION, WRIT OF, 1.
DISSOLUTION
of attachment: ATTACHMENT, 9, 12.
DOCKET ENTRY
of oral defense, by JUSTICE OF THE PEACE, 3.
of payment of JUDGMENTS, 2.

DOMESTIC RELATIONS.
1. No one is bound to pay for volunteered services rendered under circumstances which do not fairly indicate an expectation of reward. So *held* where a man living in his father-in-law's family without paying board sued for work which he did on the latter's farm. *Coe v. Wager*, 49.
2. An aged couple deeded their property to their son on an agreement by him to give them a good and sufficient support, without any labor or service on their part except such as they might give voluntarily. The father died and the mother continued to live quietly with her son for several years until he married, when difficulties arose and she went to live elsewhere, claiming to be entitled to her support wherever she chose to reside. *Held* that in view of the moderate circumstances of the parties the understanding evidently was that the son was to support his parents at his home, and that the mother could not demand support elsewhere unless she showed that he failed in his duty to her. *Pratt v. Pratt*, 174.

accounting between relations: DEBTOR AND CREDITOR, 6, 7.
change of possession: SALE, 2.
ownership of property: REPLEVIN, 3.
wages to son-in-law: MASTER AND SERVANT, 7.

DOMICILE.
1. Where a person has left his domicile with no intention of returning, and is killed before he establishes another, the legal character of the old domicile does not necessarily control in matters of policy, and determine the place where a guardian for the decedent's infant child should be appointed. *Willie Rice's Case*, 528.

appointment of guardians: GUARDIAN AND WARD, 1, 2.

DOWER.
right of, an incumbrance: REAL PROPERTY, 5.

DRAINS.
1. In proceedings to open a drain under Act 140 of 1875, notice of the application to the probate court for the appointment of commissioners is necessary to the jurisdiction. And the drain should be identified or described in the order of the probate court, or in the commissioner's finding of the necessity for opening it. *Willcheck v. Drain Commissioner*, 105.

DURESS.
officer's presence during jury deliberations: CRIMINAL LAW, 17.

EASEMENT.
occupation for market, not an easement: REAL PROPERTY, 6.

EJECTMENT: *Right of action*, 1; *parties*, 2, 3; *pleadings*, 2–4; *proof*, 5–7; *judgment*, 8; *allowance for improvements*, 9.
1. A deed absolute gives the grantee the right of possession and will sustain ejectment, even though it was meant as a mortgage, if nothing appears to show that intent. *Jeffery v. Hursh*, 563.
2. Where ejectment was brought for premises on which was a house, a distinct part of which was occupied by defendant's father, it was *held* proper to join the latter as a defendant, but the action would not fail for non-joinder. *Hendricks v. Rasson*, 104.
3. The non-joinder, as a defendant in ejectment, of one who occupies a distinct portion of the premises, only limits the recovery by excluding that portion. Comp. L., § 6206. *Id.*
4. In ejectment the plaintiff cannot recover lands not described in his declaration. *Twogood v. Hoyt*, 609.

5. Testimony that defendant in ejectment had put plaintiff's grantor in possession of the premises sought, as the premises described in his deed, would be admissible as tending to show the location of the lands described in the declaration, but not to support a recovery of other lands than those therein described. *Id.*
6. Evidence that the owner of land had intended in platting it, that streets laid out by some other plan to which his own was an addition, should at some time be extended, and had laid out certain lots with reference to such streets, and that the streets had been extended, is admissible in an action of ejectment as bearing upon the true location of the lands described in the declaration. *Id.*
7. The location of lands claimed in ejectment is a question of fact for the jury, and may be proved by any kind of evidence that would be admissible to prove any fact. *Id.*
8. Where special findings in ejectment are inapplicable to the case, they are nugatory and a general judgment should be entered, whether the findings are stricken from the record or allowed to remain. *Burkle v. Ingham Circuit Judge*, 513.
9. The statutes allowing for improvements on a recovery in ejectment (Comp. L., § 6252: Act 180 of 1875) can apply only to cases where the plaintiff establishes a title in fee simple. *Id.*

cannot include enforcement of lien for taxes: TAXATION, 19, 20.
cannot question tax-title collaterally: TAXATION, 22.

ELECTION
of remedy: ACTION, 6–10.
between counts: TRIAL, 30, **31.**
of constables: CONSTABLE, **1.**

EMINENT DOMAIN:
taking land for DRAINS, 1.
laying out and vacating HIGHWAYS, **1–7.**
damages for opening street: LICENSE, **2.**

ENCROACHMENTS,
removal of: HIGHWAYS, **8–11.**

ENDORSEMENT.
See INDORSEMENT.

ENROLLMENT
of chancery proceedings: EQUITY, 9, **15.**

EQUITY: *Province*, 1; *final order*, 2; *pleadings*, 3–6; *practice*, 7–17.
1. Equity regards substance rather than form, and enforces the actual intent if lawful and just. *Stuart v. Worden*, 154.
2. A assigned a claim which he held against an estate to his wife, but on a proceeding against him in the nature of a creditor's bill under Comp. L., ch. 203, an order was made declaring the assignment void as against creditors, appointing a receiver, and restraining the transfer to A of the money due to him from the estate, or any interference with it by A or his wife. *Held* that A could appeal from this order, as it would not protect him from proceedings to enforce his liability on the assignment. *Reed v. Baker*, 272.
3. The purchaser at an execution sale under a personal decree for a deficiency on foreclosure, is not properly a party to a bill of review. *Gies v. Green*, 107.
4. Where a mortgage or other security is set forth and referred to in a bill in chancery, and made a ground of relief, it becomes a necessary part of the record, and if not denied in the answer it needs no formal proof. Chancery rule 56. *Mickle v. Maxfield*, 304.

5. Matters not set up in a bill but only in the answer are not thereby put in issue and cannot properly be adjudicated. *Miles v. Skinner*, 181.
6. Where defendants in chancery had answered in another suit attacking the same transaction, their answer, if meant to be an admission, is admissible as such, though never filed in the suit for which it was drawn. *Matson v. Melchor*, 477.
7. When a defendant in chancery is once lawfully impleaded, he cannot, by disposing of his interests, step out of the position of defendant, but he continues, usually for the purposes of the suit, to represent his original interests. *Mickle v. Maxfield*, 304.
8. Where complainant appealed but did not appear in person or by counsel, nor file a brief, the decree was affirmed with costs, though a record was filed and a brief for the defendants. *Woodward v. Chester*, 461.
9. The enrollment of chancery proceedings is not invalidated by omitting bills of costs not theretofore taxed; such bills can be afterwards included among the enrolled papers. *Mickle v. Maxfield*, 304.
10. Enforcement of a decree can be demanded only by those to whom it gives affirmative relief; on appeal they are the parties provided for by the appeal bond, and on a bill of review they cannot object that the decree was not performed. *Id.*
11. A court of equity cannot examine errors in proceedings at law on objections that do not go to the jurisdiction. *Wilson v. Coolidge*, 112.
12. A decree should not be reversed unless the appellate court is satisfied that it is wrong. *Sager v. Tupper*, 605.
13. A bill of review concerns the original controversy only and does not cover subsequent proceedings. *Gies v. Green*, 107.
14. A bill of review lies where a foreclosure decree has been made contrary to the terms of the mortgage, and an application for the correction of the error, made within a reasonable time, has been refused. *Mickle v. Maxfield*, 304.
15. One who files a bill of review does not thereby lose any rights that he would have had on a rehearing; the only distinction is that a rehearing precedes and a bill of review follows enrollment. Neither remedy can be had without leave. *Id.*
16. A mere subsequent encumbrancer cannot, on appeal from a decree on a bill of review, raise a question as to the security to be given on obtaining leave to file the bill, nor object that it was not given earlier. *Id.*
17. Where a bill of review is filed there is no practice which authorizes rights which accrued after the decree, to be introduced into the controversy except by some affirmative pleading in the shape of an original or supplemental bill bringing the new parties into court. *Id.*

governs enforcement of lien for taxes: TAXATION, 20.
there is no equity against an express contract: CONTRACTS, 8.
defense to claim for money received: ACTION, 11.
See titles of bills for various purposes.

EQUITY PLEADINGS. See EQUITY, 3-6.

EQUITY PRACTICE. See EQUITY, 7-17.

ERROR.

1. Facts cannot be presumed in order to find error. *Brong v. Brown*, 119.
2. Administrative questions are not in their nature judicial and are not subject to review. *Benjamin v. Manistee River Imp. Co.*, 628.

3. Error will not lie on rulings not excepted to, or if excepted to, on which error was not assigned. *Larkin v. Mitchell & Rowland Lumber Co.*, 296.
4. It is not prejudicial error to have refused offers of evidence to show good faith, where such evidence had already been admitted and the jury have found the fact. *Clark v. Field*, 342.
5. Where it does not appear that adverse rulings have prevented a party from making a full showing of the case, the appellate court may decline to disturb the judgment for errors in overruling questions on formal objections, when their exclusion does not appear to have done injury. *Fraser v. Jennison*, 206.
6. Suit was brought against joint parties, but summons was served on only one, who stipulated for taking a deposition. The other afterwards appeared, and on the trial the deposition was ruled out on his objection that it was taken without his consent and without notice to him. *Held* that the defendant who stipulated could not bring error on this ruling. *French v. Canada S. Ry. Co.*, 64.

not presumed: CRIMINAL LAW, 19; CERTIORARI, 2.
error at law not concerning the jurisdiction: EQUITY, **11.**
on directions as to conduct of case: TRIAL, **19.**
admission of cumulative proof: TRIAL, 9, 10.
on exclusion of testimony: TRIAL, 6.
on modification of requests as to DAMAGES, **2.**
refusal of requests to charge: TRIAL, 20, 21.
refusal to require special finding: WARRANTY, **2.**
omission to find before judgment: TRIAL, 25.
in charge, made harmless by verdict: INSURANCE, **8.**
cured by verdict: TRIAL, 13.
allegation of as to judgment: PRACTICE, 14.
effect on collection of judgment: EXECUTIONS, 2.
objections raised in Supreme Court: PRACTICE, **15, 16.**

ESCROW.
deposit of deed in: CONTRACTS, 7.

ESTATES OF DECEASED PERSONS: *Descent*, 1-4; *debts*, 1-4; *funds*, 5, 6; *claims*, 7-9.
1. Real estate descends to heirs subject to the payment of decedent's debts; and conveyances made by the heirs before administration, or before claims against the estate are paid or barred, are also subject to his debts. *Burns v. Berry*, 176.
2. A decedent's creditor may obtain administration of the estate and have the realty sold, if necessary, to satisfy the debt, even though he had lost his own mortgage lien thereon by neglecting to record it until a subsequent conveyance to a *bona fide* purchaser had been placed on record. *Id.*
3. Heirs can take no better title to real estate than their ancestor had at the time of his decease, and receive it subject to any incumbrances under which it may then lie. *Id.*
4 Where a man, after making a contract of sale, leaves a life estate in all his property to his wife, and there is no administration, payments on the contract are good if made to her. *Lamore v. Frisbie*, 186.
5. An administratrix withdrew from the custody of the court a fund belonging to the estate, and on the same day was relieved, by her own request, from her position as administratrix. *It seems* that the court still retains power to recall the fund on a satisfactory showing that it had been imposed on, and that the fund had been withdrawn in fraud of the solicitor of the estate, who had a lien on it. *Dennis v. Kent Circ. Judge*, 249.

6. Where the circuit court had cognizance of a case in which an administratrix was complainant, and the administratrix procured her discharge, and the probate court appointed in her place a special administrator, who filed a bill to enable him to enforce the decree granted in the case, and thus acquired a standing in the court as an intervening litigant, it was *held* that he was a *quasi* party to the case and sufficiently within the authority of the court to be subject to an order recalling into the custody of the court a portion of a fund which the administratrix had improperly withdrawn and paid over to him. *Id.*
7. Where a claim against an estate is based on a written agreement between decedent and claimant, the estate is not entitled to any deduction from it on account of items not specified in the agreement, on the ground that such deduction would be manifestly just and that it must be supposed that the parties understood the contract to provide for it. *Fraser v. Fraser's Estate*, 275.
8. The general provisions of the Statute of Limitations apply to claims against the estates of decedents. Comp. L., § 7157. *Sperry v. Moore's Estate*, 353.
9. Testimony by a third party that he had heard a decedent orally admit having bought certain property and become a debtor therefor at some previous time not specified, but which the witness inferred was comparatively recent, did not avail to release from the bar of the Statute of Limitations a claim against his estate upon an open account. *Id.*

claims on ACCOUNT STATED, 2.
claim on open accounts: STATUTE OF LIMITATIONS, 2.
when claims should be contested: WILLS, 5.
devisee contesting contract for sale of HOMESTEAD, 2.
custody of infant heir-at-law: HABEAS CORPUS, 4.
suit by executor on note belonging to the estate: JUDGMENTS, 7.

ESTOPPEL.

1. Estoppels rest on the protection of equities. *Ferguson v. Millikin*, 441.
2. An estoppel arises from the act and not the intention of it. *Vanneter v. Crossman*, 465.
3. Where a creditor, by attaching property and by his representations leads another creditor to suppose that he also has a right to attach it, and he does so, the first is estopped as against him from thereafter claiming that he himself was the owner of it. *Id.*
4. Where an attaching creditor had induced another creditor to levy an attachment which afterward became a prior lien by reason of the discontinuance of the first suit, the former is estopped in so far as the value of the property may be needed for satisfying the latter claim, from asserting that the ownership of the property was in himself. *Id.*
5. A judgment in replevin against an officer holding goods under an attachment does not estop the same or prevent any other officer from levying execution on the same goods in a different suit brought by another creditor of the party against whom the attachment was issued, where such creditor had had no interest in the replevin suit nor right to intervene therein. Nor would it be conclusive of the title as against a purchaser at the execution sale. *McKay v. Kilburn*, 614.
6. The lawful owner of a claim can only be estopped by garnishment proceedings in which the garnishee has been placed, by regular course of law, in position to bind him. *Hirth v. Pfeifle*, 31.

7. The rule that one who recognizes an association as a corporation by dealing with it as such, is estopped from disputing its incorporation, originates in equitable principles and rests on the ground that the act of recognition creates relations and encourages conduct which there may be difficulty in undoing. But it does not apply where no new rights have intervened and the recognition has itself been brought about by fraudulent dealing carried on for the purpose of entrapping a party into the act from which the recognition is inferred. *Doyle v. Mizner*, 332.
8. Whether parties can be estopped by their recognition of a corporation organized in violation of the statute by which it was supposed to be authorized—*Q.* *Att'y Gen. v. Hanchett*, 436.
9. How far the doctrine of estoppel by the recognition of corporate character can apply in favor of private corporations whose organization is defective because of illegalities in violation of public right—*Q.* *Id.*

construction of LICENSE, 1.
by bill of sale: SALE, 1.
by dealing in corporate character: MORTGAGE OF CHATTELS, 3.
from claiming damages for opening HIGHWAYS, 1.
from claiming under land contract: STATUTE OF FRAUDS, 1.
from claiming wages: LEASE, 5.
from contesting payment of premium: INSURANCE, 2, 3.
from disputing settlement: ACCOUNT STATED, 5.
from instituting quo warranto proceedings: QUO WARRANTO, 2.

EVIDENCE: *Weight of*, 1, 2; *declarations*, 3, 4; *hearsay*, 5; *experts*, 6–8; *physician's testimony*, 9; *depositions*, 10, 11; *memoranda*, 12; *handwriting*, 13, 14; *usage*, 15; *certificates*, 16.

1. The conclusions of the trial judge as to the preponderance of evidence are entitled to respect where the testimony was taken out of court, and is evenly balanced. *Sager v. Tupper*, 605.
2. There is no injustice in declining to give controlling force to the testimony of a witness as against his positive assertions and acts to the contrary, whereby he claims to have deceived another. *Cressinger v. Dessenburg*, 580.
3. The declarations of a party may be put in evidence against his interest, and where part of a statement or conversation is given for that purpose, he may himself bring out whatever has been omitted that bears on it. *Vanneter v. Crossman*, 465.
4. A party cannot escape the force of adverse evidence by introducing his own statements made before the trial to his attorney. *Id.*
5. Testimony that a witness knows by repute that her father and his brother came to the State together, and that they were the only two brothers of the family that did come to the State, is not objectionable as hearsay. *Fraser v. Jennison*, 206.
6. Expert evidence should be confined within reasonable bounds; and where the contestants of a will had examined five experts to show testator's mental condition, it was *held* proper to decline to allow another to be called. *Id.*
7. It is not error to exclude the opinion of a witness as to the depreciation caused to property by a trespass if it does not appear that he professed to know or had means of judging of the effect on the value of the estate. *Clark v. Field*, 342.
8. One who complains of the theft of a seal-skin cloak which she has worn for one winter, and who testifies that she has priced such articles, is competent to testify to its value. *Printz v. People*, 144.

