Desiring to bring his work down to date, the Reporter has seen fit to issue this volume in advance of volumes 66 and 67 Michigan Reports, which will be ready in a short time.

MICHIGAN REPORTS

CASES DECIDED

IN THE

SUPREME COURT

OF

MICHIGAN

FROM

SEPTEMBER 29 1885 TO JANUARY 6 1886

HENRY A. CHANEY

STATE REPORTER

VOL 58

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The Index to this Volume is by Mr. Albert P. Jacobs of the Detroit Bar.

The head notes to *Schofield v. Walker* (p. 96) and *First National Bank v. E. T. Barnum Wire & Iron Works* (p. 124) are by Mr. Justice Champlin, who wrote the opinions.

This Volume is published in advance of vols. 56 and 57 which, it is hoped, will appear speedily.

Rec. Sept. 28, 1886

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SUPREME COURT OF MICHIGAN.

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To October 1, 1885, when he resigned

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of Ann Arbor.

During the October term of 1885

ALLEN B. MORSE

of Ionia.

From Dec. 31, 1885

JAMES V. CAMPBELL

of Detroit.

ASSOCIATE JUSTICES

To January 1, 1886

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of Detroit.

THOMAS R. SHERWOOD

of Kalamazoo.

JOHN W. CHAMPLIN

of Grand Rapids.

From Dec. 31, 1885

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CRIER

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ATTORNEY GENERAL

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28	SILAS S. FALLAS.

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.

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SUPREME COURT RULE 32.

The following rule, adopted by the Supreme Court, July 21, 1886, as Supreme Court Rule No. 32, was *ordered* to take effect September 1, 1886:

RULE 32.—It shall be the duty of a party bringing a civil cause into this Court to file with the Clerk thereof, before the first day of the term for which such cause is regularly noticed for argument or hearing, twelve printed copies of the record. Upon neglect or failure to comply with this rule the cause will be stricken from the calendar on the first day of the term, and further dealt with as justice may require.

JUNE TERM 1885.*

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CYNTHIA W. CRAWFORD v. HERMAN HOEFT, FRANCIS CRAWFORD, JAMES D. TURNBULL, ADMINISTRATOR FOR FRANCIS CRAWFORD, ANNA M. CRAWFORD, EDWIN HADLEY, CHAS. R. MILLER AND JOSIAH C. ROWLEY.

Forgery—Burden of proof of good faith—Laches—Release.

1. In determining the existence of a forgery it is proper to consider the relationship of the parties who profit and suffer by it, and the age and mental condition of the latter.
2. Where a mother whose mind is weakened by age has dealings in reference to her property with a son who has control of it, and relies upon his integrity not to mislead her, the dealings must be characterized by perfect good faith, and the burden of establishing its fairness is on those whose claims are based on these dealings.
3. A son obtained apparent control of his mother's property by means of a forged deed, but she prevailed on him to convey it back to her, which he did under certain conditions by deed in escrow; but at the same time, without her knowledge, he conveyed away and mortgaged portions of the property. *Held*, that she was justified in repudiating the settlement, not only because of the fraud upon her, but because the settlement gave her nothing of value.
4. The long form warranty deed on paper folding like legal cap and with the description on one leaf and the attestation clause and acknowledgment on the other, is criticized as affording unusual facilities for fraud.
5. Rights are not lost by laches as against persons claiming under a forged deed.
6. Innocent purchasers under a forged deed are in no better position as to title than if they had purchased with notice.
7. Land exchanged in consideration of the conveyance of other land by a forged deed may be recovered back, even from subsequent purchasers.

* Continued from Vol. 57.

8. A release by the party defrauded by a forgery, of rights set up under a forged deed by subsequent purchasers, may be effectual and valid.

9. The Supreme Court has power to issue any writ necessary to the enforcement of its decrees; but it may also leave it to the court below to issue such writ, where the lower court has power to do so, if the record has been remanded to that court.

10. A person in possession under a forged deed can claim no rights; and even if he has made improvements, ejectment need not be resorted to for the purpose of recovering possession from him after a decree requiring him to give it up; a writ of restitution is enough.

Appeal from Presque Isle (Emerick, J.) October 23, 1884.—April 9, 1885. Re-heard, June 2–3.—September 29.

BILL to cancel deed. Complainant appeals. Reversed.

George W. Bates and *Alfred Russell* for complainant. As to the conclusiveness of a notary's certificate upon the fact of signing: *Hourtienne v. Schnoor* 33 Mich. 274; *Johnson v. Van Velsor* 43 Mich. 219; see also *Cameron v. Culkins* 44 Mich. 533; *Camp v. Carpenter* 52 Mich. 375; *Matter of Wool* 36 Mich. 299; *Blair v. Compton* 33 Mich. 453; for cases in which deeds have been set aside for fraud on the grantor and other reasons see *Case v. Case* 26 Mich. 492; *Wartemberg v. Spiegel* 3 Mich. 402; *Seeley v. Price* 14 Mich. 547; *Thorn v. Thorn* 51 Mich. 167; *Wright v. Wright* 37 Mich. 57; *Savery v. King* 5 H. L. Cas. 626; *Allore v. Jewell* 94 U. S. 506; *Kempson v. Ashbee* L. R. 10 Ch. App. 15: 11 Eng. 401; there can be no bona fide purchase after a forgery: *Austin v. Dean* 40 Mich. 388; Kerr on Fraud, 314; and an attorney's knowledge is that of his client: *Larzelere v. Starkweather* 38 Mich. 107; *May v. Le Claire* 11 Wall. 217; *Smith v. Ayer* 101 U. S. 325; the want of notice necessary to a bona fide purchase must exist at the time of payment as well as of purchase: *Warner v. Whittaker* 6 Mich. 135; *Dixon v. Hill* 5 Mich. 404; *Blanchard v. Tyler* 12 Mich. 339; *Stone v. Welling* 14 Mich. 514; *Kohl v. Lynn* 34 Mich. 360; *Thomas v. Stone* Wal. Ch. 117; *Palmer v. Williams* 24 Mich. 328; *Battershall v. Stephens* 34 Mich. 75; *Matson v. Melchor* 42 Mich. 481; *Smith v. Williams* 44 Mich. 241; *Boxheimer v. Gunn* 24 Mich. 372; *Chadwick v. Broadwell* 27 Mich. 6; *Haescig v. Brown* 34 Mich. 503; an agent's knowledge is also that of his principal: *Russell v. Sweezey* 22 Mich. 235; *Sanford v. Nyman* 23 Mich. 326; *Emerson v. Aiwater* 7 Mich. 12; 1 Story's Eq. Jur. § 408; those who