9. The rule excluding a physician's testimony as to matters learned while attending a patient (Comp. L., § 5943) may be waived by the patient or by those who represent his interests after his death; and it will not prevent the proponents of a will from showing the testator's competency by the evidence of his physician. *Fraser v. Jennison*, 206.
10. The death of a party to a suit before it is brought up for hearing does not affect the validity of a deposition taken during his lifetime, nor exclude evidence of his own admissions. *Matson v. Melchor*, 477.
11. Where a witness is only temporarily absent from the State, and it does not appear that he has been subpœnaed or that any effort has been made to procure his testimony or personal attendance, his testimony given on a trial in another court between other parties, cannot be introduced. *Kellogg v. Secord*, 318.
12. Where a memorandum upon a deed was admissible in evidence, and referred to the land described in it, the deed was *held* admissible. *Russell v. Phelps*, 377.
13. In an action on a note the question arose whether defendant had written certain letters. The execution of the note was not in issue, but defendant denied having signed it, and there was testimony tending to show he did not write the letters. *Held* proper to admit, for purposes of comparison, the testimony of a witness showing that he had a note which he had seen defendant sign, and to allow him to compare the note in suit with it, and express his opinion as to whether he had signed the note and written the letters. *Worth v. McConnell*, 473.
14. Recoupment for breach of warranty was claimed in an action on a note given for the article sold. The plaintiff claimed that defendant had sent certain letters expressing his satisfaction with the article and asking an extension of time for payment. *Held* proper to introduce the letters so that the jury, by comparing them with the note, and from other evidence, might determine whether they were genuine and were written by the defendant or by his authority. *Id.*
15. Law books cannot be read to the jury to establish local usages of trade that are subject to change. *Iron Cliffs Co. v. Buhl*, 86.
16. The certificate of the Secretary of State to a legal conclusion is of no validity as evidence. His duty in certifying to copies of instruments on file in his office is purely ministerial, and he must certify to a copy of the entire document. A mere certificate that a paper required to be acknowledged, is accompanied by an acknowledgment in the usual form, is of no effect. *Doyle v. Mizner*, 332.

stipulation for taking deposition: ERROR, 6.
receiving evidence on trial: TRIAL, 4–18.
should not be held back for rebuttal: REPLEVIN, 2.
refusal to admit cumulative proof: ERROR, 4.
exclusion of, without injury: ERROR, 5.
supervisor's certificate: TAXATION, 5.
weight and tendency of: TRIAL, 10.
to vary terms of CONTRACTS, 9–17.
to show *alibi:* CRIMINAL LAW, 6.
in prosecution for rape: CRIMINAL LAW, 13–16.
as to consideration of DEEDS, 1, 2.
of identity of lands sought: EJECTMENT, 5–7.
in *habeas corpus* case: HABEAS CORPUS, 1–3.
in breach of promise suit: HUSBAND AND WIFE, 1–5.
of burning insured property: INSURANCE, 6–8.

to regulate tolls: NAVIGABLE STREAMS, 8.
of additional consideration: NEGOTIABLE INSTRUMENTS, 5.
of satisfaction with consideration: NEGOTIABLE INSTRUMENTS 4.
of notice of non-payment: NEGOTIABLE INSTRUMENTS, 13.
in reduction of judgment in REPLEVIN, 6.
of purpose of bill of sale: SALE, 1.
of change of possession: SALE, 2.
as to manner of selling: SALE, 9, 10.
of intent to adopt SIGNATURE, 1.
in suit on warranty: WARRANTY, 3.
as to making of WILLS, 3–12.

EXAMINATION.
on charge of crime: CRIMINAL LAW, 1–3.
to fix custody of child: HABEAS CORPUS, 2.
of witness: TRIAL, 4–8.
of subscribing witnesses to WILLS, 4, 5.

EXCEPTIONS.
to finding: TRIAL, 28.
to rulings objected to: ERROR, 3.
to sureties on bond in replevin: SURETYSHIP, 4.
See BILL OF EXCEPTIONS.

EXECUTIONS: *Writ*, 1; *enforcement of*, 2; *levy*, 3–8; *sale*, 9–14.

1. Execution issued from the circuit court on a transcript of a justice's judgment in a suit begun by summons, is invalid if the transcript was filed in the circuit court before the expiration of the five days allowed by Comp. L., § 5395, before execution may issue. *O'Brien v. O'Brien*, 15.
2. A judgment creditor may proceed to collect his judgment notwithstanding the allowance of a writ of error, if his opponent has filed no bond to stay the proceedings; and if he does not exhaust this remedy he cannot take out a *capias ad satisfaciendum* after three months from the return day of the execution. *Douglass v. Manistee Judge*, 495.
3. A sheriff in making levy and sale merely exercises a power in the interest of a party whose writ is delivered to him for execution; and a purchaser at the execution sale does not stand in the sheriff's right, but is the privy of the party under whose execution the sale was made. *McKay v. Kilburn*, 614.
4. A levy of execution is not valid unless made before the writ is returnable. *Quackenbush v. Henry*, 75.
5. A levy of execution must be so made as to identify or give means of identifying the property levied on so as to make it chargeable to the officer; and property not levied on cannot be afterwards claimed. There must be manual seizure, or such assertion of control as may be made effectual, if necessary in order to bring and keep the property within the dominion of the law for sale on execution only. An intention to allow it to be disposed of by the execution debtor is not the intention required. *Id.*
6. A levy of execution on real estate may describe the property by proper abuttals, but it is better to describe it by reference to the recorded plat, if any, and by the number of the lot and block as given thereon, together with such other descriptive facts as may be necessary to identify it. *Burrowes v. Gibson*, 121.
7. It is for the jury to determine from evidence and under instructions, whether the acts required to effect a valid levy have been carried out, even though the levy is indorsed on the execution, if the return is not explicit and the extent of the levy is uncertain. *Quackenbush v. Henry*, 75.

8. A certificate of levy on "lot 7 of the subdivision of lots 12, 13 and 14 of the Labrosse and Baker farms in Detroit," is not sufficient to charge a purchaser with notice that it is intended to cover "lot 7 of John Gibson's subdivision of lots 12, 13, 14 and 18 of the Labrosse and Baker farms, situated on the south side of Pine street, between Sixth and Seventh streets, according to the recorded plat of the same in the register's office of Wayne county." *Burrowes v. Gibson*, 121.
9. Whether the proceedings required by Comp. L., ch. 192, for setting aside property exempt from execution do not call for some farther identification of the property than where seizure can be made of a mass of property not subject to such reduction—*Q. Quackenbush v. Henry*, 75.
10. Where execution is levied on mortgaged chattels, sale must be so made as to preserve the mortgagee's lien; the property cannot be sold in parcels, but must be sold altogether, subject to the mortgage. *King v. Hubbell*, 597.
11. It is not a condition precedent to the sale on execution of property mortgaged by the defendant therein, that the execution creditor should have paid off the mortgage and thus acquired the mortgager's interest. *Id.*
12. An execution sale made upon a transcript of a justice's judgment is void if the transcript was made within five days after the entry of judgment. *Vroman v. Thompson*, 145.
13. Where a homestead right is not asserted in defense to a bill in aid of execution and the defendant has died and his children are of full age, there is no obstacle to a sale under the levy. *Matson v. Melchor*, 477.
14. Where a bill was filed in aid of an execution that was levied on a lot which had been conveyed in fraud of creditors and was occupied as a homestead, and the answer did not aver its value to be low enough to bring it within the constitutional exemption, the levy was *held* legal, and action should have been taken under it to ascertain the homestead right or secure such interest as might remain over in case the value of the property exceeded the amount of the levy. *Id.*

title by execution void for want of jurisdiction: ACTION, 8.
for deficiency on foreclosure: MORTGAGE OF LANDS, 28.
on goods under attachment: ESTOPPEL, 5.
title by execution sustains trover; TROVER, 1.
in suit on bond: BOND, 7.
sufficiency of delivery as against execution: SALE, 4.

EXECUTORS AND ADMINISTRATORS.

1. A case in which an administrator is complainant may still be open for the allowance of orders necessary to the protection of a fund, even though the administrator has been relieved from duty. *Dennis v. Kent Circ. Judge*, 249.
2. A foreign executor can sue in his own name on a note belonging to the estate and payable to bearer; and any claim held by the defendant against the estate can be presented as set-off. But if the note were non-negotiable or payable to order and not indorsed, the executor should sue in his official character. *Knapp v. Lee*, 41.

EXEMPLARY DAMAGES
for LIBEL, 1.
for selling liquors: LIQUOR LAWS, 3.

EXEMPTIONS
setting aside property: EXECUTIONS, 9, 14.

EXPENSE
of perfecting title, recoverable in ASSUMPSIT, 2.

EXPERTS:
admission of EVIDENCE, 6–8.
questions as to testator's sanity: **WILLS, 6.**
surveyor's testimony: **REAL PROPERTY, 4.**
as to values: EVIDENCE, 7, 8.

FENCE,
as encroaching upon HIGHWAYS, **9–11.**
FINALITY
of judgment: TRIAL, **1.**
FINAL ORDER
declaring assignment void: **EQUITY, 2.**
FINDING
in suit on bond: BOND, 8.
as to the weight of EVIDENCE, **1, 2.**
as to articles covered by a SALE, **11, 12.**
of value: TRIAL, 26.
special finding as to warranty: WARRANTY, **2.**
of supervisors as to accounts of JUSTICES OF THE PEACE, **4.**
absence of regular finding: PRACTICE, 14.
omission to make finding before giving judgment: TRIAL, **25.**
effect of special finding upon verdict: PRACTICE, 7.
supplemental finding of special answers: TRIAL, 26.
exceptions to finding: TRIAL, 28.
special findings, objections to: TRIAL, 23.
on law points, objection thereto: PRACTICE, **16.**
judgment on special finding in EJECTMENT, 8.
See TRIAL, 23–28.

FIXTURES.
1. Where permanent annexation to the freehold is intended, an article lawfully annexed becomes a fixture and part of the realty whether its removal would injure the freehold or not. *Morrison v. Berry*, 389.
2. One who makes improvements on the land of a person who has not been in fault about it, does it at the risk of losing both his property and his labor. *Id.*
3. Machinery specially adapted for use in connection with the realty, and put up for use and actually used on it and owned in common with the realty, is a fixture, however the parties may regard it. So *held* where the machinery of a woolen factory, propelled by a water-wheel with shaft and belting, had been included as personal property in a mortgage of the land on which it was placed. *Lyle v. Palmer*, 314.

included in finding of SALE, 11.
refusal to surrender fixtures not conversion: TROVER, **3.**
FLIGHT
to avoid arrest: CRIMINAL LAW, **12.**
FORECLOSURE
of MORTGAGE OF LANDS, 16–30.
defective; review of proceedings: EQUITY, **14.**
rights of infant parties: GUARDIAN AND WARD, **5–7.**
FORFEITURE:
condition of, is an incumbrance: REAL PROPERTY, **5.**
of policy for non-payment: INSURANCE, 1–4.
FRAUD:
conveyance in fraud of creditors: SURETYSHIP, **5.**
gift by debtor to wife: HUSBAND AND WIFE, **6.**
in giving mortgage exceeding debt: MORTGAGE OF CHATTELS, **5.**

in sale by debtor: ATTACHMENT, 4.
by purchaser, in payment: ACTION, 7.
in making proofs of loss: INSURANCE, 4.
recognition obtained by fraudulent means: ESTOPPEL, 7.

FRAUDULENT DEBTORS' ACT.
1. The Fraudulent Debtors' Act does not cover cases of mere constructive fraud nor apply to those who are guilty of no personal delinquency and compel them to account for transactions of others which they cannot be presumed able to explain. *Watson v. Hinchman*, 27.
2. A complaint that specified partners had disposed of their property with intent to defraud, and a finding that one of them had failed to account for the firm assets and to explain the doings of all, will not sustain a conviction of the individual partner under the Fraudulent Debtors' Act. *Id.*
3. It is good practice for a circuit court commissioner to file a written statement of his conclusions on a complaint made to him under the Fraudulent Debtors' Act. *Id.*

FREIGHT:
recovery of advances: ASSUMPSIT, 1.

GARNISHMENT.
1. Garnishment process cannot reach a joint debt where there is service on only one of the debtors. *Hirth v. Pfeifle*, 31.
2. A demand due in part only to the principal defendant cannot be garnished. *Markham v. Gehan*, 74.
3. A tenant cannot be garnished for rent payable in the future, and not absolutely due at the time of garnishment. *Thorp v. Preston*, 511.
4. A claim under an insurance policy is not garnishable if the company has the right to elect whether to pay for the property lost or replace it. *Id.*
5. Comp. L., § 6503, in providing that demands to become due absolutely, may be garnished, refers only to claims which are already fixed in amount or capable of being fixed, and not dependent for their validity or amount on anything to be done or earned in the future, or the continued liability for which may be changed by events. *Id.*
6. Money paid to a justice to be applied upon a judgment in garnishment cannot be used to satisfy a different judgment against the same party, even though the time had expired during which the fund could be bound by the proceedings in garnishment. *McDonald v. Lewis*, 135.
7. A garnishee cannot waive or admit away the rights of the principal defendant, as by disclosing that the debt was due to some other person. *Hirth v. Pfeifle*, 31.
8. It is no defense to a suit on a joint note that one of the defendants had been garnished in a former suit as indebted to the husband of the plaintiff in the latter one, and had admitted that he was indebted to the husband on the note in suit. *Id.*

of JUDGMENTS, 4.
estoppel by: ESTOPPEL, 6.

GIFT
to wife in fraud of creditors: HUSBAND AND WIFE, 6.

GOVERNOR
not amenable to mandamus: COURTS, 4.

GRAND RAPIDS,
police court of: COURTS, 2.

GUARDIAN AND WARD.

1. The laws of Michigan usually contemplate the appointment of a guardian who shall have custody of the estate, whoever may have custody of the person, and do not provide for corporation guardianships. They contemplate that guardians may be appointed for infants who have property in Michigan whatever may be their residence, and only recognize foreign guardians as a matter of comity. *Willie Rice's Case*, 528.
2. If a guardian has been appointed for an infant at a foreign domicile, and has had personal custody of the infant, his claims as guardian should be respected elsewhere; but this is not necessarily the case if he has no control of the infant's estate and was appointed in a jurisdiction from which the infant was personally absent. *Id.*
3. A son whose parents have turned over their property to him in consideration that he will support them, is in a position of guardianship over them and is bound to take no advantage of them in dealing with them. *Bowe v. Bowe*, 195.
4. A court is bound to guard the interests of infant litigants whether protected by their guardian or not. *Sheahan v. Wayne Circuit Judge*, 69.
5. General guardians do not represent their infant wards in foreclosure proceedings, and the solicitors of the guardians cannot bind the rights of the infants; nor can guardians *ad litem* bind the infants except in strict accordance with the rules for their protection. *Id.*
6. The new security required by Chancery Rule 94 before money belonging to infant litigants can be turned over to general guardians, calls for a responsible showing, and cannot rest on loose verbal statements. *Id.*
7. Money belonging to infant litigants in foreclosure cannot be ordered paid to the solicitors of their general guardian, as they are strangers to the infants and have no claim on, nor power to represent them. *Id.*
8. A court should not give up control of a fund belonging to infant litigants without securing the rights of their guardian *ad litem* or his solicitor. *Id.*

appointment of guardians: DOMICILE, 1.
custody of infant heir: HABEAS CORPUS, 4.
mortgage to secure support: MORTGAGE OF LANDS, 4.
surety's liability on guardian's bond: SURETYSHIP, 3.

HABEAS CORPUS.

1. *It seems* that a writ of *habeas corpus* should be taken out from the Supreme Court, if they are to pass upon the evidence in the proceedings. *Corrie v. Corrie*, 509.
2. In *habeas corpus* proceedings between parents for the custody of a child, there should be full inquiry and examination on oath to enable the court to decide as the welfare of the child may require. *Id.*
3. The Supreme Court does not examine on *certiorari* the evidence taken on the hearing of *habeas corpus* proceedings in a lower tribunal, but is confined to questions of law. *Id.*
4. The parents of an infant were killed and the child was injured in a railway collision in Michigan while on their way from their former home in Philadelphia, to Kansas where they meant to reside. The child's property consisted chiefly in his right to compensation, and was therefore in Michigan where he remained. A guardian who was nearly related to him was appointed for him in Michigan where the guardian has charge

of the estate, and another guardian who was to have charge of the person only, was appointed for him in Philadelphia, where a trust corporation was made guardian of the estate. The guardian appointed in Philadelphia sought to obtain the custody of the child on a writ of *habeas corpus*. *Held* that the foreign guardian was not entitled to it as a matter of right, and the writ was refused. *Willie Rice's Case*, 528.

HANDWRITING.
comparison of: EVIDENCE, 13, 14.

HEARSAY.
family traditions: EVIDENCE, 5.
statements of third parties: MORTGAGE OF CHATTELS, 3.

HIGHWAYS: *Opening ways*, 1, 2; *vacating streets*, 3–7; *encroachments*, 8–11.

1. One who petitions for the laying out of a street which would cross his land is not thereby precluded from claiming compensation therefor. *Turner v. Stanton*, 506.
2. Everything necessary to support the proceedings of a village board in laying out a street across the land of private persons ought to appear of record; such as any waiver of damages. *Id.*
3. *It seems* that the rights of the public in city streets may be extinguished by legislation. *Cooper v. Detroit*, 584.
4. The general highway laws of Michigan provide for vacating as well as laying out ways, and for vacating public highways by non-user as well as by direct proceedings. *Id.*
5. Where any part of a highway has been extinguished and turned to other uses, it cannot be renewed without the same methods of dedication or user which would turn other lands into public ways. *Id.*
6. Where a highway is vacated conditionally, it is not re-established by the suspension of the conditional occupation. *Id.*
7. Where a city charter does not require the purpose of vacating a highway to be expressed, nor make the expression of it obligatory on the subsequent occupation, the expression of a specific purpose in the proceedings to vacate it, is surplusage. *Id.*
8. The proceeding for the summary removal of encroachments upon a highway (Comp. L., ch. 27) does not cover cases where there is a dispute in good faith as to whether any highway was ever opened which included the land where the alleged encroachments are. *Willson v. Gifford*, 454.
9. An order from the commissioner of highways to move one's fence as being an encroachment on the highway, must state how far the fence lies from where it ought to lie. *People v. Smith*, 138.
10. The statutory penalty imposed by Comp. L., § 1291, for neglecting to remove a fence that encroached on the highway, after being ordered to do so by the commissioner of highways, applies only to statutory ways and not to highways by user. *Id.*
11. Comp. L., §§ 1290–1, provides that if one whose fence encroaches on the highway does not move it within thirty days after being ordered to do so by the highway commissioner, the latter may sue him. *Held* that the landholder cannot be put in default unless he has been distinctly notified how far the fence lies from the true line, and if the notice is defective in that regard, the thirty days do not begin to run until it is perfected. *Id.*

improvement of, by TAXATION, 12.
streets as BOUNDARIES, 3.

HIGHWAY COMMISSIONERS:
payment of orders: MANDAMUS, 1.
signature to order on treasurer: TOWNSHIPS, 1.
HOMESTEAD.
1. Where the deed of a homestead mentions the house separately, it still remains part of the freehold. *Lyle v. Palmer*, 314.
2. A man agreed to sell a piece of land on which he lived and which exceeded a statutory homestead. The family moved to another place and the purchaser made payments after the removal, which were accepted, the last being made after the vendor's death to his widow. *Held* that the vendor's devisees could not contest the contract on the ground that it was for the sale of the homestead. *Lamore v. Frisbie*, 186.
sale of: EXECUTIONS, 13, 14.
transfer by debtor to his wife, DEBTOR AND CREDITOR, 3.
HUSBAND AND WIFE: *Breach of promise*, 1–5; *gift to wife*, 6; *wife's estate*, 7; *alimony*, 8.
1. A declaration for breach of promise averred a promise to marry plaintiff (1) on request; (2) within a reasonable time; and (3) generally. *Held* that evidence was admissible to prove a promise to marry when certain buggies were finished, at all events where this promise was only a part of what had passed between the parties, on which the suit was based. *Bennett v. Beam*, 346.
2. In a breach of promise suit brought by a woman, evidence of the effect of the alleged refusal to marry upon her mind and feelings, is admissible as bearing on the question of damages. So is evidence of defendant's financial standing, as it is presumed that in contracting marriage property considerations are not ignored. But in an action for the breach of an ordinary contract, such evidence is inadmissible, as it cannot affect damages. *Id.*
3. In a suit brought by a woman for breach of promise, evidence of interviews between her father and the defendant in her absence is properly excluded; but where on cross-examination of the plaintiff evidence of an interview between the plaintiff and her counsel was called out, it was *held* proper to refuse to strike out testimony referring to an offer of settlement made by the defendant's brother. *Id.*
4. In an action for breach of promise brought by a woman, the fact that she was seduced by defendant under a promise of marriage should have great weight in fixing damages. *Id.*
5. In an action by a woman for breach of promise, it is inadmissible for the mitigation of damages to cross-examine the plaintiff as to whether she is then willing to marry the defendant, or to examine the defendant as to whether he had not notified plaintiff's counsel after the action was begun, that he was then ready to perform his agreement to marry. *Id.*
6. The fraudulent effect of a gift from a man to his wife by which the property is placed beyond the reach of creditors, is not changed by the fact that the wife, while she knew her husband was indebted, did not know that he could not give her his property under the circumstances. *Matson v. Melchor*, 477.
7. A married woman is not personally responsible, and her land is not bound, for improvements and expenditures made on it by her husband where no credit has been given to her and he has contracted on her behalf. *Morrison v. Berry*, 389.
8. A decree for alimony to be paid in land set off by a commissioner at a fair valuation, contemplates that it shall be set off according to the value of the property as shown by the testi-

mony taken in the case, and not by some new estimate after values have changed. *McClung v. McClung*, 53.
wife's claim preferred: DEBTOR AND CREDITOR, 3.
improvement of wife's estate: TROVER, 3.
mortgager's wife may buy from foreclosure purchaser: MORTGAGE OF LANDS, 20.
insurance for wife's benefit: INSURANCE, 3.
suretyship of wife on note: SURETYSHIP, 6.
payments to widow on contract of sale: ESTATES ETC., 4.
prosecution for adultery: CRIMINAL LAW, 10.
testimony of adultery: CRIMINAL LAW, 9.

HYPOTHETICAL QUESTIONS.
See TRIAL, 7.

IMPEACHMENT
of witness, exclusion of evidence: TRIAL, **13.**

IMPROVEMENT
of highways by TAXATION, 12.
of rivers: NAVIGABLE STREAMS.
on another's land: FIXTURES, 2.
on wife's land: HUSBAND AND WIFE, **7.**
on wife's property: TROVER, 3.
allowance for, on recovery in EJECTMENT, 9.
lien for, not enforced in ejectment: TAXATION, **9, 10.**

INCORPORATION.
fact of: MORTGAGE OF CHATTELS, 3.
See CORPORATIONS; ESTOPPEL, 7–9.

INCUMBRANCE,
instances of: REAL PROPERTY, 5.

INDORSEMENT
for accommodation; notice: DEBTOR AND CREDITOR, **2.**
by surviving partner, in firm name: PARTNERSHIP, 4.
of NEGOTIABLE INSTRUMENTS, 9–13.

INFANT.
1. In a suit on a joint contract made by an infant and an adult as joint parties, and under which money has been earned, the infant's father cannot sue with the other contractor in his own name as the infant's substitute. *Osburn v. Farr*, 134.
2. Where an action on a note is appealed to the circuit court, and the surety on the appeal bond is impleaded as defendant, and the defendants show that one of the original promisors is an infant, the plaintiff can accept the infancy as a fact and discontinue as against him. *Taylor v. Dansby*, 82.

guardianship of: GUARDIAN AND WARD.
to be protected by courts: GUARDIAN AND WARD, 4–7.
co-signer of note with infant: NEGOTIABLE INSTRUMENTS, **7.**
partnership contract by: PARTNERSHIP, 3.

INFORMATION
in the nature of QUO WARRANTO; filing of: ATTORNEY GENERAL, **1.**
based on warrant for arrest: CRIMINAL LAW, 2, 4.
for joint offenses: CRIMINAL LAW, 2, 4, 5.

INJUNCTION.
1. An injunction does not lie where the complaint is not that a new grievance is created, but that an old one is not stopped. *Cooper v. Detroit*, 584.
2. Where the right of a city to certain property has been established by the statute of limitations, specific allegations that its use for a specified purpose that is not unlawful will have a

bad effect on neighboring property, can have no bearing on a proceeding to enjoin its use therefor. *Id.*
bond conditioned on dissolution of: BOND, 1.
restrained by writ of prohibition: PROHIBITION, WRIT OF, 2.
to restrain collection of tax: TAXATION, 14–16.

INSANITY.
1. Incapacity, either criminal or civil, must for legal purposes be judged of by manifestations in conduct or language; symptoms of insanity which only physicians can perceive and which have no apparent effect upon one's ability to transact business are not enough to vitiate one's civil acts. *Fraser v. Jennison*, 206.
affects power to mortgage: MORTGAGE OF LANDS, 5.
of testators: WILLS, 1–11.

INSTRUCTIONS.
See CRIMINAL LAW, 19.

INSURANCE: *Surrender*, 1; *forfeiture*, 2; *payment*, 3; *waiver*, 4, 5; *burning property*, 6–8.
1. A provision in an insurance policy that if a policy for its surrender value is taken, it must be demanded within one year from the time an accrued premium falls due, refers to an accrued premium for the non-payment of which the company can determine the policy. *Mich. Mut. L. Ins. Co. v. Bowes*, 19.
2. Where an insurance company takes a note when a premium falls due, and gives therefor renewal receipts, the policy continues in force and the company cannot afterwards insist upon its forfeiture as for non-payment. *Id.*
3. Where an insurance company takes the notes of some other person than the assured when the premium falls due, it cannot, as against the assured, insist that they did not amount to a payment. So *held* where a husband's life was insured for his wife's benefit and his notes were given in renewal of the policy. *Id.*
4. The by-laws of an insurance company provided that all claims should be forfeited if there was any fraud in making proofs of loss. *Held* that if the person assured, in good faith and with the knowledge of the company's responsible officer included as her own, articles belonging to other members of the family, there was no fraud; and that if the directors knowing all the facts, gave orders for payment of the policy, any conditions that might have been insisted on were waived. *Farmers' Mut. F. Ins. Co. v. Gargett*, 289.
5. Where the by-laws of an insurance company provide that there shall be no waiver of the terms of the policy without the concurrence of the secretary of the company, indorsed or specifically acknowledged, it was *held* that if the secretary signed orders for payment, on the adjustment of the loss, it should be regarded as a very conclusive waiver in writing, if he knew all the facts. *Id.*
6. An assured person being called on to account for the fire by which the insured property was destroyed, suggested that it might have originated in some oiled shavings in a lumber room in the cellar. *Held* that there was no evidence in this suggestion that the assured had set fire to the property. *Id.*
7. Where an attempt was made to remove a piano from a burning house, it was *held* that a suggestion by the person assured 'to let it burn, it was well insured,' would be a significant fact to fix on her the guilt of setting the property on fire, if it were not that it was conceded that the policy did not cover the piano, and there was no evidence that it was insured at

all, and that there was evidence that what she did actually say was that 'it might better burn,' the fact being that the by-standers were about to knock its legs off with an ax in order to save it. *Id.*

8. A fire insurance company, being sued for the amount of a loss, sought to show that the person assured had burned the property, and the judge charged that the burden of proving that she committed the crime was on the company. The evidence showed, however, that she had made great exertions to save that which was insured. *Held* that such a charge would have been erroneous if there had been evidence on which to ground it, as it would have implied that the evidence of guilt must have been as conclusive as if the assured were on trial for the crime; but that, as it was, the defense were not entitled to any charge on that question, and the instruction was immaterial, the verdict being for the assured. *Id.*

elective compensation not subject to GARNISHMENT, 4.

INTEREST
on long time notes, annually: NEGOTIABLE INSTRUMENTS, 14.

IRREGULARITIES.
reviving suit: PRACTICE, 8, 9.
in swearing a jury: TRIAL, 3.

JOINDER
of defendants in EJECTMENT, 2, 3.
of respondents in information: CRIMINAL LAW, 4, 5.

JUDGMENTS: *Transcripts*, 1; *payment of*, 2; *by default*, 3; *stay of proceedings*, 4; *res judicata*, 5; *bar*, 6, 7.

1. Proceedings in regard to transcripts of justices' judgments must conform strictly to statute. *O'Brien v. O'Brien*, 15.
2. A justice's docket entry that money paid into court is in satisfaction of a particular judgment cannot make him liable to the judgment creditor for the money, if it was actually meant to be applied upon a different judgment. *McDonald v. Lewis*, 135.
3. Under Act 97 of 1879 the jurisdiction of the Superior Court of Detroit is confined in transitory actions "to cases where one of the parties lives in Detroit." *Held* that a judgment by default for non-appearance in a suit begun by declaration cannot be sustained where the declaration does not show the residence of either party. *Bagley v. Pridgeon*, 550.
4. Mandamus to compel a circuit judge to stay proceedings for the collection of a judgment was denied where it appeared that he had refused the stay on the ground that the judgment had been assigned before the commencement of the proceedings in garnishment, was subject to a lien for attorney's fees, and was not garnishable by law. *Gunzberg v. Kent Circuit Judge*, 591.
5. Where property attached was replevied by a third party, and the defendant in replevin took judgment by default, it was *held* that as against the plaintiff the judgment showed that the defendant in attachment had a leviable interest that would bind him and his sureties in an action on the replevin bond. *Ryan v. Akeley*, 516.
6. A judgment for defendants in a joint action does not bar another proceeding against a portion of them on the same cause of action. *Detroit v. Houghton*, 459.
7. Judgment recovered in Michigan by a foreign executor suing in his own name on a note belonging to the estate and paya-

ble to bearer, would bar any subsequent proceeding against the defendant, and the executor would be accountable officially in the court which had jurisdiction of the estate. *Knapp v. Lee*, 41.
on non-appearance of defendant: JUSTICE OF THE PEACE, 2.
by default against wife as surety: SURETYSHIP, 6.
for penalty in action on BOND, 7, 8.
on special finding in EJECTMENT, 8.
in replevin, evidence to reduce judgment: REPLEVIN, 6.
assignment of, does not carry bond in ATTACHMENT, 6.
collection of: EXECUTIONS, 2.
estoppel from levy of execution: ESTOPPEL, 5.
payment to apply: GARNISHMENT, 6.
execution on transcript of: EXECUTIONS, 1, 12.
alleged to be unsustained: PRACTICE, 14.
finality of: TRIAL, 1.
not disturbed for harmless error: ERROR, 5.
new trial after reversal on CERTIORARI, 3.

JUDGMENT CREDITOR'S BILL.
proceedings at law: DEBTOR AND CREDITOR, 12.

JURISDICTION
of municipal courts: JUDGMENTS, 3.
conflict of: COURTS, 1.
of action against assignee in BANKRUPTCY, 3, 4.
exercise of: PROHIBITION, WRIT OF, 1.
by service or appearance: JUSTICE OF THE PEACE, 1.
of proceedings to dissolve ATTACHMENT, 12.
of justice, in suit on bond: ACTION, 8.
to restrain collection of tax: TAXATION, 15.
errors not affecting the jurisdiction: EQUITY, 11.

JURY.
peremptory challenge: TRIAL, 2.
swearing a jury: TRIAL, 3.
may consider resistance and flight: CRIMINAL LAW, 12.
must deliberate privately: CRIMINAL LAW, 17.
reports of deliberations: TRIAL, 24.
See QUESTIONS OF FACT.

JUSTICE OF THE PEACE: *Jurisdiction*, 1; *adjournment*, 2; *docket*, 3; *accounts*, 4.
1. A justice acquires jurisdiction when proper service is made or defendant appears. But the fact of actual notice without any appearance will not give it, and is no reason for refusing or dismissing a writ of certiorari to bring up the proceedings. *Vliet v. Westenhuver*, 593.
2. Where, on the adjourned day of a cause, a justice was absent half an hour over time in the performance of official duties not pertaining to his judicial office, and on his return, upon defendant's refusal to appear, adjourned the cause in his absence and gave him notice of the adjournment, and on the next adjourned day gave judgment against him in his absence, it was *held* that the judgment must be reversed. *Ruberts v. Hathaway*, 592.
3. A justice should enter an oral defense on his docket, unless it is imperfect in substance, but his failure to do so will not deprive the defendant of his defense. If it is imperfect the defendant should be allowed to amend. *Eddy v. Manshaun*, 532.
4. The Justices' Act contemplates that a justice, in rendering his account to the board of supervisors, shall specify the services

in detail, so that the board may determine whether the amounts charged correspond with the statutory fees. The board is not concluded by the account, but may require proof and examine his docket and files and the returns made by him, and where they do so, and reject claims on the ground that the services were not performed, or that the charges made exceeded those allowed by statute, their action cannot be disturbed on a review of their finding upon the facts. *Macdonald v. Muskegon Supervisors*, 545.

approval of bond for writ of replevin: SURETYSHIP, 4.
jurisdiction of suit on bond: ACTION, 8.
plea in justice's court, sufficiency of: PLEADINGS, 6, **7.**
set-off by joint debtors: SET-OFF, 4.
docket entry of payment of JUDGMENTS, 2.
transcript of JUDGMENTS, 1.
execution on transcript of judgment: EXECUTIONS, **1, 12.**
costs on appeal, how awarded: COSTS, 2.
liability for money paid on JUDGMENTS, **2.**

LABOR DEBTS.
suits against stockholders: STATUTE OF LIMITATIONS, **1.**

LACHES.
There is no laches in delaying suit until the party bringing it has been damnified. *Post v. Campau*, 90.

LANDLORD AND TENANT:
garnishment for rent not due: GARNISHMENT, 3.
recovery of possession of REAL PROPERTY, 9, 10.
when tenant may contest title: REAL PROPERTY, **9.**

LARCENY:
value of property taken: EVIDENCE, 8.

LEADING QUESTIONS:
negative instances: TRIAL, 8.

LEASE.
1. A contract for use and occupation cannot be made out unless the person charged as tenant has either accepted possession from the landlord, or done some other act in plain recognition of the relationship, or which equitably estops him from denying it. *Lockwood v. Thunder Bay River Boom Co.*, 536.
2. A hotel lease covenanted that new furniture added by the lessees should be included in the inventory to be made up when the lease expired, and accounted for accordingly, and that the lessor should have the right to take possession of it. *Held* that this covenant could not cover furniture belonging to a third person but allowed by the lessee to be placed on the premises. *Beecher v. Bartlett*, 60.
3. A "sewing machine lease" gave the privilege of purchasing the machine by paying the full amount of the rent at any time during the continuance of the lease, but reserved to the lessor all property in the machine, and the right to control it until the purchase money was paid in full, and also gave him the right to seize it on default in payment. *Held* that the title continued in the lessor, and that as matter of law he had a right to dispossess the lessee in case of default. *Smith v. Lozo*, 6.
4. Under a contract by which lessees work a farm on shares, *it seems* to be their duty to deliver to the lessor his share, and not his duty to parcel their shares out to them. *Coe v. Wager*, 49.

5. Where parties live in common in expectation of the land of one of them which the others work on shares, the latter cannot recover back from the land owner anything that was meanwhile used in the common interest. Each party would be estopped meanwhile by daily acquiescence from claiming pay for services rendered or articles consumed, and a contract to refund cannot be implied against the distinct understanding on which the parties have acted. If it was understood that property belonging to one of them should go into the common stock, he cannot claim, if anything, more than so much of it as was not consumed with his consent in the common service. *Id.*

rent due allowed as PAYMENT, 3.

LEGISLATURE
cannot bind its successors: COURTS, 5.

LEVY
of execution; mode: EXECUTIONS, 4–9.

LEX LOCI
governs conveyances of REAL PROPERTY, 1.

LIBEL
1. A publication that is libelous *per se* is presumed to be voluntary and with malicious motive, and is therefore ground for exemplary damages. *Evening News Association v. Tryon*, 549.
2. Where it appears that a libel was published with no intent to injure the person libeled, and that all proper precautions were observed in publishing it, the recovery of damages is limited by the actual injury. *Id.*
3. *It seems* that a retraction of a libelous article, published after suit is begun for the libel, cannot be considered in mitigation of damages. *Id.*

LICENSE.
1. A license, like an estoppel, is limited to the fair understanding on which the parties are at liberty to act; it does not give the licensee a general authority to do what he pleases. *Ortmann v. Sovereign*, 1.
2. Where a petitioner for a village street across his land verbally stated to the authorities that he claimed no damages, it was merely a license that would be binding only when they proceeded to take the land, and might be previously revoked by a written notice. *Turner v. Stanton*, 506.
3. Evidence to show a license from the agent of a land owner to cut timber on the land is not admissible as a defense unless the agent's authority is shown; but it may be received to show that the defendant acted in good faith in cutting it. *Clark v. Field*, 342.

to remove timber: REPLEVIN, 4.
proof of, in TRESPASS, 2.

LIEN
of attorney for services: GUARDIAN AND WARD, 8.
of attorney on fund in court: PRACTICE, 5.
of solicitors on funds of estate: ESTATES OF DECEASED PERSONS, 5.
of mortgagee, preserved on sale under EXECUTIONS, 10.
for taxes, not shown by tax receipts: TAXATION, 18.
for taxes, not enforced in ejectment: TAXATION, 19, 20.
of tax, removed by injunction: TAXATION, 14.
of vendor, on real property: VENDOR'S LIEN.
for money advanced to pay for goods: DEBTOR AND CREDITOR, 5.

LIMITATION OF ACTIONS. See STATUTE OF LIMITATIONS.