are not bona fide purchasers take subject to existing claims; *Smithers v. Heather* 25 Mich. 447; delay in seeking relief against fraud affects the complainant only after he has the means of knowledge thereof: *Browne v. McKlintock* L. R. 6 H. L. 456: 8 Eng. 54; *Lindsay Petroleum Co. v. Hurd* L. R. 5 P. C. 221: 8 Eng. 180; see *Hatch v. Hatch* 9 Ves. 292; *Wollaston v. Tribe* L. R. 9 Eq. 44; for cases upon forgery of signature to deed see *In re Cooper* L. R. 20 Ch. Div. 627; 3 Pomeroy's Eq. Jur. 416.

Turnbull & Dafoe (for defendants Hoeft and Turnbull) and *C. R. Miller* and *Millard, Weaver & Weaver* (for defendants Rowley and Miller) for appellees. A sealed instrument is conclusively presumed to be on good consideration, unless it is impeached for fraud: Best on Evidence §§ 220, 429; a sealed release cannot be qualified by parol: 2 Pars. Cont. 713, 715; an executed release will be enforced, though voluntary, as it requires no further act to give it effect: Story's Eq. Jur. § 793 *a*; one who has long neglected to protect others from dealing with a person who has obtained interests by fraud, is estopped from claiming anything against such others. Id. §§ 1533–51.

Cooley, C. J. This case came before us with a voluminous record, containing a great deal of conflicting evidence, and has given us no little trouble. The purpose of the bill was to obtain an adjudication that a deed purporting to be made by complainant to her son was a forgery by the son, and that subsequent conveyances and mortgages by the son were therefore void.

The argument of the case left me somewhat impressed with complainant's view of the facts, but on a careful reading of the testimony afterwards I found this impression substantially effaced. And the more I have reflected upon the case since, the more convinced I have become that the deed in question was made by complainant, who weakly suffered herself to be misled and defrauded by her worthless son. This conclusion would dispose of the case and entitle the defendants to protection.

I therefore think the decree should be affirmed. But in affirming it I should deem it proper to provide that if, pending this suit, any of the defendants holding incumbrances

from which the complainant would be entitled to redeem have taken proceedings in foreclosure, such proceedings should be held subject to redemption still, and on settlement of the decree time should be fixed for that purpose, if not agreed upon.

CHAMPLIN and SHERWOOD, JJ., concurred.

CAMPBELL, J. Although the case is one which is not at all satisfactory in many respects, my opinion is that the deed complained of was not a genuine instrument.

Motion for rehearing. Granted.

Bates and *Russell* for the motion. Where proof of forgery is in harmony with the general purpose of a bill to cancel a deed for fraud, relief is proper: Story's Eq. Pl. (Redf. ed.) § 40; *Hobson v. M'Arthur* 16 Pet. 195; *Scudder v. Young* 25 Me. 153; and a court that has once acquired jurisdiction of the parties will retain it for any purpose within the scope of the equities to be enforced: *Mason v. Hartf., Prov. & F. R. R. R. Co.* 19 Fed. Rep. 55; *Ober v. Gallagher* 93 U. S. 199; *Ward v. Todd* 103 U. S. 327; and will make the relief sufficient to dispose of the case: *Miller v. Stepper* 32 Mich. 203; *Carroll v. Rice* Walk. Ch. 374; *Brown v. Gardner* Har. Ch. 291; *Whipple v. Farrar* 3 Mich. 436; *Hawkins v. Clermont* 15 Mich. 511; *Folkerts v. Power* 42 Mich. 283; leave should at least be granted to amend the bill if the amended case is sustained by the proofs: *Church v. Holcomb* 45 Mich. 39; *Smith v. Sherman* 52 Mich. 637; *Parrill v. McKinley* 9 Grat. 1; *Hewett v. Adams* 50 Me. 371; *Whelan v. Sullivan* 102 Mass. 204; *Neale v. Neale* 9 Wal. 1.

Turnbull against.

The motion was granted. The case was again heard June 2–3, 1885, and was decided September 29.

Bates and *Russell* for complainants.

Turnbull, Shields & Dafoe, Chas. R. Miller and *Millard, Weaver & Weaver* for defendants.

CHAMPLIN, J. This is a suit to cancel a conveyance of lands in the county of Presque Isle, purporting to have been made by the complainant to her son Leonard C. Crawford on the 10th day of August, 1878, and also to set aside a deed made by Crawford to defendant Hoeft, and also a mortgage executed by Crawford to Edwin Hadley and by him assigned to the defendants Miller and Rowley, as encumbrances upon the property. Leonard C. Crawford died in 1881, leaving no children. Defendant Francis Crawford is the father of Leonard; defendant Turnbull, the administrator of his estate; and Anna M. Crawford is his widow.

The bill of complaint was filed on the 15th day of August, 1882, and alleges that on and prior to August 10th, 1878, the complainant Cynthia W. Crawford, owned the property in suit, consisting of several thousand acres of land in Presque Isle county, upon which was a village called Crawford's Quarry, a saw-mill, store and a valuable stone quarry; that in September, 1873, for the purpose of starting business at Crawford's Quarry, she leased a part of these lands to her son Leonard C. Crawford, he agreeing to pay her five hundred dollars a year for her support, and pay the taxes on her property in that county; that he did business there under this lease until some time prior to August 10th, 1878, when, the lease having expired, he requested an indefinite continuation of such lease, and proposed that she deed him, during his life, the quarry lands, covering the lake front and mill property, to be used by him during his life, and on his death to revert to her, as a means of providing for him against any reverses that might happen to her; that she consented, but expressly reserved section twelve, the town plat, and the old homestead, and with the understanding that this deed was not to be recorded but simply should be held by him as the evience of his life-lease in said land, with no right of sale, and on the further understanding that Leonard should comply with all the terms of the old lease, and especially as to the payment of the taxes and of five hundred dollars annually to herself, said deed being intended to simply extend said lease during the life of said Leonard and subject to the same con-

ditions; that she signed what purported to be a deed of the quarry lands, with the reservations and agreement mentioned, but never acknowledged it, as it was not intended to be recorded; that she resided at the "Quarry" during the summers, and at Detroit during the winters, and never knew or heard that her son Leonard claimed to have a deed of said lands other than the one intended as a life-lease until the winter of 1880, when she learned that her son Leonard had placed a deed upon record of all her lands; that she never signed or acknowledged such deed, but that it was signed and forged by her said son, without her knowledge or consent, and that, to conceal its existence as long as possible, it was kept from the record for nearly six months, and when it was recorded it was so indexed as to still further conceal its existence; that she charged her son Leonard with having a false and fraudulent deed from her on record of all her lands, and repeatedly tried to get him to restore said premises to her, but he, while he always promised to do so, continually delayed doing anything for her in that respect for the purpose of gaining time to sell or encumber the whole of said property, and put it, as he supposed, beyond her reach, and for this purpose he did, without her knowledge or consent, on the 15th of October, 1880, execute a deed to Herman Hoeft for four thousand dollars of an undivided one-half interest in section twenty-four, where the town site, the mill and dock property are located, and on the same day he executed to Edwin Hadley a mortgage for eight thousand dollars, covering the balance of her said lands, which mortgage was on October 27th, 1880, assigned to defendants Miller and Rowley for seven thousand five hundred dollars; that both the Hoeft deed and Hadley mortgage were taken with a knowledge of this claim; that in October, 1880, she went with counsel to the "Quarry" to compel her son to restore these lands, and after much effort, finally induced him to do so on the 16th of October, 1880, by deed, which was left with William A. Moore, of Detroit, in escrow, to be delivered to her on the death of her son, and on her paying one thousand dollars to his widow, but if she died first, the same was to be returned to her son and canceled;

that this deed was taken without knowledge of the Hoeft deed and Hadley mortgage, and was supposed to embrace all the lands, with the title in the same condition as on that 10th day of August, 1878, but when she learned that it did not so convey all these lands, and was to be received subject to these conditions and also said conveyances, she repudiated it as a fraud on her rights in the premises, and claimed all her lands free and clear of any encumbrances placed thereon by him. The prayer is for a decree setting aside this deed as a forgery, and also the Hoeft deed and Hadley mortgage, and for an accounting for the use and occupation of the premises and the timber cut therefrom.

Defendants Francis Crawford, the heir-at-law, Anna M. Crawford, the widow who took a life estate, and Edwin Hadley made no answer. Defendants Hoeft, Turnbull, administrator, and Miller and Rowley filed separate answers.

Hoeft's answer. Admits the deed and record, and denies the forgery; claims the complainant was in Presque Isle county since the date of the deed and allowed her son, down to his death in October, 1881, to have general control of the place and to sell and mortgage it as his own, and never objected; denies any knowledge of the fraud, and charges he purchased in good faith for value, and without notice of any claim made to the same; relied on this deed and its record, and, though it was well known that he was going to purchase this property long before he did, complainant never informed him of any claim to the property nor objected to his buying it, notwithstanding the fact that she was then at the "Quarry" and knew of his afterwards making large improvements on the property; demurs on the ground that the bill is defective for want of necessary parties; that complainant is estopped by her own laches by having put this property into the hands of her son and allowing him to dispose of it as his own, and also in thus failing to notify him of her claim, though she knew of his purchase and being in possession of the property.

Turnbull's answer. Makes the same substantial defense as the Hoeft answer, but alleges the additional ground of

demurrer that, as complainant knew of the fraud in 1880, it is now too late to complain after her son's death, both as against his creditors as well as the bona fide purchasers of this property.

Miller and Rowley's answer. Says that they know nothing of the matters alleged except as to the mortgage; they admit its existence and record, but deny that Hadley had any knowledge of the fraud or that he was their agent in securing this loan, and aver that, relying upon his representations, they purchased this mortgage in good faith, and paid him therefor seven thousand five hundred dollars, without any notice or knowledge of the claim against this deed, and they allege that complainant is estopped by laches and by a deed of release executed to them January 26th, 1883, whereby she released to them all manner of right to question this mortgage and to further prosecute her suit against them.