LIQUOR LAW.
1. Damages under the Civil Damage law of Michigan cannot be lessened, nor can the liability be apportioned, merely because the injury was due in part to the acts of others than defendant. *Steele v. Thompson*, 594.
2. In an action under the Civil Damage law, if the jury do not find that defendant's act in supplying liquor was so closely connected with the injury for which the action was brought as to have been effective in causing it, they cannot find for the plaintiff. *Id.*
3. Exemplary damages cannot be imposed on a liquor-seller, under the Civil Damage law, if it does not appear that any request or suggestion had been made to him to refuse liquor to the injured person, or that he knew that the latter had any family. *Id.*

tax on saloon keepers: TAXATION, 10.

MALICE,
presumption of, in LIBEL, 1.

MANDAMUS.
1. Mandamus lies, not assumpsit, to compel a township board to pay a valid order given by the highway commissioners on the township treasurer. *Just v. Wise*, 573.
2. Mandamus lies to compel the Board of State Auditors to perform mandatory duties imposed on them by the Legislature outside of the exclusive powers vested in them by the Constitution. Art. viii., §§ 4, 5. *Ayres v. State Auditors*, 422.
3. Remedy by mandamus is not precluded by the fact that the respondent may be liable as for a misdemeanor in willfully neglecting his duty; a criminal prosecution will not secure its performance and specific compliance can be enforced only by mandamus. *Id.*
4. The rule rejecting the intervention of private complainants against public grievances is one of discretion and not law. *Id.*
5. A private person who would be a competent bidder under a State law for letting a contract may appear as relator by his own counsel in a proceeding by mandamus to compel State officers to carry out the law, if the public interest requires prompt action and the Attorney General declines to appear for him *Id.*
6. Judicial discretion is always involved in mandamus cases, concerning the relief as well as other questions. *Id.*
7. An answer to an order to show cause is disregarded if only drafted by the attorneys in the case without being submitted to the respondent and approved by him. But the case may be treated as on demurrer to the relator's showing. *Douglass v. Manistee Judge*, 495.
8. *It seems* that affidavits in answer to an order to show cause cannot be assumed to be evasive, and if so in fact, the respondent will be bound by them according to the interpretation evidently intended. *Attorney Gen. v. Supervisors of Sanilac County*, 72.

to begin *quo warranto* proceedings: ATTORNEY GENERAL, 1.
to executive State officials: COURTS, 4.
to stay proceedings on JUDGMENTS, 4.
to vacate default: PRACTICE, 2.

MAP,
taxation of costs for: COSTS, 5.

MARK. See SIGNATURE.

MARKETS:
Central market place: DETROIT, 1.

MARSHALING ASSETS. See MORTGAGE OF LANDS, 6.

MASTER AND SERVANT.

1. A master cannot, by delegating it to another, relieve himself of the duty of exercising due care in the employment and retention of competent servants; and if he does delegate it to a general manager, foreman or superintendent, he remains responsible. *Quincy Mining Co. v. Kitts*, 34.
2. A servant assumes all the usual risks of his employment including the risk of injury from the carelessness of fellow-servants, provided they have been prudently chosen and not retained in the employer's service after he has knowledge of their unfitness or negligence. *Id.*
3. A servant assumes the risk of a fellow-servant's negligence even though the latter is in a position of greater responsibility or a different line of employment, so long as both are in the same general business so that the negligence of one may contribute to the danger of the other. *Id.*
4. A servant does not assume the risk of the master's negligence, or of that of any one to whom the master entrusts his superintending authority. *Id.*
5. A servant cannot recover from his master for an injury received in his service without showing some fault on the part of the master. *Id.*
6. A brakeman cannot hold the company which employs him responsible for the failure of fellow-servants to take peculiar precautions. *Day v. Toledo, Canada Southern & Detroit Ry. Co.*, 523.
7. Where one who lives in his father-in-law's family without paying board, works for his father-in-law under circumstances that do not indicate that his services are to be compensated, it is for the jury to determine whether wages are due him. *Coe v. Wager*, 49.

rent due from employee allowed as PAYMENT, 3.

MEMORANDUM

on deed, relating to the contents: EVIDENCE, 12.
of protest, not part of note: NEGOTIABLE INSTRUMENTS, 2.

MICHIGAN

is not suable in her own courts: ACTION, 5.

MISNOMER

of parties to action: PLEADINGS, 2, 3.

MONEY HAD AND RECEIVED.

equitable defense to claim for: ACTION, 11.

MORTGAGE OF CHATTELS.

Power to mortgage, 1–3; *good faith*, 4–6; *proceedings under*, 7–10; *assignment*, 11; *renewal*, 12, 13.

1. A resolution passed by two directors of a corporation in the absence of a third not sufficiently notified, will not authorize the execution of a mortgage whereby the latter's property is taken from his possession. *Doyle v. Misner*, 332.
2. Where the only authority for mortgaging corporate property was a resolution passed by a majority of the directors, providing for a general mortgage, and that actually given was not general but was given to secure a particular debt, it could not be sustained in the hands of the original holder, and without any extension of time or other circumstance making out a case of a mortgage in good faith entitled to protection. *Id.*
3. D joined in articles of association with M and G, and gave them a bill of sale of certain property, which was not to take effect until the issue of stock by the new corporation. The

legal preliminaries to incorporation were not completed, but M and G, who were a majority of the directors, D being the other, mortgaged the property in his absence, and K, the holder of the mortgage, took possession of it. D brought trover against them. *Held* (1) that there was no incorporation; (2) that as between the parties to the transfer there was no estoppel by dealing in a corporate character with another, as they were bound to know that there was no legal incorporation, and if they did not, a mistake of law on that point would exonerate one party as well as the other; (3) that in testifying as to how he came to take the mortgage, K could not repeat the statements made to him by his co-defendants, as to their previous dealings with D, as they were hearsay and not needed to describe the *res gestæ;* (4) that the admission of testimony of a sale under the mortgage, if erroneous, was cured by an instruction that the measure of damages, if any, would be the value of what was taken with interest from the time of taking it, less the actual amount of the mortgage. *Id.*

4. The fact that part of a mortgage debt is valid and unquestioned does not necessarily preclude any question as to the good faith of the mortgage. *King v. Hubbell*, 597.
5. It is a badge of fraud if a chattel mortgage is given and received for much more than is due the mortgagee; and it is fraud in law if the purpose is to protect the debtor's interest from other creditors. *Id.*
6. A man began business on money borrowed from his father shortly before, and although neither had reason to suppose he had made money, the father sold him at par a quantity of worthless railroad stock, took a mortgage on his stock in trade for an amount that would have nearly exhausted it, and left him in possession to sell the goods in the course of business. The goods were seized on an attachment by the son's creditors and the father brought replevin for them. *Held* that on these facts the case should have gone to the jury on the question of the good faith of the mortgage. *Id.*
7. A mortgager of chattels cannot contest the mortgage for the failure to file it, nor can his trustee. *Lyle v. Palmer*, 314.
8. Authority from the mortgagee of chattels to the mortgagor to go on and make sales of the mortgaged goods in the usual course of business would be ended by the levy of an attachment on them. *King v. Hubbell*, 597.
9. Where a mortgaged chattel is advertised for sale and sold subject to the mortgage, purchasers have sufficient notice of the mortgage to estop them from contesting it on the ground that it was not duly placed on file. *Kellogg v. Secord*, 318.
10. Purchasers on a foreclosure of a chattel mortgage have the rights of mortgagees in possession and cannot be sued in trover by any one who is precluded from attacking the mortgage or who shows no right to contest the possession. *Lyle v. Palmer*, 314.
11. It is a conversion for a mortgagee of chattels, after taking possession of a portion of the mortgaged property on breach of condition, to retain possession of it and assign the mortgage to a third person; if he so converts the property, its value may be applied on the debt. *Brong v. Brown*, 119.
12. The annual renewal of a chattel mortgage is required by Comp. L., § 4709, not only for the information of the mortgager's general creditors, but for that of subsequent purchasers or mortgagees in good faith. *Briggs v. Mette*, 12.

13. An affidavit for the renewal of a chattel mortgage is insufficient if it does not distinctly indicate the amount to which the mortgagee was entitled. So *held* where the mortgage secured an unexpired lease containing various stipulations, and there was nothing to show whether the lessee had observed the covenants or whether any rent remained due, the affidavit stating merely "that there was due and remaining unpaid on said mortgage the conditions as mentioned in said chattel mortgage lease, and that the mortgagee's interests in the chattels therein described remain unchanged and are hereby renewed for the amount above written." *Id.*

no bar to attachment: ATTACHMENT, 1-3.

sale of mortgaged chattels on EXECUTIONS, 10, 11.

MORTGAGE OF LANDS. *Construction*, 1, 2; *delivery*, 3; *validity*, 4, 5; *subsequent encumbrancers*, 6; *payment of*, 7, 8; *record*, 9; *release*, 10, 11; *evading tender*, 12-14; *discharge*, 15; *foreclosure*, 16-23; *sale*, 24-30.

1. A mortgage is to be construed most favorably for the mortgagee. *Stuart v. Worden*, 154.
2. Where property is exchanged by deeds, and one grantee gives a mortgage upon that which he receives, to secure the difference in value, the deeds and mortgage may be read together and with reference to the circumstances, in construing the intention of the parties; and their manifest intent is not to be derogated from by adhering to the literal terms of the papers. *Id.*
3. A mortgage left with a third party to be delivered when a prior mortgage had been discharged and other conditions performed, was assigned by the mortgagee named in it, to the depositary, before they had been fulfilled. It was afterward assigned to another party before it fell due, and the assignee sought to foreclose it. *Held* that there had been no delivery. *Cressinger v. Dessenburg*, 580.
4. Relief may be granted as against a mortgage extorted by a son from his parents by oppressive means and for an inadequate consideration, while he was practically in a position of guardianship over them and their property. *Bowe v. Bowe*, 195.
5. A mortgage made by a man who had been insane some time before and had periodical recurrences of insanity, and was insane at the time he gave the mortgage, though he had all along managed his own affairs with average correctness and had been treated by his neighbors as competent to do business even while they considered him of unsound mind, was set aside as being made while *non compos mentis*, though not so manifestly insane as to make the conduct of the mortgagee fraudulent in making the bargain which it was meant to secure, even though he had been given sufficient warning to put him on his guard. *Curtis v. Brownell*, 165.
6. Subsequent encumbrancers take subject to any explicit provisions of a mortgage as to the order in which the property shall be sold, and that without reference to the considerations on which such preferences were agreed on. *Mickle v. Maxfield*, 304.
7. A mortgagee of land cannot avail himself of an agreement made by a mere owner of the equity of redemption to pay the mortgage, if he was not a party to it nor in any way liable for the debt secured by it. *Stuart v. Worden*, 154.
8. Where a grantee of land agreed to pay a mortgage on it, but did not do so, and the land was sold for less than the mortgage debt, the fact that the foreclosure decree does not show

how much was due as principal and how much as interest, is immaterial in an action against the grantee for damages resulting from his failure to pay the debt. He is liable for what he agreed to pay and no more, and evidence of the foreclosure is only important as showing that the land, which was a fund in his hands from which the mortgage might have been paid, had been exhausted without satisfying the debt. *Strohauer v. Voltz*, 444.

9. Where a mortgage is left unrecorded and the mortgager's heirs give a second mortgage which is put on record, an assignee of the second mortgage, who takes it in good faith for a full consideration actually paid, and without any notice, actual or constructive, that any claim exists against the premises, and whose assignment has also been recorded, is protected and given precedence by Comp. L., § 4231, which provides that every unrecorded conveyance shall be void as against any subsequent purchaser in good faith whose conveyance is recorded first. *Burns v. Berry*, 176.
10. Mortgagees need not examine the records before releasing portions of the mortgaged premises, because the record of a later conveyance would not be notice to them; but if they have notice of facts enough to put a prudent man upon inquiry, they are bound to examine the records and act accordingly. *Dewey v. Ingersoll*, 17.
11. A purchaser of a portion of some mortgaged premises situated on one of the principal streets in the village where the mortgagee resided, promptly recorded the deed and went into actual possession, improving the premises and living on them. *Held* that the mortgagee's knowledge of this was enough to put him on inquiry before releasing other parts of the premises from the mortgage lien. *Id.*
12. A mortgagee loses his lien by evading tender of payment. *Ferguson v. Popp*, 115.
13. Where a mortgager has made a tender of payment which was not accepted and which he had not kept good, and the mortgagee afterwards tendered a conveyance and demanded payment, it was decreed on foreclosure that the mortgager pay the principal of his debt with simple interest to the time of payment, less the period that intervened between the dates of the tender and of the mortgagee's subsequent offer to reconvey; and that the mortgager's costs of both courts be deducted. *Id.*
14. A mortgager, by way of tender, made repeated offers of money to the mortgagee while they were riding together on the public highway. He involved it with other matters of dealing between them, and the settlement was interrupted by a quarrel, but before any costs were incurred the mortgagee offered to receive the amount due. *Held* that no tender had been made that would discharge the mortgage lien. *Parks v. Allen*, 482.
15. Where a bill to enforce the discharge of a mortgage had been filed before the time for redemption had expired, but after foreclosure was begun, and it was held that the complainant mortgager was not entitled to a discharge, he was allowed to redeem on paying the amount of the debt with interest at the stipulated rate, and the costs of foreclosure, with interest, but without the attorney fee provided for in the mortgage. *Id.*
16. Where the assignee of certain notes secured by mortgage is induced to postpone foreclosure by representations made by an assignee of other notes maturing earlier and also secured

by the mortgage, he does not become entitled to any advantages over the latter, if at all, if he has not been damaged by relying on his statements. *Burhans v. Mitchell*, 417.

17. W owned the equity of redemption in land mortgaged to D, but deeded the land to S in exchange for certain other property, and to equalize the trade and sustain his covenant of title, he agreed to pay a certain portion of the amount due on D's mortgage, and gave S a mortgage on the property he received, to secure this agreement. S afterward quit-claimed the land to a third person subject to D's mortgage which the grantee assumed as part of the purchase price. *Held* that on W's failure to pay D what he had agreed to pay on D's mortgage, S was entitled to foreclose the later mortgage given to him, to compel such payment to be made to himself. *Stuart v. Worden*, 154.
18. Foreclosure by advertisement is not a judicial proceeding, but an act of a party, and cannot take place unless the mortgage contains a power of sale. *Hebert v. Bulte*, 489.
19. In foreclosing by advertisement a mortgage securing separate notes, the mortgagee can preserve his lien for subsequent foreclosures by selling the premises subject to the payment of the principal indebtedness; if he sells them discharged from farther incumbrance, he can depend on the mortgager's personal liability. *Miles v. Skinner*, 181.
20. Where a foreclosure by advertisement for the first instalment due on a mortgage and for interest on the other instalments, has become absolute, and the land has been bid off and not redeemed, the mortgager's wife may, with her own money, buy it from the purchaser on foreclosure, and if the sale was not made subject to succeeding instalments, she acquires full title. *Id.*
21. Comp. L., § 6913, by which the lien of a mortgage is preserved for successive foreclosures by advertisement for instalments of the debt as they fall due, would not, *it seems*, apply where title was obtained by a foreclosure on default in the payment of interest on a note, and the sale was not made subject to the principal debt. *Id.*
22. The sheriff's deed on statutory foreclosure is no evidence that the foreclosure was legal; and the affidavits required by Comp. L., § 6926, are merely to perpetuate evidence of the sale. *Hebert v. Bulte*, 489.
23. Whether the title obtained by one who buys from the purchaser on statutory foreclosure after the time for redemption has expired, can be passed upon in a foreclosure proceeding for a second instalment under the mortgage—*Q. Miles v. Skinner*, 181.
24. A foreclosure decree cannot be rendered without producing the securities or giving adequate reasons why they cannot be produced. *Mickle v. Mansfield*, 304.
25. Where a foreclosure decree provides for the sale of land, there is no personal liability to be enforced against defendant until after it is sold and a deficiency reported. *Id.*
26. A foreclosure sale cannot be made absolute so long as objections duly taken to the report of the commissioner have not been passed on. *Howard v. Bond*, 131.
27. A purchaser on foreclosure cannot demand possession until the commissioner's report of sale is confirmed. *Id.*
28. An execution for deficiency on foreclosure should not be issued without special application to the court, and notice to the defendant. *Gies v. Green*, 107.

29. Where a defendant in foreclosure retains part of the property in suit, and is responsible on his covenants for other portions, he is interested in having the mortgage foreclosed according to its terms, and if it is not, he is a proper complainant in a bill to review the decree. *Mickle v. Maxfield*, 304.
30. In proceedings to obtain possession of land bought on mortgage foreclosure, it is sufficient to follow the description in the mortgage, especially if the mortgager himself retains possession. *Cook v. Wiles*, 439.

proof of: EQUITY, 4.
rights of infant parties: GUARDIAN AND WARD, 5–7.
possession under mortgage deed: EJECTMENT, 1.
foreclosure sale; discharge of bond to pay decree: BOND, 3.
remedy for defective foreclosure: EQUITY, 14.
costs on reducing mortgage: COSTS, 7.
costs, on review, against encumbrancer: COSTS, 6.

MUNICIPAL CORPORATIONS:
possession of land for market purposes: REAL PROPERTY, 6.
paving contracts: CONTRACTS, 13, 15.
water-works: CORPORATIONS, 5.
assessment of school taxes: TAXATION, 10.

NAME
of party: PLEADINGS, 2, 3.

NAVIGABLE STREAMS.
1. The navigable waters of the United States, though forever free, are nevertheless subject to State control and regulation and may be improved by the States or bridged or dammed under their legislation. *Benjamin v. Manistee Riv. Imp. Co.*, 628.
2. "Free navigation" is not necessarily the unobstructed navigation of a stream in its natural condition. *Id.*
3. The channel of a stream is the bed over which its waters run, or the passage way between banks through which they flow. *Id.*
4. Comp. L., ch. 85, in authorizing corporations formed for improving the navigation of rivers, to charge tolls for the use of the improved stream, is not in violation of the provisions of the Ordinance of 1787 or of the State Constitution, securing free navigation. *Id.*
5. Tolls for the navigation of an improved stream are not taxes, duties or imposts on the use of the stream, but are tolls for the enjoyment of improvements by which it has acquired a new value and increased navigability. *Id.*
6. In proceedings by quo warranto against a corporation authorized by law to deepen the channel of a river, it pleaded that it had removed obstructions by cutting channels through jams, and by confining the water at various points. *Held* on demurrer that it could not be said as matter of law that this was not an exercise of the power given to deepen the channel. *Id.*
7. The Board of Control of St. Mary's Falls Ship Canal has exclusive and discretionary authority under Comp. L., ch. 85, to determine the plan of river improvements, and on evidence satisfactory to itself decide when tolls may be properly levied, and grade and change them thereafter. *Id.*
8. Comp. L., § 2730, requires a river improvement corporation to file with the Board of Control an annual affidavit of a director as to the probable amount of traffic through the improved portions of the river during the year, and that he had made due inquiry from lumbermen and otherwise; but it does not give the affidavit any peculiar force as evidence and leaves the

board to choose its own methods of getting information, and the Board can avail itself of the personal observation of its members if it sees fit to do so. *Id.*

NEGLIGENCE.