General replications to the answers were filed, and the case is before us upon pleadings and proofs. It was first argued before us at the October term of 1884, and was held under advisement until the 9th of April, 1885, when an opinion was filed by the Chief Justice affirming the decree of the court below dismissing the bill of complaint.

It was there stated that the case contained a great deal of conflicting evidence which had given us no little trouble, but in considering the evidence, the majority of the Court did not feel fully assured that the forgery alleged in the bill had been established, but we felt quite well satisfied, as stated by the Chief Justice, "that the deed in question was made by complainant, who weakly suffered herself to be misled and defrauded by her worthless son." Mr. Justice Campbell did not agree with us in the conclusion which we had reached, and expressed the opinion that the deed complained of was not a genuine instrument. A rehearing was granted, and the case was at our last term ably and exhaustively argued by counsel for both parties. We have again read the printed record with care, and in addition have critically examined the original depositions and exhibits returned to this Court, and as we have come to a different conclusion from what we

before announced, I shall proceed to state the reasons therefor.

The main ground upon which relief is asked is the forgery alleged to have been committed by Leonard C. Crawford of the deed bearing date August 10th, 1878. In weighing the testimony bearing upon this point, it is proper to consider the relation which these parties bore to each other, their age, mental condition and the surrounding circumstances. The complainant is the mother of Leonard C. Crawford, and he is said by some of the witnesses to have been her favorite son. She was a lady over seventy years of age at the time the forgery is alleged to have been committed, and judging from her testimony her mind and memory must have been weakened by age, for it bears inherent evidence of intellectual decay and of the presence of infirmities incident to advanced years. She frequently contradicts herself and falls into errors without apparent cause. She was inquired of and testified to many things, such as admissions, conversations and transactions which were incompetent as evidence, being within the prohibition of the statute allowing parties to testify as witnesses in their own behalf. All such testimony we have excluded from our consideration. But the fact remains that she was a weak old woman, dependent upon the son for the management of her business and for the maintenance and support of herself, and that she placed great confidence in his integrity and disposition to do right in his transactions with her. In short, she had a mother's weakness for a favorite child. Her trust in him is illustrated by the testimony of Mr. Dowling, who was engaged by her to get a reconveyance of the property. She had accused her son of forging the deed, and Dowling had obtained the consent of the son to reconvey the property upon certain conditions more particularly referred to hereafter. Dowling says that he was not acquainted with the descriptions, and he read the deed which her son proposed to execute to her to ascertain if it contained all, and he says she did not seem to know, and she said: "I guess they are all there; if my son says so, it must be so."

Such being the relation of the parties to the deed claimed to have been forged, a transaction whereby, as it is claimed, the mother voluntarily made a conveyance of all her property, variously estimated to be worth from twelve thousand to fifty thousand dollars, to her son, must be characterized by the utmost good faith, and the burden of establishing the fairness of the transaction is upon those who claim under the conveyance. *Farmer's ex'r v. Farmer* 39 N. J. Eq. 211; *Condit v. Blackwell* 22 N. J. Eq. 481; *Porter v. Woodruff* 36 N. J. Eq. 174; *Tate v. Williamson* L. R. 1 Eq. 528; *Rhodes v. Bate* L. R. 1 Ch. App. 252; *Billage v. Southee* 9 Hare 534; *Cowee v. Cornell* 75 N. Y. 91. In the case last cited Mr. Justice Hand said: "It may be stated as universally true that fraud vitiates all contracts, but as a general thing it is not presumed but must be proved. * * * Whenever, however, the relations between the contracting parties appear to be of such a character as to render it certain that they do not deal on terms of equality but that either on the one side from superior knowledge of the matter derived from a fiduciary relation, or from overmastering influence, or on the other from weakness, dependence, or trust justifiably reposed, unfair advantage in a transaction is rendered probable, there the burden is shifted, the transaction is presumed void, and it is incumbent upon the stronger party to show affirmatively that no deception was practiced, no undue influence was used, and that all was fair, open, voluntary and well understood."

It is entirely clear that up to August 10th, 1878, Mrs. Crawford was the owner in fee of the valuable property in question. It is not claimed or pretended that Leonard C. Crawford ever purchased this property from his mother or paid her any consideration therefor, and yet a deed bearing date the 10th day of August, 1878, is produced, which, if genuine, vests the title of the whole of this property in the son for the nominal consideration of two thousand dollars. He suddenly becomes the ostensible owner, and his mother at the same instant becomes ostensibly a beggar. The proposition is startling, and calls for an explanation of the transaction from

the son. He is accused of forgery and fraud, and what is the explanation he gives? To Mr. Carpenter he denied that he forged his mother's signature, but he admitted that he had obtained the deed by means perhaps ungracious, and justified himself by the plea that his brothers and sisters in Detroit had had more than their share of his mother's property; that there was some property in St. Paul that one of the children had the advantage of, and that he had worked hard at Crawford's Quarry, and that he thought the property there ought to belong to him. He also stated to Mr. Carpenter that the deed was taken to him entirely, only at the event of her death he should have it (the property) in preference to the other children. Mr. Carpenter then said to him that his mother now asked the property back; that he was invited up there by his mother, and he (Leonard) said the mother could have the property back upon this condition,—that upon her death she should give it to him in preference to the other children. To Mr. Dowling, another attorney employed by Mrs. Crawford to regain these lands, he said that his mother had claimed that she had never signed this deed, and he brought and exhibited to Dowling another conveyance to show the signature attached to it, and asked him to pass his opinion upon the two signatures as to whether they were alike or not. And he said: "This is the voluntary deed of my mother duly acknowledged and duly witnessed; there is no mistake about it whatever." Dowling further testifies as follows: "I told him that his mother had requested me to have a talk with him about the matter, and get him, if possible, to reconvey those lands to her, and he refused to reconvey them. He said his mother was getting old, and that she had disposed of most of her property, and she probably would dispose of those lands if he reconveyed them, and he did not think he had his share of her worldly wealth, and he intended to keep the lands and hold them under that deed, which was a voluntary deed on her part."

If the testimony of Emma Crawford, Emma C. Jouret and C. Stenton is to be believed, the proof of forgery would be clearly established. Each of these witnesses testify that

Leonard C. Crawford admitted in their presence that he had forged the deed in question, but at the same time they say that he asserted that he should rely on the deed and hold the property to the exclusion of the other children of Mrs. Crawford. It seems hardly credible that a person accused of forgery and threatened with a prosecution to recover the property should so freely admit away his title to it, and at the same time express his determination to hold the property under the deed. Yet these statements may each and all be true. It may be possible that he boldly asserted to his sisters Mrs. Jouret and Mrs. Stenton that he had forged the deed and meant to keep the property, relying upon their desire to avoid a public scandal and disgrace in the family, and also upon his mother's fondness for him, to prevent a prosecution. If so, it exhibits a daring hardihood and a reckless disregard of consequences seldom met with outside of the criminal classes.

In reaching the conclusion that the deed in question is a forgery, I have laid aside the testimony of each of these witnesses as tinctured with an evident bias. The witnesses who were present at the transaction all agree that, at about the time this deed bears date, Mrs. Crawford signed her name to a certain instrument to which Mrs. Crawford and her son Leonard were parties; they all agree that Mrs. Williams was present on that occasion; they all agree that Mr. Alexander McDonald was a witness called to witness the signature of Mrs. Crawford to the paper then signed by her. The deed in question appears to be signed by Mrs. Crawford, and to be witnessed by Philip O'Farrell and A. McDonald, and the acknowledgment appears to have been taken before Philip O'Farrell as a notary public. The witnesses disagree as to the kind of paper then signed, as to its appearance, as to who were present, and as to what transpired on that occasion. It is to be remarked, however, that all agree that but one deed was ever made or executed of any lands in Presque Isle county between Mrs. Crawford and her son Leonard that Mr. McDonald was a witness to.

Mrs. Williams testifies that there were present Mrs. Craw-

ford, her son Leonard, Mr. McDonald and herself, and that O'Farrell was not present. Mr. McDonald testifies that Mrs. Crawford, Leonard, Mrs. Williams, O'Farrell and himself were present. Mr. O'Farrell testifies the same as McDonald. He also testifies that he was there at the request of Leonard, who told him to prepare the deed of all Mrs. Crawford's lands that had not been conveyed, and told him his mother was going to deed these lands to him. He says he told Leonard that he did not think his mother would, because he had heard her speak to the contrary some time before; that he drew up the deed and took it to Mrs. Crawford's place to have it signed; that he spoke to her, and that she consented to sign it; and that he was greatly surprised. He says:

"In fact I told somebody that I would not be surprised if she had shot me more than I was when she consented to sign it. So I took her into a room of the house—at least, arranged to get her in there—and I explained it to her. Of course, I don't remember now what language was used; but I am very positive that my intention was to tell her that she was giving him what property she had in Presque Isle county. She went on to tell what he had promised to do with reference to giving her a certain amount of money—I don't remember the amount—and to make provision for the support of herself and his father, her husband. There was some talk about where the father should stay, whether it was to be in Detroit or up there, and they came to some conclusion about it, but I don't remember what it was; and I don't know as I would remember as much as I do only for my surprise about her signing such an instrument at all. Well, then there was something said about what security she would have that he would carry out his agreement with her, and my recollection is, although I would not be very positive about it, that I suggested drawing up a bond or a contract, or something to that effect, and for him to give her a mortgage on the property to secure her in his carrying out this agreement about this support and money, and so on; but what became of that, or whether it was done there and then, I have no definite recollection. Then I remember that we went into another room, and in fact walked from one room to another talking about the matter. Mrs. Williams was called from another room, or from up stairs, in the same house, to be as a witness, and when Mrs. Williams came down she was called upon to be

a witness. I don't remember who spoke to her about it, or I don't remember who called her from up stairs, or wherever she was, but I remember the objection she made, saying she was friendly with the other members or branches of the family, and that she thought that this document would be taking property in Presque Isle county away from them—from the Detroit parties—and that she was going down to Detroit in a very short time; and that it would be bad policy for her to have anything to do with it. She spoke a good deal about how she loved the family; and loved one as well as another; and went on in a woman-like way, and said she didn't want to have anything to do with it, so Mr. McDonald was called in. It was spoken about going to get somebody, and I think it was Len. that said he was in the store, and that he would get him; and yet my recollection is that he sent for him and brought him in. When he came in, Mrs. Crawford spoke something about the matter; it was generally spoken about there; and Mrs. Crawford said something to Mrs. Williams—I don't remember what it was—as to why she would not be a witness. But I know that the paper was signed there by Mrs. Crawford, and I signed as a witness, and I saw Mr. McDonald sign as a witness. Of course, I would not remember that that Exhibit A is the paper any more than that I do remember when I read the description and remember the time I had arranging to get it into such a condensed form, and it suggests to my mind that it is the paper, because I saw papers drawn up by Mr. Hunt of about the same purport, which were very voluminous; and I know I made it a point to get it in without any repetition in drawing the body of the paper; and my best recollection is that that is the one; and I do know that that is my signature as a witness on it. Well, the paper was signed, and there was something said, but by whom I don't remember, about how unwise it would be to put it on record, as Mr. Crawford had been in business there before, and there was some debts hanging over him, and likely it would induce his creditors to commence proceedings against him. There was something said about how that could be avoided, but the details of that I cannot remember. But I know after the business was transacted I went away, and I have no distinct recollection of hearing anything about the whole affair until, well, some months or such a matter; I don't remember exactly."