1. An experienced brakeman was ordered by the conductor to attach a car loaded with lumber which projected forward and compelled him to stoop in making the coupling. In doing so, he delayed a little and his fingers were caught in the coupling-link and hurt. *Held* that he could not maintain an action against the railway company, as he fully understood the difficulty to be guarded against, and the conductor was not shown to have been in fault in any way. *Day v. Toledo, Canada Southern & Detroit Ry. Co.*, 523.

employment of servants: MASTER AND SERVANT, 1, 2.
of fellow-servants: MASTER AND SERVANT, 2–6.

NEGOTIABLE INSTRUMENTS.

Execution, 1; *copies*, 2; *consideration*, 3–5; *signature*, 6–10; *indorser*, 11–13; *interest*, 14.

1. A corporation can give its treasurer parol authority to execute a promissory note in its name. *Odd Fellows v. First Nat. Bank of Sturgis*, 461.
2. A receipt written upon a note for a part of the amount, and a memorandum that it had been protested for non-payment are no part of the note and need not appear in the copy served with a declaration in a suit on it. *Buhl v. Trowbridge*, 44.
3. A written agreement to pay all damages arising from a complaint for bastardy and in case of farther trouble from it, and that no farther damage should accrue against the respondent, was *held* a sufficient consideration for a promissory note. *Taylor v. Dansby*, 82.
4. In an action on a note given in consideration of an agreement to secure the respondent in bastardy proceedings from damages arising from the complaint, proof that the injured woman agreed to be satisfied with the arrangement made was no more than proof of its execution, and was *held* admissible. *Id.*
5. Where a written agreement is shown as consideration for a note, but not referring to it or indicating what the entire dealings were, evidence of additional consideration is admissible. *Id.*
6. A signature to a note made in the owner's presence and by his direction is sufficient. *Sager v. Tupper*, 605.
7. One who signs a note with an infant may be held as sole maker after discontinuance as against the infant. *Taylor v. Dansby*, 82.
8. One who has signed a note after it has become operative against the maker, but in order to induce others to take it, must be held as a joint debtor. *Robbins v. Brooks*, 62.
9. Where any one but the person to whose order a note is made payable writes his name across the back, he is to be regarded as joint maker with the one who signs it. *Moynahan v. Hanaford*, 329.
10. The fact that an accommodation maker of a note has written his name across the back instead of signing on the face of the note, tends, though not conclusively, to indicate that he did not intend to sign as joint maker, but only as surety, and is enough to put the original creditor on inquiry. *Id.*
11. An indorser admits that previous indorsements were duly made and warrants the title and genuineness of the paper he transfers; and he is not released if it appears that a previous indorsement is invalid. *Fish v. First Nat. Bank of Detroit*, 203.

12. One who receives negotiable paper need not look beyond the signature of the last indorser if he is satisfied that it is genuine, and has no notice of facts that should put him on inquiry. *Id.*
13. An indorser denied having received notice of non-payment, but did not attach to the plea an affidavit of denial as required by Comp. L., § 603. There was proof of demand, protest and the mailing of notice, and notarial certificates were duly attached to the protested paper. *Held* that there was no error in charging that the notice was sufficient. *Id.*
14. Where a note is made payable several years after date "with annual interest" the interest falls due every year during the period for which the note is to run. *Cook v. Wiles*, 439.

genuineness of signature: EVIDENCE, 13, 14.
notice of accommodation indorsement: DEBTOR AND CREDITOR, 2.
indorsement in firm name by survivor: PARTNERSHIP, 4.
rights of sureties on notes: SURETYSHIP, 5, 6.
payment by interest-bearing notes: PAYMENT, 1.
payment of premium by notes: INSURANCE, 2, 3.
note included as SET-OFF, 2, 3.
action on note given for debt: DEBTOR AND CREDITOR, **1.**
suit by foreign executor: EXECUTORS ETC., 2.
defense in suit upon joint note: GARNISHMENT, 8.
misnomer of defendant on note: PLEADINGS, 2.
discontinuance as to infant party: INFANT, 2.

NEW TRIAL:
definition; proceedings on: TRIAL, 29–31.
for verdict tainted by duress: CRIMINAL LAW, **17.**

NOTICE
to absent defendants in ATTACHMENT, 7.
of meetings of creditors: BANKRUPTCY, 2, 5, 7, 9.
of letting State contract: CONTRACTS, 18.
of accommodation indorsement: DEBTOR AND CREDITOR, **2.**
of appointment of drain commissioners: DRAINS, 1.
of levy, to purchaser: EXECUTIONS, 8.
to move fence encroaching on the way: HIGHWAYS, **11.**
does not always give jurisdiction: JUSTICE ETC., 1.
of revocation of LICENSE, 2.
to purchasers, of MORTGAGE OF CHATTELS, 9.
to assignee of mortgage: MORTGAGE OF LANDS, **9.**
of later conveyances: MORTGAGE OF LANDS, 10, 11.
of application for execution for deficiency: MORTGAGE OF LANDS, 28.
to payee as to accommodation: NEGOTIABLE INSTRUMENTS, 10.
of non-payment, denial of: NEGOTIABLE INSTRUMENTS, 13.
of special defense with general issue: PLEADINGS, 7.
of set-off and recoupment: PLEADINGS, 8.
of set-off: SET-OFF, 2.
of application to withdraw fund: PRACTICE, 5.
as to review of liquor tax: TAXATION, 10.
of hearing for fixing TOLLS, 1.

OCCUPATION
of land: REAL PROPERTY, 6–10.

OFFERS OF PROOF
as basis for error: CRIMINAL LAW, 19.

OFFICER:
authority of township clerk: TOWNSHIPS, 1.
controls attached property: ATTACHMENT, 10.
cannot involve State in ACTION, 5.

estoppel by judgment as against: ESTOPPEL, 5.
absence in performance of non-judicial duties: JUSTICE ETC., 2.
failure in duty by assignee in BANKRUPTCY, 3–9.
must not attend jury deliberations: CRIMINAL LAW, 17.
of State: mandamus to: COURTS, 4.
costs against public officials: COSTS, 1.
joint action on bond of: SURETYSHIP, 2.
See CONSTABLE.

ORGANIZATION
of corporations: CORPORATIONS, 1–5.

OWNERSHIP,
averment of, in TRESPASS, 3.

PARENT AND CHILD.
1. Neither parent has any right to the custody of a child if it is against the child's own welfare. *Corrie v. Corrie*, 509.
custody of child: HABEAS CORPUS, 2.
ownership of property: REPLEVIN, 3.
support of parents: DOMESTIC RELATIONS, 2.
agreement to support parent: GUARDIAN AND WARD, 3.
mortgage for support: MORTGAGE OF LANDS, 4.

PAROL EVIDENCE
as to circumstances of making will: WILLS, 12.

PARTICEPS CRIMINIS
in adultery; testimony of: CRIMINAL LAW, 7.

PARTICULARS. See BILL OF PARTICULARS, 1.

PARTIES
to actions: ACTIONS, 2–5.
residence of, in transitory cases: JUDGMENTS, 3.
plaintiff in TRESPASS, 1.
private complainants in proceedings by MANDAMUS, 4.
defendants in EJECTMENT, 2, 3.
formal defendant; TRIAL, 3.
to later rights, brought in by supplemental bill: EQUITY, 17.
cannot leave the case: EQUITY, 7.
special administrator as intervenor: ESTATES ETC., 6.
to bill of review; foreclosure purchaser: EQUITY, 3.
in suit on joint contract: INFANT, 1.
in suit on infant's contract of PARTNERSHIP, 3.

PARTNERSHIP.
1. A partnership must contain more than one person. *Stirling v. Heintzman*, 449.
2. Comp. L., § 5307, permits a partnership suit to be instituted in the firm name if the names of the partners are not known, and allows of amendment at any time before the pleadings are closed, by inserting the names of the partners. *Held* that this can only apply in cases of actual partnership; and where a writ of replevin was issued in a partnership name, and the amendment showed that there was only one plaintiff, the action failed. *Id.*
3. An infant's partnership contract is not void, and in a suit under it upon a completed cause of action for the infant's benefit, he should be a plaintiff in his own name and not through another. *Osburn v. Farr*, 134.
4. A member of a firm that has been dissolved by the death of a partner cannot bind the survivors by indorsing a note in the firm name, unless they ratify his act, even though the note may have been given for a debt of the firm. *Carleton v. Jenness*, 110.

accommodation indorsement of firm: DEBTOR AND CREDITOR, 2.
effect of individual on joint contracts: CONTRACTS, 14.
individual credits: STATUTE OF LIMITATIONS, 2.
conviction of partner: FRAUDULENT DEBTOR'S ACT, 2.

PAVING CONTRACTS. See CONTRACTS, 12-15.

PAYMENT.

1. Where interest-bearing notes are taken instead of a cash payment, it is a legal presumption that the transaction was for the interest of the party taking them. *Mich. Mut. Life Ins. Co. v. Bowes*, 19.
2. Payments made on Sunday and not returned, but allowed on a final accounting, will not avoid the contract on which they were received as one made in violation of the Sunday laws. *Lamore v. Frisbie*, 186.
3. A labor contract also bound the employer to rent certain premises to the employee, and provided for monthly settlements of wages and rent. *Held* that in a suit for wages due, the amount of rent due might be proved as payment. *Iron Cliffs Co. v. Gingrass*, 30.

of claim, inferred: DEBTOR AND CREDITOR, 6.
of insurance premium, by note: INSURANCE, 2, 3.
of loss, as waiver of conditions: INSURANCE, 5.
on judgment, application: GARNISHMENT, 6.
of mortgage, agreement for: MORTGAGE OF LANDS, 7, 8, 17.
of orders: ACCOUNT STATED, 4.
of highway orders: MANDAMUS, 1.
for voluntary services: DOMESTIC RELATIONS, 1.
evading tender: MORTGAGE OF LANDS, 12-14.
purchaser's fraud: ACTION, 7.
before notice of defect in title: BONA FIDE PURCHASER, 1.
to widow, on contract of sale: ESTATES OF DECEASED PERSONS, 4.
evidence of notice of non-payment: NEGOTIABLE INSTRUMENTS, 13.

PENALTY

not reviewable if within statutory limit: CRIMINAL LAW, 18.
for neglecting to remove encroachment, HIGHWAYS, 10.
judgment for penalty of BOND, 7, 8.

PHYSICIAN

testimony as to patient: EVIDENCE, 9.

PLATS

of lands on meander stream: BOUNDARIES, 4.

PLEADINGS.

1. A declaration cannot be objected to in the appellate court for insufficiency if it was not demurred to, and if it set forth the facts intelligibly and the proofs made out a sufficient case and furnished ample material for amending it to satisfy the technical rules of pleading. *Burke v. Wilber*, 327.
2. "Trobridge" for "Trowbridge" is not a material variance in naming a defendant in a declaration on a promissory note. *Buhl v. Trowbridge*, 44.
3. An amendment to a declaration whereby the plaintiff's name was changed from Dilks to Wilks was properly allowed on due showing, after personal service and default made absolute, and before judgment. *McLaughlin v. Wilks*, 553.
4. Where a declaration against an assignee in bankruptcy set forth facts constituting a breach of duty, and alleged that the plaintiffs as creditors of the bankrupt were thereby deprived of their claim against his estate, and that by means thereof the estate had been exhausted and the plaintiffs wholly deprived of their rights therein, the allegation of damage was held to be suffi-

ciently specific to admit evidence showing whether the entire claim, and if not, what part of it, was lost because of the facts of which complaint was made. *Russell v. Phelps*, 377.

5. Whether a statement of ownership that will support proof of a holding in fee simple is not such an allegation of title as will sustain a finding in favor of the plaintiff in an action for treble damages for trespass on lands—*Q*. *Clark v. Field*, 342.
6. A plea in a justice's court is sufficient if it fully apprises the plaintiff as to what the defense is. *Eddy v. Manshaun*, 532.
7. The requirement that in cases tried before a justice, the plea shall be the general issue in all cases, with notice of any special defense, is mere matter of form and will not invalidate a special defense pleaded alone. *Id.*
8. A defendant filed two pleas of the general issue, and attached to one a notice of set-off and to the other a notice of recoupment. *Held* that the latter was not in the nature of a bill of particulars and did not restrict the notice of set-off. *Ferguson v. Millikin*, 441.

by unauthorized attorney: PRACTICE, 1, 2.
general declaration in action upon a CONTRACT, 16.
declaration in EJECTMENT, 4.
declaration for breach of promise: HUSBAND AND WIFE, **1.**
averment of ownership: TRESPASS, 3.
claim of damages: TRESPASS, 4.
amendment of declaration: PARTNERSHIP, **2.**

POLICE COURT
of Grand Rapids, COURTS, **2.**

POSSESSION
given by deed though meant as mortgage: EJECTMENT, **1.**
of lands: REAL PROPERTY, 6-10.
of land, proceedings to recover: REAL PROPERTY, 9, 10.
under foreclosure sale: MORTGAGE OF LANDS, 27.
of lands bought on foreclosure: MORTGAGE OF LANDS, 30.
right of possession supports REPLEVIN, 1, 2.
change of possession: SALE, 2.
of stolen articles: CRIMINAL LAW, 11, 12.

POWER OF SALE.
necessary to statutory foreclosure: MORTGAGE OF LANDS, 18.

PRACTICE.
In Circuit Courts, 1-10: *Appearance*, 1-3; *service*, 4; *notice*, 5; *findings*, 6; *revivor*, 7-9; *discontinuance*, 10.
In Supreme Court, 11-16: *Record*, 11-14; *allegations of error*, 13-16.

1. *It seems* that where counsel appear in the name of a party by whom they have not been retained, and put in a plea different from one that is afterward entered by counsel duly authorized, the opposite party is entitled to relief against their acts. *Arno v. Wayne Judge*, 362.
2. Act 113 of 1877 provides that suits for labor debts may be brought against a corporation and individual stockholders jointly. Such a suit being brought, the corporation counsel gave the plaintiff's attorneys verbal notice of retainer, but certain attorneys retained by the stockholders, without giving any notice of retainer at all, pleaded in abatement *in the name of the corporation* before the corporation counsel had pleaded. The latter afterward pleaded the general issue. Plaintiff's attorneys paid no attention to the plea of abatement, and were defaulted. Mandamus was granted to vacate the default and strike the plea in abatement from the files. *Id.*

3. One cannot be bound who is not regularly before the court; nor can a decree be rendered against any party before the court, settling any right which can only be lawfully settled by reaching an absent party. *Reed v. Baker*, 272.
4. Service of process on a manufacturing corporation under Comp. L., § 2857 (amended, Act 187 of 1875, sec. 31) can only be made within the county where its business office is fixed. *Dewey v. Cent. Car & Mfg. Co.*, 399.
5. Notice of an application to withdraw a fund from court should be given to the attorney who has a lien upon it. *Dennis v. Kent Circ. Judge*, 249.
6. Discontinuance may be had in the circuit court in an action brought up on appeal, as well as if begun there; and as it is contemplated by the appeal bond does not release the surety on that bond. *Taylor v. Dansby*, 82.
7. A verdict should not be sustained where, on the whole special finding, it is reasonably certain that it ought not to be. *Dupont v. Starring*, 492.
8. The omission of plaintiff's administrators to revive a suit before taking out an execution after his death, is only an irregularity and may be cured by an order *nunc pro tunc*. *Jenness v. Lapeer Circuit Judge*, 469.
9. An irregularity is such a defect in legal proceedings as may be waived; a nullity is one that cannot. *Id.*
10. Parties to a controversy cannot, after judgment, revive it in another court and cause, in order to raise again the questions already in issue and adjudicated. *Hudson v. Judge of Superior Court*, 239.
11. The record of a case in the Supreme Court cannot be amended by stipulation of counsel. *McDonald v. Lewis*, 135.
12. Where the bill of exceptions does not set forth all the evidence, or purport to give its substance, the charge must be presumed to be warranted by the evidence. *Cummins v. People*, 142.
13. Where it is apparent that the record gives the evidence only in condensed form, the appellate court cannot assume that the trial judge misstated it in charging the jury, even though his charge varies from the evidence as set forth, so long as it does not appear that his attention was called to the alleged misstatement at the time, or the record does not put the fact of misstatement beyond question. *Farmers' Mut. Fire Ins. Co. v. Gargett*, 289.
14. Where the only allegation of error is that the facts do not support the judgment, the Supreme Court will not entertain the objection that there is no regular finding. *Fletcher v. Moore*, 577.
15. Objections raised for the first time in the Supreme Court will not be considered. *People v. Smith*, 138.
16. No question can arise in the Supreme Court upon a point of law not passed upon in the finding of the court below. *Just v. Wise Township*, 573.

in suit on contract made jointly: INFANT, 1.
joinder of defendants in EJECTMENT, 2, 3.
discontinuance as against INFANT, 2.
discontinuance as to infant on NEGOTIABLE INSTRUMENTS, 7.
objection to declaration for insufficiency: PLEADINGS, 1.
license not provable under general issue: TRESPASS, 2.
costs on remanding case: COSTS, 4.

PRESUMPTION
as to existence of CONTRACTS, 4.
as to acceptance of work: CONTRACTS, 5.

cannot change written contract: ESTATES ETC., 7.
of satisfaction of claim: DEBTOR AND CREDITOR, 6.
of good faith of assignment: DEBTOR AND CREDITOR, 8.
of malice, in LIBEL, 1.
as to payment by interest bearing note: PAYMENT, 1.
that charge is supported by evidence: PRACTICE, 12, 13.
as to understanding of special question: BOUNDARIES, 2.
of facts, to find ERROR, 1.
to support finding: TRIAL, 26.
in support of finding as to a SALE, 12.

PRINCIPAL AND AGENT. See AGENCY.

PRINCIPAL AND SURETY. See SURETYSHIP.

PRIORITY OF RECORD:
assignment of MORTGAGE OF LANDS, 9.
validity of conveyance: REAL PROPERTY, 2.

PROBATE LAW.
See ESTATES OF DECEASED PERSONS; EXECUTORS AND ADMINISTRATORS; WILLS; GUARDIAN AND WARD.

PROCESS
from Superior Court of Detroit: COURTS, 3.

PROHIBITION, WRIT OF.
1. A writ of prohibition is a common-law preventive against the encroachment, excess or improper assumption of jurisdiction, and can only be resorted to in clear cases and where other remedies are ineffectual. It may lie at the suit of one or more parties on either side, to restrain the action of the court so far as it exceeds its jurisdiction and thereby affects the petitioner; but it is a discretionary writ and will not be granted unless it appears that the petitioner has vainly applied for relief to the court against which he wishes it to issue. *Hudson v. Judge of Superior Court of Detroit*, 239.
2. An assignee in bankruptcy may be entitled to a writ of prohibition to restrain a State court from enjoining his proceedings in the Bankrupt Court to quiet his title to goods turned over to him by the marshal as assets of the bankrupt's estate. *Id.*

PROMISSORY NOTES. See NEGOTIABLE INSTRUMENTS.

PROOF,
offers of, as basis for error: CRIMINAL LAW, 19.
of loss; ownership: INSURANCE, 4.

PROSECUTING ATTORNEY:
comments on prisoner's resistance: CRIMINAL LAW, 12.
information based on warrant: CRIMINAL LAW, 2, 4.

PROTEST,
memorandum of, not part of note: NEGOTIABLE INSTRUMENTS, 2.

QUESTIONS OF FACT
as to mailing notice: BANKRUPTCY, 5.
as to existence of contract: CONTRACTS, 16.
location of land claimed: EJECTMENT, 7.
as to performance of acts necessary to levy: EXECUTIONS, 7.
as to good faith of MORTGAGE OF CHATTELS, 4, 6.
as to compensation for services: MASTER AND SERVANT, 7.
as to actual occupant of land: REAL PROPERTY, 7.
as to change of possession: SALE, 2.
as to weight and tendency of evidence: TRIAL, 10.
concerning eccentricity of testator: WILLS, 9.

QUO WARRANTO.
1. *Quo warranto* proceedings ought generally to be instituted in the circuit court. *Coon v. Att'y Gen.*, 65.
2. The State cannot be estopped from instituting *quo warranto* proceedings against a corporate body on the ground that it has been recognized as a corporation by a municipality. *Att'y Gen. v. Hanchett*, 436.

mandamus to file information: ATTORNEY GENERAL, 1.
proceedings against river improvement companies: NAVIGABLE STREAMS, 6.

RAILROAD COMPANIES.
injury to employee: NEGLIGENCE, 1.
negligence of follow-servants: MASTER AND SERVANT, 6.

RAPE. See CRIMINAL LAW, 13–16.

RATIFICATION
of conveyance of land: STATUTE OF FRAUDS, 1.
of note; confirmatory evidence: DEBTOR AND CREDITOR, 1.
of tort: TRESPASS, 1.

REAL PROPERTY: *Conveyance*, 1–3; *title*, 4–5; *possession*, 6–10.
1. Conveyances of realty are governed by the laws which prevail where it lies. *Palmer v. Mason*, 146.
2. One who is entitled to a full conveyance waives nothing by taking a conveyance from the owner of a part interest in the legal title, and still retains his right to demand the remainder. *Lamore v. Frisbie*, 186.
3. Where successive conveyances of the same property have been made and only the later one has been recorded, the transfer of title thereunder is not by force of the conveyance, but only of the statute (Comp. L., § 4231) which provides that an unrecorded conveyance shall be void as against a later one, that is recorded, to a *bona fide* purchaser. *Burns v. Berry*, 176.
4. The title to property claimed under a recorded plat cannot be unsettled by the testimony of a surveyor who had scaled the plat, that the scale was incorrect. *Twogood v. Hoyt*, 609.
5. An incumbrance is anything which burdens a title; as a right of way; a right to take off timber; a right of dower; a condition that may work forfeiture, or any interest that diminishes the value of the land, while it is consistent with the conveyance of the fee. *Post v. Campau*, 90.
6. The occupation of land by a city for market purposes is not a public easement, but a proprietary occupation, and private adverse rights will be barred by the same lapse of time as if the occupation was by a private person. *Cooper v. Detroit*, 584.
7. It is for the jury to find whether any other person than the nominal defendant is in occupation of part of the premises where such occupancy is alleged in defense to the action. *Hendricks v. Basson*, 104.
8. A writ of assistance is proper only where a party concluded by the proceedings refuses to give up possession on request; and it should not be granted without proper evidence of such refusal after the right of possession is established. *Howard v. Bond*, 131.
9. Where proceedings to recover possession of land are brought against a tenant holding over, the latter may show that the complainant had parted with his title before bringing the proceedings, and was no longer entitled to possession. *McGuffie v. Carter*, 497.

10. Proceedings to obtain possession of land under Comp. L., ch. 211, cannot be entertained if the complainant does not show himself lawfully entitled to possession. *Id.*

descent of, subject to debts: ESTATES OF DECEASED PERSONS, 1-4.
right to, fixed by Statute of Limitations: INJUNCTION, 2.
lien of tax on; injunction. TAXATION, 14.
vendor's lien on: VENDOR'S LIEN.
surrender of interest in: STATUTE OF FRAUDS, 1.
sale on condition of satisfactory title: CONTRACTS, 7.
when covenant runs with the land: COVENANT, 1.
description in levy: EXECUTION, 6, 8.
agreement to work on shares: LEASE, 4, 5.
See BOUNDARIES; FIXTURES.

"REASONABLE DOUBT,"
doctrine of: BASTARDY, 2.

REBUTTAL,
reserving evidence for: REPLEVIN, 2.

RECOGNITION
of debt as basis of action: DEBTOR AND CREDITOR, 1.

RECORD
of assignment to benefit creditors: DEBTOR AND CREDITOR, 10.
of deed, without grantor's consent: DEEDS, 4.
of MORTGAGE OF LANDS, 9.
priority of; transfer of title: REAL PROPERTY, 2.
must contain enough to sustain exceptions: TRIAL, 28.
taxation of costs for map: COSTS, 5.

RECOUPMENT.
1. Recoupment of damages may be had in actions of tort. *Chandler v. Childs*, 128.

of damages for breach of warranty: DAMAGES, 2.
notice of, not a bill of particulars: PLEADINGS, 8.

REFERENCE:
special answers: TRIAL, 27.

RELEASE
of mortgaged land: MORTGAGE OF LANDS, 10, 11.

RENEWAL
of MORTGAGE OF CHATTELS, 12, 13.

REPLEVIN.
1. One who has a present right of possession may maintain replevin, and possession is *prima facie* lawful. *Woolston v. Smead*, 54.
2. A plaintiff in replevin in opening his case should set forth any special or proprietary interest on which he relies, and not rest it on a mere presumption of possession; he should not reserve evidence of his special interest to make out a new case, if necessary, by way of rebutting evidence that the real right of possession was in another. *Id.*
3. Testimony in a replevin suit that plaintiff's son had offered to sell the property would not tend to show the son's actual ownership, but would tend to show his assertion of ownership, which would be some evidence that he did not recognize his father's title, and might bear upon the father's acquiescence; it would be of the same quality as testimony of the father's conduct showing the nature of his possession. *Id.*
4. License to a grantee of land to cut and carry away the timber would not prevent the licensor from maintaining replevin against one who had purchased the timber from the licensee, where the latter had paid nothing for the land and it was

understood by all parties that ownership should remain in the licensor until payment. *Ortmann v. Sovereign*, 1.

5. Comp. L., § 6766, providing that in an action on the replevin bond the defendants may show that the obligee had only a special property, only applies where the obligee has taken judgment for a return of the property, and sues on the bond to recover its value; and it cannot apply where the value is not sued for. *Ryan v. Akeley*, 516.
6. The plaintiff in replevin suffered judgment by default, and the defendant waived return and had his damages assessed. *Held* that in suing on the replevin bond, the defense could not introduce evidence in reduction of the judgment in replevin, as allowed by Comp. L., § 6766, in cases where judgment had been taken for a return. *Id.*

in name of firm of one member: PARTNERSHIP, 2.
sureties on bond for writ of replevin: SURETYSHIP, 4.
interest to bind in action on bond: JUDGMENTS, 5.
by mortgagee for attached property: MORTGAGE OF CHATTELS, 6.

REPORTER
for Supreme Court. See STATE REPORTER.

REPORTS
of decisions; publication: CONTRACTS, 18; COURTS, 5-8.

REQUESTS TO CHARGE,
modification of: DAMAGES, 2.
refusal of requests: TRIAL, 20, 21.

RESIDENCE
of parties in transitory actions: JUDGMENTS, 3.

RESISTANCE
on arrest; CRIMINAL LAW, 12.

RES JUDICATA
doctrine in collateral suits: ATTACHMENT, 4.
former rulings not conclusive on new trial: TRIAL, 29-31.
not disturbed by reviving suit: PRACTICE, 10.
as to existence of leviable interest: JUDGMENTS, 5.

RETURN
to writ of execution, when imperfect: EXECUTIONS, 7.

REVIEW
of tax on saloon-keepers: TAXATION, 10.
See BILL OF REVIEW.

REVIVOR
of suit by administrator: PRACTICE, 8.
in another court: PRACTICE, 10.

RIGHT OF WAY
an incumbrance: REAL PROPERTY, 5.

RIPARIAN RIGHTS
on meander streams: BOUNDARIES, 4.

RIVER IMPROVEMENT COMPANIES. See NAVIGABLE STREAMS.

RULES:

	PAGE.
Chancery Rule 56: Exhibits in bill	310
Chancery Rule 94: Payment to guardian	70
Chancery Rule 101: Bill of review; security	308-9
Circuit Court Rule 6: Notices to be in writing	372
Circuit Court Rule 11: Appearance by notice	372
Circuit Court Rule 12: Stipulations should be in writing	372
Circuit Court Rule 100: Revivor for issue of execution	472

SALE: *Bill of sale*, 1; *delivery*, 2-8; *mode of sale*, 9-10; *findings* 11, 12.

1. A bill of sale is invalid unless delivered; and where the same persons are grantors and represent the grantees, there must be distinct evidence that the bill was meant to be operative, and the signature is not enough to show this. Under such a transfer no new rights can arise as between the parties, on which to found an estoppel. *Doyle v. Mizner*, 332.
2. The evidence necessary to show a change in the possession of property transferred by an uncle to his nephews living together on the same premises would be different from that otherwise needed; and where there is uncertainty, it is for the jury to determine from the evidence whether the change was effected. *McLaughlin v. Lange*, 81.
3. A farm laborer orally agreed with his employer to take in payment a number of hogs which were pointed out, but which were to remain in the pasture and be fed by the employer, with others, until there should be an opportunity to sell them. *Held* that there was sufficient delivery to transfer title as against a subsequent levy on the employer's property. *Webster v. Anderson*, 554.
4. A quantity of barrels were sold from a large stock stored in the warehouse of a bailee who was accustomed to deliver to purchasers upon presentation of a bill of sale. He was notified of the sale by both parties, and at the request of the purchaser, to whom a bill of sale had been given, he undertook to keep the barrels safely until called for. But they were not designated, nor separated from the rest, which were of the same size and quality. *Held* that there was sufficient delivery to pass title, and protect the barrels sold from an execution levy against the vendors upon the general stock. *Carpenter v. Graham*, 191.
5. Where ore is piled at the point of delivery in a mass larger than was contracted for, and nothing remains but to take the contract quantity from the pile, *it seems* that it is a sufficient delivery. *Iron Cliffs Co. v. Buhl*, 86.
6. A mining company agreed to sell 2000 tons of ore to an iron company and deliver it at a certain point whence it was to be taken by rail to the consignees. The contract quantity was delivered, and with more ore of the same kind was deposited in a pile at the point of delivery, but the consignees directed the railroad company to cease forwarding it for a time as they had no room for it. They paid in full for the contract quantity, however, but as they did not finally receive the full amount, they sued the railroad company for the amount which it had failed to deliver. *Held* (1) that by these acts the iron company asserted their understanding that when the ore was delivered in the pile it was under their control, and (2) that they could not sue the mining company for the deficiency. *Id.*
7. Where several car-loads of shingles of the same quality were forwarded to a dealer in excess of his order, and he took a quantity out of one of the cars to fill the order, it is immaterial from what car he took the necessary quantity. *Larkin v. Mitchell & Rowland Lumber Co.*, 296.
8. A purchaser's delay in removing merchandise from the charge of a bailee in a reasonable time after constructive delivery, cannot subject the vendor to the risks of storage. *Carpenter v. Graham*, 191.
9. B bought goods of L's clerk, and in an action for their value defended on the ground that by L's authority the clerk had

sold them for wood to be delivered to himself. B sought to prove this defense by calling the plaintiff L as a witness, but L testified that he did not authorize his clerk to sell on his own account or to sell for wood, and that it had not been his custom to allow him to sell in that way. *Held* that B could hardly complain of the refusal to allow him to ask L if he had not on other occasions permitted his clerk to sell on his own account; or to go over in a general way the ground which had already been occupied by more definite questions and answers. *Burger v. Limbach*, 162.

10. An action for the value of merchandise was defended on the ground that by plaintiff's authority the sale had been made by his clerk on the latter's own account, and payment had been made to the clerk in wood. Defendant called the plaintiff as his witness, and the latter's testimony showed that the sale had been in part on credit and in his presence, but that he had not authorized the clerk to sell on his own account. The bill of exceptions states that it did not appear that plaintiff knew of any other arrangement between defendant and his clerk, and there was no evidence that any part of the negotiation took place at any other time. *Held* that the court did not err to defendant's prejudice in refusing to allow him to swear that on the occasion of the sale he had made a private arrangement with the clerk to pay him in wood. *Id.*
11. A finding that defendant purchased a bakery, is specific enough to include the oven and oven fixtures, and authorize a finding of the value of the fixtures. *Neib v. Hinderer*, 451.
12. In finding the cost price of a stock of groceries, a referee may find the quantity and price of the different articles by name, even though he does not expressly find that each article enumerated constitutes a part of the stock; and though the testimony cannot be resorted to in aid of the finding, if it appears on inspection that the articles named are usually classed as groceries, the finding may be sustained, and it cannot be assumed that the referee included articles not within the contract of purchase. *Id.*

assignment in excess of order: ASSUMPSIT, 5.
recovery of advances for freight: ASSUMPSIT, 1.
on condition of satisfactory title: CONTRACTS, 7.
by debtor; fraud: ATTACHMENT, 4.
on EXECUTIONS, 3, 10–13.
on foreclosure of MORTGAGE OF LAND, 26–30.
prevented by attachment levy: MORTGAGE OF CHATTELS, 8.
for purchaser's note: BONA FIDE PURCHASER, 1.
payments after vendor's death: ESTATES ETC., 4.

SCHOOL DISTRICT
party to injunction against collection of school tax: TAXATION, 16.
on wrong assessment roll: TAXATION, 9.

SCIRE FACIAS
for recovery of damages: BOND, 7.

SECONDARY EVIDENCE
must be seasonably objected to: TRIAL, 16.

SECRETARY OF STATE,
certificate by: EVIDENCE, 16.
filing articles: CORPORATIONS, 2.

SECURITY
from general guardian: GUARDIAN AND WARD, 6.
objections to, on bill of review: EQUITY, 16.

SEDUCTION:
previous chastity in issue: CRIMINAL LAW, 8.
damages for: DAMAGES, 1.
affects damages for breach of promise: HUSBAND AND WIFE, 4.
SERVICE
gives jurisdiction: JUSTICE OF THE PEACE, **1.**
of process of city court: COURTS, 3.
on corporation: PRACTICE, 4.
on one joint-debtor: GARNISHMENT, **1.**
SET-OFF.
1. The right of set-off in courts of law is purely statutory and cannot be enlarged. *Robbins v. Brooks*, 62.
2. A notice of set-off in terms as broad as the common money counts in assumpsit, will, if no bill of particulars is called for, cover anything that could be proved as a demand under such counts; such as a joint and several note signed by the plaintiff. *Ferguson v. Millikin*, 441.
3. A joint and several note may be set off against a claim by one of the makers. *Id.*
4. Joint debtors can set off only joint demands (Comp. L., § 5796. subd. 6) in the circuit courts, though in justice's courts a demand of the principal debtor alone may possibly be set off when the other debtor is only a surety. *Robbins v. Brooks*, 62.
not restricted by notice of recoupment: PLEADINGS, 8.
claim on estate in suit by executor: EXECUTORS ETC., 2.
to claim against intestate in bar: STATUTE OF LIMITATIONS, 2.
SETTLEMENT OF ACCOUNTS
by agent: ACCOUNT STATED, **3.**
SHERIFF.
1. A sheriff's return never becomes part of the record until actually on file with the clerk, and he may amend it without leave at any time before filing. *Watson v. Toms*, 561.
power of sheriff in making levies: EXECUTIONS, 3.
may leave attachment with attorney: ATTACHMENT, 8.
foreclosure deed as evidence of legality of sale: MORTGAGE OF LANDS, 22.
sheriff is party to a bond in ATTACHMENT, **5.**
SIGNATURE.
1. A mark attached to a signature is evidence of the intention to adopt it; but this may also be done by any other act expressed clearly. *Just v. Wise*, 573.
2. Where one who cannot write, directs another person to sign for him and the latter signs in his presence, the signature is binding whether the former does or does not attach his mark. *Id.*
to bill of sale: SALE, 1.
to notes: NEGOTIABLE INSTRUMENTS, 6–12.
to township orders: TOWNSHIP, 1, 2.
genuineness of signature to note: EVIDENCE, **13, 14.**
SPECIAL QUESTION:
ambiguous answer: WARRANTY, 4.
must be seasonably excepted to: TRIAL, **23.**
STATE,
contracts by: CONTRACTS, 17, 18.
not estopped by municipal action: QUO WARRANTO, **2.**
officers of; mandamus: COURTS, 4.
STATE OF MICHIGAN. See MICHIGAN.
STATE AUDITORS,
mandamus to: MANDAMUS, **2, 3, 5.**

STATE REPORTER:
office: COURTS, 6.
STATUTE OF FRAUDS.
1. The Statute of Frauds in providing that a surrender of any interest in lands must be in writing does not prevent one who has given back a land contract held by him, in order that the land might be conveyed to another party, from recovering the consideration for which he gave it up, as by bringing suit he ratifies the conveyance and precludes himself from claiming any interest in the lands. *Sullivan v. Dunham*, 518.
2. The Statute of Frauds does not require a vendee's agreement to pay the purchase money for land, to be written to enable him to contract to sell the land again. It is therefore of no consequence, so far as such a contract is concerned, whether the vendee could have enforced his rights in the land as against his vendor, or not; and the vendee's grantee is not concerned in dealings between the vendee and his vendor as to what the former shall receive out of any money to be paid for the land. *Burke v. Wilber*, 327.
STATUTE OF LIMITATIONS.
1. Act 113 of 1877 is severely criticised for limiting to two years the period within which suit may be brought against a stockholder of a manufacturing corporation for a labor debt. *Arno v. Wayne Circuit Judge*, 362.
2. A claimant against an estate sought to free an open account from the bar of the Statute of Limitations by showing that within the statutory period the decedent had orally admitted that the price of a bull bought from a firm of which he was a member was properly credited to him individually; also that by his oral consent an order drawn by the claimant on another firm of which he was a member, was carried to his individual credit. But there was testimony that no one had accounted for the price of the bull, and there was nothing to show decedent's right to apply the price of it as a set-off to any account held by the claimant against him, and the defense also claimed that decedent had not assumed to apply to his benefit the credit arising from the payment of the order. The jury found against the claimant. *Held* that the account was not released from the bar of the statute. *Sperry v. Moore's Estate* 354.
applies to claims against ESTATES OF DECEASED PERSONS, 8, 9.
establishment of right to realty: INJUNCTION, 2.
bars adverse rights to land: REAL PROPERTY, 6.
how overcome: ACCOUNT STATED, 1.
waiver of: DEBTOR AND CREDITOR, 4.
STATUTES,
construction, when not consistent: CORPORATIONS, 4.
not conclusive on later legislation: COURTS, 5.
change in judicial office: COURTS, 2.