On his cross-examination he testified that there was talk of a trust deed, and something was said about the respective

merits of a trust deed being given by the mother, and an absolute deed and mortgage back. No one can read the testimony of this witness without reaching the conclusion that, by the transaction as he details it, an unconscionable advantage was taken of the old lady, which, under the circumstances, amounted to a positive fraud upon her. By his story she was weak, trustful and confiding. The papers were executed under the understanding that she was to have security back by way of "mortgage for her support, and money, and so on," and yet no security was given. As soon as he had secured the deed nothing further was done; and he seems to have lost suddenly his solicitude for the old lady's welfare. But the story he tells is not true. He is directly contradicted by Mrs. Crawford and by Mrs. Williams, and inferentially by McDonald, who testifies that he was a friend of Leonard and was in partnership with him in 1878; that he had talked with Leonard about his trying to induce his mother to make a deed or give him some portion of her property; that he talked with both of them upon the subject, and it was agitated for two or three months to his knowledge; that the deed talked of was to be a trust deed, securing in the same instrument the payment to her of three hundred dollars in cash every year, and her support, and also the support of his father if he would remove to the "Quarry," and reside there; that the deed was not to be placed upon record; that she always insisted upon reserving from the deed section twelve and the homestead; that he was afterwards called in to Mrs. Crawford's by Leonard to witness the signature of his mother to a deed, which he supposed to be the trust deed talked about; that he did not read the paper and could not identify it, but did identify his signature as a witness; that he had the impression that the paper he witnessed was written upon legal cap paper; that Mrs. Williams was present and asked to witness the paper, but declined because she was about to leave for Detroit, and while in Detroit she wanted to visit among the Crawfords, and she didn't want to be a party to any transfer for fear it would make her enemies; that from what was said he knew that the paper he witnessed

was a transfer of the Crawford property from Mrs. Crawford to Leonard, and that something was said about not putting the deed upon record; that he never witnessed the signature of Mrs. Crawford but once. This witness also testifies that, so far as he knows, Mrs. Crawford was perfectly satisfied. He says that afterwards Leonard told him he had left the deed in charge of the register of deeds, with instructions not to place it upon record until he notified him.

In this connection, the testimony of the register of deeds is noteworthy. He says that he was elected in 1876, and occupied the office in 1877 and 1878; that in the summer of 1878 O'Farrell told him that Leonard C. Crawford would bring a document to be put in his possession for safe keeping, and that he should preserve it and keep it in his possession, and not put it on record until he was told to, or something to that effect, and that Crawford would pay for keeping it safe; that a few days afterwards Crawford brought to him a warranty deed, a bulky paper written on legal cap, from Cynthia W. Crawford to Leonard; that he looked it over, and took it into his possession for safe keeping; that it took in all the lands in Presque Isle county belonging to Mrs. Crawford; that he thinks O'Farrell took the acknowledgment, and that McDonald was a witness. Crawford told him not to put it upon record, because he was in such a position that there were some judgments hanging over him, and he did not want to put it on record. He said he would be in a good position soon, and pay up all; that he looked it over very carefully, and discovered a mistake in the descriptions, and spoke to Crawford about it, and he took it, and said it would be fixed again, and he never saw that paper again. It was in O'Farrell's handwriting. Afterwards he received another deed from Crawford, it being the deed now claimed to be a forgery. He told the witness to keep it in some way, not to put it on record; that he was in such position that everybody was watching him, and he did not want it to be put on record, and to put it on when he gave notice; and a few months after he told him to record it, and he did so on the 30th day of December, 1878. It will be noticed that this was the day

before his official term would expire. He afterwards gave the deed to Crawford. It appears that the index of this deed in the index of deeds required by law to be kept by the register was so indexed under the initial C that its presence would not be ascertained except by the merest chance. There were twenty-seven lines upon which no entry had been made upon the last page occupied by entries of names commencing with the letter C, and the entry of this deed was over the leaf. It was some time after the register who went into office on January 1st, 1879, discovered by accident the entry, although he had searched for conveyances and incumbrances of this property previously without finding any.

Mrs. Crawford did not discover the existence of this deed until the spring of 1880, when she promptly repudiated it and pronounced it a forgery. From that time on she seems to have endeavored to obtain a reconveyance. She is charged with laches, but whether she is guilty of laches must depend in a great measure upon her opportunities, her surroundings, the relationship of the parties, and the efforts she put forth to obtain a reconveyance. At the "Quarry" she was in the hands of her son, and was completely helpless. The members of the legal profession, so far as we are advised, residing at the "Quarry" or at Rogers City, were in the employ of her son. The only way that she could put the public upon notice of her rights was to talk, and from the evidence it appears that her tongue was not idle. She denounced the deed as a forgery to all whom she met. She wrote to the register of deeds forbidding him to record any conveyances from her son, for the reason that the deed had been obtained by fraud—a futile thing to do, but she was doing what she thought she could do to give notice. She besought Mr. Carpenter, an attorney, and relative of the family, to see her son, and he did so, but without result. She employed Mr. Dowling, an attorney in Detroit, and he, about the middle of October, 1880, visited Crawford's Quarry, and after a protracted negotiation obtained an agreement from Leonard that he would reconvey by quitclaim deed all the lands covered by the deed of August 10th, 1878, but on

condition that the same should be deposited with William A. Moore in escrow, subject to the conditions endorsed thereon, as follows:

"The conditions referred to in the within deed, and hereby mutually agreed upon, are these: That this deed shall be placed in escrow with Wm. A. Moore, Esq., of Detroit, Mich., to be by him retained, without filing, recording, or publicity, until the death of said Leonard C., or of said Cynthia W. Crawford. That if said Leonard C. Crawford dies first, then, on said Cynthia W. Crawford paying in *cash* to the widow of said Leonard C. Crawford one thousand dollars, said deed shall be delivered up to her, said Cynthia W. Crawford, and not before. That in case of the death of said Cynthia W. Crawford before said Leonard C. dies, then this deed shall forthwith, upon her death, become null and void, and shall be forthwith delivered up to said Leonard C. Crawford.

Dated Crawford's Quarry, Presque Isle county, Mich., October 16th, A. D. 1880.

LEONARD C. CRAWFORD.
CYNTHIA W. CRAWFORD.
By M. E. DOWLING, her Attorney."

This deed bears date October 16th, 1880, and at the time of its execution Dowling was not informed of any deeds or mortgages having been executed upon the property. But it turns out that this settlement was a fraud upon the rights of Mrs. Crawford scarcely less heinous than the forgery of the deed in the first instance. For, while Leonard C. Crawford was negotiating with Dowling for a settlement of the matter with his mother, and while ostensibly yielding to her a portion of her rights, he was secretly conveying away and incumbering the whole of the property beyond the means and reach of his mother. To use a familiar quotation, he was "keeping the word of promise to her ear to break it to her hope." At the time he was preparing the quitclaim deed to his mother he was also preparing for execution a deed for an undivided half of the quarry property to Herman Hoeft, and a contract of partnership by which the whole of the quarry property should be put into the firm as assets for ten years, and a mortgage to one Edwin Hadley upon all of the

other property, to secure the payment of eight thousand dollars, which it was intended Hadley should negotiate for Leonard's benefit. These papers were actually drawn and delivered before the execution of the deed to Mrs. Crawford, which was to be placed in escrow, and which has expressed therein that it is executed "*for and in consideration of the natural love and affection to said second party his mother.*" But more than this, he left out and kept back all of section twenty-four, upon which the village and the quarry is situated. This settlement and deed Mrs. Crawford also repudiated; and she refuses to be bound by the settlement made by Dowling. In this she is justifiable, not only because of the fraud perpetrated upon her in executing the conveyances above mentioned, but because the settlement, so called, gave her nothing whatever of value. It imposed a burden upon her in order to obtain what was her own.

The testimony of Mrs. Williams has certain peculiarities which incline us to weigh it with caution, yet upon the facts attending the execution of a deed by Mrs. Crawford when McDonald was present, she is clear as to the nature of the instrument and the object to be accomplished thereby. She testifies that O'Farrell was not present at all on that occasion; that the property conveyed was simply the quarry property, with a reservation; that it was but a single sheet, and with but little writing upon it, and she is positive in her statement that the deed in question is not the deed which she saw on that occasion. She also testifies to being present at interviews previous to the time the deed was executed between Mrs. Crawford and Leonard, in which he importuned his mother to deed him the land, and that she refused to do it, but finally consented to execute a quitclaim deed which should stand in the place of a lease, so he could carry on business, for which he was to support her and her husband if he should remove to the "Quarry" to reside, and pay her three hundred dollars annually, which deed should not be placed on record. And this, she says, was the deed which was executed at that time.

The evidence above referred to was before us on the

former hearing, and was duly considered, and although we were satisfied therefrom that a fraud had been perpetrated, it did not appear clear to the majority of the Court that the instrument complained of was a forgery. It appeared to us that the signature appended to the deed was the genuine signature of Mrs. Crawford, and I am still of that opinion. The forgery, if one existed, could not be readily discerned. Since the last argument, however, we have made a careful examination of the deed alleged to have been forged, and have discovered what to us appears conclusive that a forgery of the deed has been committed, when viewed in the light of the testimony of the witnesses as to the character of the deed which was executed by Mrs. Crawford to her son at the time Mr. McDonald and Mrs. Williams were present, and the other testimony in the case bearing upon the genuineness of the deed in question. The deed produced, and which it is claimed is a forgery, is filled out upon the printed form known as the long form warranty deed, upon sheets folded at the end like legal cap paper, having marginal red lines ruled upon both margins of the pages of the sheet. The first half of the sheet embraces all of the deed, including the description of the premises conveyed, except the attestation clause and the acknowledgment. To a person desiring to perpetrate a fraud by substituting a spurious conveyance for a genuine, this form affords unusual facilities. All such evil-disposed person would have to do would be to sever the sheet in the middle and attach the half sheet which has the genuine signature and the genuine signatures of the witnesses and acknowledgment to a half sheet of like form containing the spurious description. The deed in question, although executed as claimed in 1878, has a very dilapidated appearance. It is worn and dirty. It appears so worn as to become separated at each fold, and has been attached together by the aid of paper and mucilage. The edge where the half sheet was folded had been severed, and was also securely attached together by the same means. On detaching this mucilaged paper it was found that the edges of the half sheet were smooth and had no appearance of having been worn like the other folded

edges. It also is apparent that they are not the halves of the same sheet of paper. One is wider than the other, and the marginal red lines do not correspond with each other. It is manifest that the half sheet which contains the description of land conveyed is not a part of the sheet upon which the attestation clause and signature of Mrs. Crawford and the names of the witnesses appear. We are satisfied that the first half sheet of the present deed was substituted in place of some other deed executed by Mrs. Crawford, and is spurious and a forgery.