LAWS REFERRED TO.

Revised Statutes of the United States.

PAGE.

§§ 5091–4: Bankruptcy; assignee 380–388

Constitution of Michigan.

Art. iv., sec. 22: State printing contracts . . 430, 433
sec. 36: Publication of documents . . . 431
viii., sec. 4, 5: Board of State Auditors . . . 427
xiv., sec. 9: Internal improvements . . . 635

PAGE.

Art. xv., sec. 1: Incorporation laws 337
sec. 7: Stockholders; individual liability . 363
sec. 14: Judicial officers; elections . . . 66
xviii., sec. 4: Navigable streams 633
Schedule, secs. 12, 13: State printer; existing statutes 431

Ordinance of 1787.

Article iv. Navigable waters as free highways . . . 633

Territorial Laws.

Laws of 1827, 2 Terr. L., 344: Detroit; plan . . . 589

Revised Statutes of 1838.

Pt. 3, tit. 1, ch. 6, §§ 28-33: Supreme Court reports . 431

Revised Statutes of 1846.

Ch. 116, § 3: Corporations; service on officers . . 401

Compiled Laws of 1857.

§ 4159: Assignee of chose in action; suits by . . 560

Compiled Laws of 1871.

ch. 27: Encroachments on highways 456
85: River improvement companies 630
95: Mining corporations; suits against 400
126: Detective associations 526
128: Water works corporation 436
192: Exemptions from execution 80
198: Trespass by taking timber 343
203: Judgment creditors' bills 273
211: Proceedings to recover possession . . 490, 498
218: Foreclosure under power of sale . . . 490
230: Fraudulent debtors 28
§ 292, 294: State printing contracts 432-3
603: Evidence; notarial certificate 206
732: Highway commissioners; orders 576
991: Supervisor's certificate on assessment roll . 457
1005: Certificate to county treasurer's transcript . . 26
1014: Suit for personal taxes 458
1033, 1057, 1091, 1129: Sale of land for taxes . 25, 26
1131: Ejectment; lien for taxes 569
1245: Highway commissioners; orders for payment 576
1290, 1291, 1297: Encroachments on highways . . 139
2720, 2728, 2730: River improvement companies . 638
2838, 2839: Mining companies; articles . . . 337-8
2852: Stockholders; liability for labor debts . . 363
2857: Corporations; service of process on . . . 401
3355: Water-supply companies 437
4231, 4236, 4237: Registration of mortgages . . . 179
4349: Wills; death of devisee before testator . 407, 411
4428: Claims against estates; set off 357
4518: Probate bond; approval of judge 504
4692: Statute of Frauds: transfer of interests in lands 520
4706: Statute of Frauds; record of chattel mortgage 316
4709: Chattel mortgage; affidavit for renewal . . 13
4817: Guardian's bond; amount and sureties . . 504
5255: Action on bond; covenant 535
5294: Bond for replevin; exceptions to sureties . 542
5307: Action against partnership; amending declaration 450
5382: Justice of the peace; transcript of judgment 16, 146
5383: Transcript of justices' judgment 16

PAGE.

§ 5395: Execution on justices' judgment; time . 16, 146
5477: Justices' courts; judgment on certiorari . . 127
5651–9: Supreme Court reports; publication of . 431
5796, subd. 6: Set off by joint defendants . . 63, 443
5796, subd. 8: Set off; requisites of 443
5802: Recoupment of damages in actions of tort . . 130
5931: Evidence; certification to copies 338
5943: Evidence; physician's testimony 224
6097: Execution levy on mortgaged chattels . . 601
6133: Judgment against surety for costs . . . 464
6155–6162: Breach of condition of bond; *scire facias* 535–6
6189, 6190: *Capias ad satisfaciendum;* time for issuance 496
6206–7: Ejectment; right of action 105
6252: Ejectment; recovery for improvements . . 512
6371: Treble damages, assessment of 346
6401–9: Attachment of mortgaged chattels . . 602–3
6409: Attachment; custody of goods 557
6411: Attachment bond 554
6414: Attachment; failure of personal service . . 562
6503: Garnishment of fixed dues 512
6544: Corporations; commencement of suits against 401
6706: Possession of lands; tenant holding over . . 490
6754, 6759: Replevin: judgment for value 518
6765–6: Replevin; reduction of judgment in suit on bond 517–8
6913: Mortgage; foreclosure for instalment . . 185
6926: Foreclosure; affidavit of sale 490
7127: Return of writ of error; time for 456
7133: Certiorari; allowance of writ 488
7134: Certiorari; when writ must be taken . . 456
7148, 7152: Limitation of actions; open account . . 357
7154, 7157: Limitation of actions; death of party . 94
7157: Limitation of actions; account current . . 357
7158: Limitation of actions; reversal on certiorari . 117
7160: Written renewal in bar of limitation . . . 358
7177: Fraudulent debtors; affidavit for warrant . 29
7425: Costs; affidavit to sustain bill 68
7677: Neglect of official duty a misdemeanor . . 428
7693: Adultery; prosecution without husband's consent 269
7855, 7944: Examination before filing information . 257
7960: Separate trial; joint information . . . 258

Session Laws.

Joint Resolution 28 of 1842, p. 168: State Reporter's salary 431
Act 21 of 1844, p. 19: Supreme Court reports . . 431
Act 41 of 1853, § 22, p. 58: Service on mining corporations 400, 401
Act 86 of 1853, p. 128: Assessment of taxes . . 621
Act 120 of 1855, p. 270: Judgment creditors' bills . . 274
Act 217 of 1859: Private detectives 526
Act 75 of 1863, p. 102: Assignee of *chose in action* . 560
Act 174 of 1871, vol. 1, p. 287: Supreme Court reports 431
Act 249 of 1871, vol. 2, p. 793: Alpena charter . . 284
Act 55 of 1873, § 9, p. 57: Private detectives . . 527
Act 61 of 1873, vol. 1, pp. 70, 71: State printing contracts 433
Act 157 of 1873, vol. 1, p. 209: Publication of State documents 433
Act 65 of 1875 [§ 1267], p. 94: Encroachments on highways 139
Act 140 of 1875, p. 166: Township drain law . . 106
Act 165 of 1875, p. 193: Assumpsit for trespass . . 540

PAGE.
Act 180 of 1875, p. 207: Ejectment; improvements . 515
Act 187 of 1875, §§ 31, 35, pp. 220, 221: Service on corporations 401
Act 217 of 1875, p. 260: Supreme Court reports . . 433
Act 231 of 1875, p. 283: Civil Damage Law . . . 595
Act 113 of 1877, §§ 35, 37, pp. 95–96; Stockholders; liability 363, 370, 373
Act 123 of 1877, p. 112: Corporations; commencement of suit against 401
Act 158 of 1877, p. 150: Supreme Court reports . . 424
Act 193 of 1877, p. 212: Civil Damage Law . . . 595
Act 76 of 1879, p. 66: Police Court of Grand Rapids . 66
Act 97 of 1879, p. 90: Superior Court of Detroit . . 550
Act 168 of 1879, p. 157: Supreme Court reports . . 422

STAY OF PROCEEDINGS.
mandamus to compel: JUDGMENTS, 4.

STIPULATION.
by joint party for deposition: ERROR, 6.
recognizing deposition in a case: TRIAL, 18.
record not to be amended by: PRACTICE, 11.

STOCKHOLDERS.
suits against for labor debts: STATUTE OF LIMITATIONS, 1.

STORAGE.
delay in removing goods: SALE, 8.

STREETS. See HIGHWAYS.

STRIKING OUT
testimony: TRIAL, 14, 15.

SUNDAY,
contract dated on; CONTRACTS, 3.
payments made on Sunday: PAYMENT, 2.

SUPPLEMENTAL BILL
to cover later rights: EQUITY, 17.

SUPERIOR COURT
of Detroit; service of process: COURT, 3.

SUPERVISORS.
auditing accounts of: JUSTICES OF THE PEACE, 4.
power to equalize valuations: TAXATION, 1.

SUPREME COURT. See COURTS, 4–8.

SURETYSHIP.
1. No covenants that do not appear on the face of the bond can be implied as against the surety. *Bishop v. Freeman*, 533.
2. A joint action on an official bond fails if it appears that any one of the defendants is not liable. *Detroit v. Houghton*, 459.
3. A surety cannot escape liability on a guardian's bond as having signed only on condition that a specified co-surety should be procured before it was used, if he had delivered it to the principal to be completed with nothing on its face to suggest to the approving officer that such a condition was imposed. The fact that the obligation clause in a printed form was so filled out as to read "sureties" is not enough. The name of the person designated for co-surety should be inserted in the bond. *Brown v. Probate Judge*, 501.
4. Where a justice of the peace issued a writ of replevin before any bond had been filed by the plaintiff, and approved it next day under a misapprehension as to a surety's qualifications, it was *held* that Comp. L., § 5294, would not prevent the defendant from excepting to the sureties. *Johnson v. Stilson*, 541.

5. A surety on a promissory note, the maker of which had become insolvent, conveyed his land to his son for inadequate consideration and in evident contemplation of being held liable as surety. The other surety paid the note, sued him for contribution and levied on the land conveyed. *Held* on a bill in aid of execution, that the deed should be set aside as against the execution levy. *Pashby v. Mandigo*, 172.
6. A married woman was sued on a promissory note which she had signed with her husband, and though personal service was made on her, she did not appear, but suffered judgment by default on which execution was levied. *Held* that as she neglected to make her defense at law and allowed the judgment to stand, she could not maintain a bill in equity to set aside the execution on the ground that she had signed as surety for her husband and the judgment was void as against her. *Wilson v. Coolidge*, 112.

of accommodation maker of NEGOTIABLE INSTRUMENTS, 10.
form of action on bond: ACTION, 8.
for costs, on remand for new trial: COSTS, 4.
when the surety is not held for COSTS, 4.
surety impleaded on appeal: INFANT, 2.
not affected by discontinuance on appeal: PRACTICE, 6.
See BOND.

SURRENDER
of fixtures; refusal not conversion: TROVER, 3.
of interest in land; STATUTE OF FRAUDS, 1.

SURVEYOR;
title not unsettled by testimony of: REAL PROPERTY, 4.

SURVEYS:
disturbance of BOUNDARIES, 1.
based on fixed BOUNDARIES, 3.

TAXATION: *Valuations*, 1, 2; *assessments*, 3–10; *return*, 11; *collection*, 12–17; *tax-title*, 18–22.

1. The equalization of valuations for taxation is a political duty, and the power to equalize is exclusive in the supervisors. *Attorney General v. Supervisors of Sanilac County*, 72.
2. Petitions for the reduction of the valuations of townships cannot be regarded by the supervisors in the assessment of taxes. *Id.*
3. Where the board of supervisors had ordered certain specified taxes spread upon the rolls, it was *held* that the fact that others were added would not invalidate the tax without an affirmative showing that they were not duly authorized. Comp. L. § 1129. *Hunt v. Chapin*, 24.
4. Comp. L. § 991, requires a supervisor, on completing an assessment roll, to certify in effect that he 'has set down all the real estate liable to be taxed according to his best information,' and that 'the roll contains *a true statement of* the aggregate valuation of the taxable personal estate.' A supervisor omitted the italicised words and certified that he had set down the real estate' 'according to his best [judgment and] information.' *Held* that these variations from the authorized form did not invalidate the certificate. *McCallum v. Bethany*, 457.
5. A supervisor's official certificate of valuation is legal evidence in Michigan in collateral proceedings involving the validity of the tax, and cannot be contradicted by parol evidence. *Blanchard v. Powers*, 619.

6. The validity of a tax-title, especially if it be of long standing, cannot be impeached in an action of ejectment against the holder by parol evidence to show the falsity of the supervisor's certificate of valuation attached to the assessment roll. *Id.*
7. The absolute illegality of a tax may be shown in proceedings to enforce it, and it cannot be cured by proof that if the valuation had been correct, the tax would have been legal. *Id.*
8. A tax is invalid if it appears only upon a roll to which it does not belong, and is omitted from a roll to which the law authorizing it expressly assigned it. *Folkerts v. Power*, 283.
9. The charter of Alpena (Act 249 of 1871) provides for two assessment rolls, one of which, called the "city roll," should contain, among other designated taxes, the school taxes assessed for the city, while the other was to contain taxes not assigned to the city roll. *Held* that school taxes enrolled upon the second were invalid. *Id.*
10. An ordinance of Cassopolis imposing a tax on saloon keepers required the assessor to give notice of a review and correction of the assessment roll, which must take place before the collection of the tax. The special assessment roll for the saloon tax was distinct from the general assessment roll of the village, and notice of review was given only for the latter. *Held* that the want of notice invalidated the saloon tax. *Dool v. Cassopolis*, 547.
11. The county clerk is not required to certify to the township treasurer's return to the county treasurer, but to the proceedings had on extending the time for collecting taxes, and to the accuracy of the county treasurer's transcript to the Auditor General. *Hunt v. Chapin*, 24.
12. The policy of Michigan is against the improvement of highways for trade and commerce by taxation of the people. *Benjamin v. Manistee River Imp. Co.*, 628.
13. A tax cannot be collected if not authorized by written law. *Folkerts v. Power*, 283.
14. Injunction lies to restrain the collection of a tax illegally assessed, if it is made a lien on the land. *Id.*
15. Where an invalid tax includes an assessment on personalty as well as on realty, a court which obtains jurisdiction to restrain the collection of the tax on the land may properly give relief from the assessment on personalty. *Id.*
16. Where an injunction is asked to restrain the collection of a school tax irregularly assessed, the school district is a necessary party; but where it had been omitted, and the tax was found to be absolutely illegal, it was *held* sufficient to add the district as a formal party before entering the final decree. *Id.*
17. Comp. L., § 1014, allows an action to be brought for personal taxes whenever they are returned unpaid by the town treasurer. *Held* that the treasurer's warrant for their collection must be exhausted before suit. *McCallum v. Bethany*, 457.
18. Tax receipts are not evidence to prove a lien for taxes paid on land held under a tax-title; the fact to be proved calls for the assessment rolls. *Weimer v. Porter*, 569.
19. The lien given by Comp. L., § 1131, for taxes paid on land held under a tax-title, cannot be tried at the same time with an action of ejectment based on the right given by the title. The invalidity of the tax-title must be determined and there must be a judgment for the recovery of the land as against the holder of the title, before the holder can enforce a lien

upon the premises for subsequent taxes paid in reliance on it. *Id.*

20. Where a tax-title is adjudged invalid in an action of ejectment based thereon, *it seems* that the lien given by Comp. L., § 1131, for taxes paid by the holder of the title, and for improvements, is to be enforced in a supplementary proceeding in chancery. *Id.*
21. A tax-deed based upon distinct taxes of different years is valid if any one of the sales was valid, whether the others were or not. *Hunt v. Chapin*, 24.
22. It is the policy of the law in Michigan that after the holder of a tax-title has recorded it and held possession for many years, the holder of the original title cannot question the tax-title in collateral proceedings, as in an action of ejectment. *Blanchard v. Powers*, 619.

of costs, for map: COSTS, 5.
for paving: CONTRACTS, 15.

TAX-TITLES.
validity of: TAXATION.

TENDER.
on mortgage; evasion of: MORTGAGE OF LANDS, 12–14.
testamentary capacity: EVIDENCE, 9; WILLS, 1–11.

TIME.
for completing contract: CONTRACTS, 2.
to fulfill contract: HUSBAND AND WIFE, 1.
for removing goods purchased: SALE, 8.
for calling case: JUSTICE OF THE PEACE, 2.
for advertising for defendants in ATTACHMENT, 7.
of making complaint of a rape: CRIMINAL LAW, 16.
for disputing claims on estates: WILLS, 5.
for suing for neglect to move fence: HIGHWAYS, 11.

TITLE
continues in lessor: LEASE, 3.
of heirs to real property: ESTATES OF DECEASED PERSONS, 3.
estoppel by attachment from asserting title: ESTOPPEL, 3, 4.
when tenant may dispute: REAL PROPERTY, 9.
when concluded by judgment: ESTOPPEL, 5.
transfer by delivery: SALE, 2–5.
transfer by priority of record: REAL PROPERTY, 3.
burdens on title are incumbrances: REAL PROPERTY, 5.
not unsettled by surveyor's testimony: REAL PROPERTY, 4.
by execution; void for want of jurisdiction: ACTION, 8.
on foreclosure by instalment: MORTGAGE OF LANDS, 20, 21, 23.
allegation of title in trespass: PLEADINGS, 5.
evidence of title in case of REPLEVIN, 3.
sale on condition of satisfactory title: CONTRACTS, 7.
expense of perfecting title recoverable in ASSUMPSIT, 2.
validity of tax-titles; See TAXATION.

TOLLS.
1. Fixing the amount of tolls is not a judicial act, but is only prescribing in advance a law for the government of those who may be brought within its provisions; and a hearing for the purpose of fixing tolls is not a judicial hearing of which all parties that may be interested are entitled to receive notice. *Benjamin v. Manistee River Imp. Co.*, 628.

for use of river improvements: NAVIGABLE STREAMS, 4, 5, 7.

TORT.
action based on purchaser's fraud: ACTION, 7.
recoupment of damages in action of tort: RECOUPMENT, 1.

TOWNSHIP.
1. A township clerk has no authority by virtue of his office to sign the names of highway commissioners to an order on a township treasurer. *Just v. Wise*, 573.
2. An order on a township treasurer to pay for labor is incomplete without a certificate that the labor is performed, and the actual signature of the highway commissioners to the certificate, where that is indorsed upon the order, is sufficient to adopt as signatures their names attached to the order, though attached thereto by some one else. *Id.*

payment of highway orders: MANDAMUS, **1.**

TRANSCRIPT.
of assessment rolls: TAXATION, **11.**
of judgment: EXECUTORS, 1, 12.
of justice's judgment: JUDGMENTS, **1.**

TREBLE DAMAGES.
for cutting timber: TRESPASS, 3, 4.
for trespass to lands: PLEADINGS, **5.**

TRESPASS.
1. One cannot be liable as for the ratification of a tort that was not committed in his interest; so *held* where suit was brought against the general agent of a sewing machine company for a forcible trespass committed by employees while removing a machine by his direction and in compliance with the orders of the company from the premises of one who held it under a sewing machine lease which had been forfeited. *Smith v. Lozo*, 6.
2. A license cannot be proved under the plea of the general issue to an action of trespass on lands, if it is not specially pleaded. *Senecal v. Labadie*, 126.
3. In an action for treble damages for cutting timber, the objection that the declaration does not contain a sufficient averment of plaintiff's ownership to support a finding in his favor, should be raised by demurrer. *Clark v. Field*, 342.
4. Treble damages in an action of trespass for cutting timber can only be allowed in case single damages are assessed; and if the case falls within the exceptions to the statute (Comp. L., § 6371) single damages will be the measure of recovery; if not, they may be trebled. The claim for damages in the declaration may be the same whether the damages recoverable are treble or single. *Id.*

cutting timber: LICENSE, 3.
injury caused by trespass: EVIDENCE, **7.**
allegation of title: PLEADINGS, 5.
waiver of tort and suit in assumpsit: ACTION, **10.**

TRIAL: *Conduct of case*, 1; *challenge*, 2; *swearing the jury*, 3; *examination of witnesses*, 4–8; *cumulative proof*, 9, 10; *cross-examination*, 11, 12; *impeachment*, 13; *striking out testimony*, 14, 15; *secondary evidence*, 16; *objections to evidence*, 17, 18; *opening case*, 19; *charge*, 20–22; *special questions*, 23; *deliberations of jury*, 24; *findings*, 25–28; *new trial*, 29–31.
1. Parties should so manage their cases in the trial courts as to fully develop their merits in order that the verdict and judgment may be final; and in will cases this is particularly important. *Fraser v. Jennison*, 206.
2. Where parties impleaded together appear by the same counsel, and after their right of peremptory challenge is exhausted, other counsel take charge of the case for part of them, the latter have no farther right of challenge. *Id.*

3. A stipulation was made between the plaintiffs on a note and one of the defendants, that the cause might be dismissed as to him, but he did not avail himself of it, and no order of discontinuance was entered. Only one of the other defendants pleaded. *Held* that the technical irregularity of swearing the jury to try the issue between the plaintiffs and the *defendants* when no issue had been joined with two of them, was a harmless blunder, and as no order was entered on the stipulation the party with whom it was made remained a defendant in form. *Buhl v. Trowbridge*, 44.
4. It is discretionary for a judge to refuse to allow a witness to give his testimony without questioning. *Clark v. Field*, 342.
5. Complainants must accept the statements of the defendants when they make them their witnesses and rest the case on their evidence. *Brigham v. Fawcett*, 542.
6. An examiner should avoid an objection to the form of a question by changing its form, instead of relying upon bringing error on a ruling sustaining the objection. *Fraser v. Jennison*, 206.
7. Hypothetical questions are not erroneous if they contain no assumption not justified by the evidence. *Daniells v. Aldrich*, 58.
8. The contestants of a will put the following questions: "Did you notice during the spring any weakening of [testator's] mind?" and "In your opinion, during the spring of 1877, had [testator's] mind weakened?" *Held* that these questions were not leading. *Fraser v. Jennison, 206.*
9. Where a fact has been shown without objection, *it seems* that farther testimony on the same point will not damnify the party against whom it is given. *Woolston v. Smead*, 54.
10. The fact that any essential element of a case has been sufficiently proved does not make it erroneous to admit farther competent testimony tending in the same direction, even though the tendency is slight; the weight and effect of the evidence are for the jury. *Russell v. Phelps*, 377.
11. Testimony is not admissible if the party against whom it is to be used, or those in privity with him, has no opportunity to cross-examine the witness. *Sperry v. Moore's Estate*, 353.
12. Where the assignor of a claim against an estate was called to prove the claim, and his cross-examination was delayed by the claimant to accommodate another witness, and he died before it could be taken, it was *held* proper to exclude his testimony. *Id.*
13. The error, if any, of excluding testimony to impeach a witness who seeks to show that defendant did not act in good faith, is cured by a verdict finding that he did act in good faith. *Clark v. Field*, 342.
14. Where a motion to strike out testimony is so broad as to cover lawful evidence also, it is properly denied. *Larkin v. Mitchell & Rowland Lumber Co.*, 296.
15. It is not material error to strike out evidence if the court afterwards correctly directs a verdict. *Id.*
16. The objection that documentary rights have been shown by secondary evidence, cannot be reserved for the appellate court if no objection was made to its admission until the point was raised on a request to charge after the evidence was closed. *Burke v. Wilber*, 327.
17. Formal objections are not allowed on the hearing of a cause where they could easily have been made before. *Matson v. Melchor*, 477.
18. A deposition filed with a commissioner to take testimony, and recognized in the cause by a stipulation, will not be excluded

on the hearing if there was no motion to suppress it, even if the stipulation was not in proper shape. *Id.*

19. Error will not lie on a direction to counsel not to spend time on certain issues as their opening to the jury would not warrant it, where, though counsel excepted to the ruling, they made no suggestion at the time that anything had been omitted from the opening, and did not afterwards offer evidence to establish the excluded issues, or necessarily tending to establish them. *Fraser v. Jennison*, 206.
20. Where respondent's requests to charge are inconsistent with the theory of the prosecution and the evidence which supports it, and are based on a different hypothesis unsupported by evidence, they are properly refused. *Maillet v. People*, 262.
21. It is not error to refuse requests for instructions to the jury where the court gives a connected charge that is fair and sufficiently full to present all the important questions of law with which the jury have anything to do, and is likely to guide the jury better than the instructions asked. *Fraser v. Jennison*, 206.
22. Portions of a charge will not be considered as if standing alone, but will be construed in connection with the rest and in the light of the pleadings and evidence. *Russell v. Phelps*, 377.
23. Where special questions to the jury do not meet the whole case, the defect must be pointed out when they are submitted, and if it is not, the special findings are not open to minute criticism. *Dupont v. Starring*, 492.
24. It is against public policy to allow the deliberations of a *petit* jury to be reported. *People v. Knapp*, 267.
25. The omission to find the facts and law before giving judgment is not an error of which the party who did not request it can complain. *Cook v. Wiles*, 439.
26. A referee after finding that defendant had agreed to pay the cost price of certain articles, found what their "value" was according to a certain exhibit not set forth in the record. *Held* that all reasonable intendments must be made in support of the finding and judgment, and that in the absence of a demand for a more specific finding it might be properly assumed that he used the word "value" to signify "cost price." *Neib v. Hinderer*, 451.
27. A referee is not required to supplement his general finding by special answers to specific questions dictated by counsel. *Odd Fellows v. Morrison*, 521.
28. A party excepting to a finding must make it appear that his exception is well taken. So *held* where the objection was that the facts were found on parol proof duly objected to, and not on certain documents which the party bringing error did not include in the record. *Odd Fellows v. First Nat. Bk. of Sturgis*, 462.
29. A new trial is a rehearing of the cause before another jury, but with as little prejudice to either party as if it had never been heard before. *Gott v. Superior Court Judge*, 625.
30. A ruling requiring a party to elect between the counts of his declaration, and the practice thereon, would not bind the judge upon a new trial of the case if brought to trial in the same shape as before. *Id.*
31. A party who has been compelled to elect between the common and special counts of his declaration, is at liberty, on a new trial, to proceed upon the other counts. *Id.*

for joint offense: CRIMINAL LAW, 4, 5.
opening case in suit of REPLEVIN, 2.
refusal to admit cumulative evidence: ERROR, 4.

TROVER.
1. Proof of a judgment and an execution issued on it in plaintiff's favor shows sufficient interest in the property levied on to sustain trover for its conversion. *Witherspoon v. Clegg*, 484.
2. Where an officer who has levied on a piece of property leaves it with a custodian and it is taken away by another person under a claim of superior right, trover lies as for its conversion. *Id.*
3. Trover as for conversion of personal property does not lie on the refusal to surrender property which the defendant had himself annexed to the freehold intending it to be a fixture. So *held* where a dealer in gas manufacturing machines had caused one to be placed in a house which he afterwards found belonged to the wife of the man who contracted that the machine should be placed there. *Morrison v. Berry*, 389.

for goods taken by marshal: BANKRUPTCY, 1.
for taking goods on defective MORTGAGE OF CHATTELS, 3.
against foreclosure purchasers: MORTGAGE OF CHATTELS, 10.
waiver, suit in assumpsit: ACTION, 9.

TRUSTEE:
interest of trustee: WILLS, 5.
trustee's right to sue: ACTION, 4.

USAGE
as to proceedings by assignee: BANKRUPTCY, 6.
to vary terms of CONTRACTS, 10.
in making sales: SALE: 9.
of trade: EVIDENCE, 15.

USE AND OCCUPATION:
incident only to contract relation: ASSUMPSIT, 4.
assumpsit for damages by trespass: ACTION, 10.
contract for: LEASE, 1.

USER
fixes BOUNDARIES, 3.
as affecting existence of streets: HIGHWAYS, 4, 5.

VACATING
streets by legislation: HIGHWAYS, 3–7.

VALUATION
for assessments: TAXATION, 1–6.

VALUE,
finding as to value of goods sold: TRIAL, 26.
of property as affecting alimony: HUSBAND AND WIFE, 8.
of property applied on debt: MORTGAGE OF CHATTELS, 11.

VARIANCE
in declaring on note: PLEADINGS, 2.

VENDOR AND PURCHASER:
fraud in payment: ACTION, 7.

VENDOR'S LIEN.
1. The doctrine of vendor's liens on realty rests on the postulate that it is not equitable to absorb another's wealth without recompense. *Hiscock v. Norton*, 320.
2. As between grantor and grantee an estate is bound for the unpaid purchase money, unless (1) there are arrangements between the parties which show that reliance is not placed on any unwritten claim against the land, or (2) such complications in their agreement that a court cannot define with certainty the present amount due, or identify the lien to be enforced. *Id.*

3. A woman deeded the west half of a quarter section of land to her brother, and took back a lease of it, and at the same time the parties made an agreement whereby he was to build her a house on the west half and she was to let him and his wife occupy a portion of it during their natural lives and was also to let to him the whole quarter section for the term of her own natural life for a certain proportion of the crops. The conditions of the agreement were too indefinite to be estimated at a fixed sum. *Held* that the three transactions must be construed together, and that an equitable lien on the land for the fulfillment of their conditions was not enforceable. *Id.*

VERDICT.
curing error: TRIAL, 13, 15.
set aside for duress: CRIMINAL LAW, 17.
set aside on special finding: PRACTICE, 7.

WAIVER.
of conditions to INSURANCE, 4, 5.
of statute of limitations: DEBTOR AND CREDITOR, 4.
of statutory conditions: CORPORATIONS, 5.
of damages for opening HIGHWAYS, 1, 2.
of examination on arrest: CRIMINAL LAW, 1, 3.
of rule excluding physician's testimony: EVIDENCE, 9.
of tort and suit in assumpsit: ACTION, 9, 10.
of tort; conversion of mortgaged goods: ASSUMPSIT, 6.
of principal defendant's rights: GARNISHMENT, 7.
by taking conveyance of a part interest. REAL PROPERTY, 2.

WARRANT
for crime, trial on: CRIMINAL LAW, 1-4.

WARRANTY.

1. The representation by the vendor of a threshing machine that it is a very good machine and will do nice work, is not a warranty. *Worth v. McConnell*, 473.
2. In a suit on a warranty of a horse, it was shown positively, and was undisputed, that defendant assured plaintiff that the animal was a good work horse; that he was true and all right, and true as a dollar, kind as a kitten, and as good a horse as any in the county. *Held* that a refusal to require the jury to find specifically and report whether the defendant warranted the horse, and if so, in what words, was not error, as the evidence, if believed, was enough to make out a warranty and there could not have been any finding inconsistent with it. *Daniells v. Aldrich*, 58.
3. In a suit on a warranty of a horse, evidence that two years after he was bought he killed himself in a fit of balking, is not too remote if it is shown that his balking was a common habit extending through the whole time. Evidence may also be given that he was balky three years before the sale. *Id.*
4. Where a special question to the jury as to whether they found a machine was sold with a recommendation or a warranty that it would do good work, was answered yes, it was *held* that the answer did not determine whether they found a warranty or a mere recommendation. *Worth v. McConnell*, 473.
5. *It seems* that the right of action for breach of warranty accrues when substantial damage is suffered; and successive acts or occurrences causing damage amount to successive breaches. *Post v. Campau*, 90.

covenants of: DEEDS, 2, 3.
by indorsement: NEGOTIABLE INSTRUMENTS, 11, 12.

WATER RIGHTS:
ownership to mid stream; BOUNDARIES.

WAYS. See HIGHWAYS.

WILLS: *Testator's powers*, 1; *capacity*, 2–11; *witnesses*, 4, 5; *experts*, 6; *construction of bequests*, 12, 13.

1. It is intended by the Statute of Wills that every person shall be at liberty, in making his will, to select the objects of his bounty among his relations at discretion, or to pass them all by if so disposed. *Fraser v. Jennison*, 206.
2. Derangement of the mental faculties ought not to incapacitate one from making his will if it does not make him incapable of acting rationally in the ordinary affairs of life, or manifest itself in the testamentary provisions. *Id.*
3. The fact that a testator had expressed regret that he had made a particular bequest has no bearing on his mental capacity. *Id.*
4. The error of admitting a will in evidence without having called a particular subscribing witness out of several, to prove its due execution, is cured by calling him afterwards and allowing the contestants to cross-examine him. *Id.*
5. A trustee named in a will was also a subscribing witness, and testified to its due execution and the testator's sanity. He was asked on cross-examination as to whether he had proved a claim against the estate, and an offer was made to show that the witness had himself drawn the will, that testator was very old, and that before his will was made he had been prompt to pay his debts. *Held* proper to exclude the question and the testimony. The witness was not so interested in the will, either as trustee or claimant, as to affect his testimony, and the evidence could at most raise a mere suspicion that his claim was unfounded or that the testator had become mentally dependent or helpless. If the claim was valid it made no difference whether the will was sustained or not, and if the claim was unfounded, it should have been disputed when presented for allowance and when its validity was the question at issue. *Id.*
6. In a will case in which the testator's sanity is in issue, an omnibus question to an expert, presenting a hypothesis covering many things of which there was neither proof nor offer of proof, including conditions which necessarily indicated insanity as well as facts which might co-exist with a state of mental soundness, and going not only into the history, eccentricities and physical condition of the testator, but into the personal traits of his relations, is properly excluded as tending to make the jury suppose that each of the enumerated circumstances indicated insanity, and to leave them at discretion to decide whether the will was suitable and proper and satisfied their judgment. *Id.*
7. Letters showing friendly relations with a brother are not admissible many years afterward as tending to show that the writer, in not leaving any bequest to the brother's children, with whom friendly intercourse had not been kept up after the brother's death, had so lost his natural affection as to indicate insanity; and affectionate letters to and from other relations, equally remote, to whom, however, he had left bequests, though they may not be strictly inadmissible, may be properly excluded. *Id.*

8. Contestants in a will case offered in their opening to read to the jury a passage from a work on mental diseases, enumerating certain causes of insanity. *Held* that the court properly refused to allow it. *Id.*
9. The question in a will case whether or not the testator was an eccentric man is not objectionable as calling for a conclusion instead of a fact. *Id.*
10. A will ought not to be overturned without reasons that are intelligible to the common sense of mankind. *Id.*
11. A will is not necessarily to be set aside on proof that the testator suffered from a mental disorder when it was executed; it must also be shown that it affected the provisions of the will. *Id.*
12. Parol evidence of the circumstances in view of which a will was made, is admissible as tending to show the testator's intent; but general rules of construction should not be set aside on extrinsic evidence unless it proves that they do not express his intent. *Eberts v. Eberts*, 404.
13. A testator devised property "to the surviving children of [her] brothers." *Held* that she meant those surviving at her death, and not those who were alive when the will was made. *Id.*

testator's competency shown by physicians: EVIDENCE, 9.
finality of judgment in will cases: TRIAL, 1.

WITNESS,
defendant as witness: TRIAL, 5.
testimony of a *particeps criminis:* CRIMINAL LAW, 7,
credibility of: EVIDENCE, 2.
manner of giving testimony: TRIAL, 4.
introduction of former testimony: EVIDENCE, 11.
examination of subscribing witness: WILLS, 4, 5.

WRIT
of assistance; when proper: REAL PROPERTY, 8.
of attachment: see ATTACHMENT.
of certiorari: see CERTIORARI.

4998 014