We are also satisfied that the complainant has lost no rights as against these defendants by her laches. The defendants can claim no rights under the forged deed. If they occupy the position of innocent purchasers, they are in no better condition to contest her rights than if they purchased with notice. Her equity is prior and superior to theirs, based alone upon conveyances from the forger. If Hoeft is an innocent purchaser, which it is not necessary to pass upon, since we hold that the deed was forged, he can recover the land conveyed by him to Crawford, if not voluntarily surrendered by those claiming under Crawford.

We are also satisfied from the testimony that the release executed by Mrs. Crawford to Miller and Rowley is valid and effectual, and that in consequence thereof their rights under the Hadley mortgage cannot be disturbed.

The decree of the circuit court is reversed, and a decree will be entered here in accordance with the prayer of the bill, except as to Miller and Rowley, and as to them the bill will be dismissed, but without costs. The decree will also be drawn so as not to affect the rights of any person who is not a party to this suit. Complainant will recover the costs of both courts.

CAMPBELL and SHERWOOD, JJ., concurred.

Motion for rehearing. Overruled November 19.

Turnbull & Dafoe for the motion. A judgment obtained by fraud can be set aside on motion seasonably made: *Jenni-*

son v. Haire 29 Mich. 219; the most flagrant fraud is one that is practiced on a court under forms of law: *Gallatia v. Erwin* Hopk. 54; any intentional device to keep the parties or the court in ignorance of facts avoids the judgment: *Patch v. Ward* L. R. 3 Ch. App. 203; Kerr on Fraud 293–4; *Duchess of Kingston's Case* 20 Howell's State Trials; Bigelow on Fraud 172; so may suppression or concealment: *Davis v. Tileston* 6 How. 114; *Van Cortlandt v. Underhill* 17 Johns. 405; *Bulkley v. Starr* 2 Day 552; *Fenemore v. United States* 3 Dall. 357; courts will set aside as nullities, judgments, decrees or awards obtained by fraud (*Willson v. Foree* 6 Johns. 110; *Jackson v. Hayner* 12 Johns. 469; *Barber v. Kerr* 3 Barb. 150; *Clark v. Underwood* 17 Barb. 221; *Wright v. Miller* 4 Seld. 9; *Weed v. Bentley* 6 Hill 56) occurring in the concoction or procurement of the result: *Ross v. Wood* 70 N. Y. 9; a former adjudication may be avoided by showing that the court was misled: *Mandeville v. Reynolds* 68 N. Y. 543; or that the matters determined were not within the issues: *Campbell v. Butts* 3 N. Y. 173; equity will interfere with the execution of a judgment if it would be unjust: *Dobson v. Pearce* 12 N. Y. 165; fraud vitiates a judgment when in consequence of it the judgment is different from what it would have been otherwise: *Verplank v. Van Buren* 11 How. 328.

Bates against.

CHAMPLIN, J. Motion was made in this case on behalf of defendants Herman Hoeft and James D. Turnbull, administrator, to vacate and set aside the decree entered therein, or for leave to file a bill for that purpose, on the ground of fraud practiced upon the Court by the complainant's solicitor in obtaining the decree. The motion is based upon a portion of the opinion of the Court, wherein mention is made of the appearance of the deed from Cynthia W. Crawford to Leonard Crawford, alleged to have been forged, as justifying, in connection with the other testimony in the case, the conclusion to which the Court arrived that the deed was forged. Affidavits have been filed in support of the motion, in which the affiants state that at the time they saw the deed, and before it was introduced in evidence, such deed consisted of a whole sheet, not severed at the center fold, and hence a half sheet

of one deed could not have been substituted for another, as intimated in the opinion of the Court.

No claim is made that the deed returned and remaining on file in this Court is not the identical deed which was introduced in evidence, or that any change or alteration has been made therein, except that it has become worn and its parts pasted together to preserve them. It appears that the instrument has been taken to Denver and exhibited to the witnesses whose depositions were there taken, and also to Chicago for the purpose of exhibiting the same to Mrs. Williams, another witness; and it is quite possible that this may account in a measure for its pocket-worn appearance; but it does not account for the fact which still remains, that one half of the sheet is wider than the other, nor that the marginal lines, which should be continuous and of the same width apart in a whole sheet, are not so in these two half-sheets when placed together. It may be possible that these discrepancies might occur in cutting and ruling the paper, but it is not very likely that both should concur in the same sheet. Be this as it may, the affidavits fail entirely to show, and there is no ground for asserting, that the complainant's solicitor intentionally or unintentionally practiced or attempted to practice a fraud upon the Court with reference to the appearance or condition of the deed in question.

The motion is overruled with costs.

The other Justices concurred.

Motion for writ of restitution. Submitted February 2, 1886. Denied February 17.

Bates and *Russell* for the motion.

Turnbull against.

CHAMPLIN, J. Motion is made for a writ of restitution to be directed to the defendants Herman Hoeft, Francis Crawford, Anna M. Crawford and James D. Turnbull, administrator, etc., commanding them to deliver up the possession of the

premises described in the bill of complaint, and particularly the premises known as fractional section number twenty-four (24) in township thirty-five (35) north, range five (5) east in Presque Isle county, Michigan. The motion is based upon the records and files in the cause and the affidavit of George W. Bates.

It appears that the parties above named are in possession, and since the entry of the final decree in this Court in said cause possession has been demanded from the defendants in behalf of complainant and defendants refuse to deliver up possession until compelled to do so by the order of this Court. On the hearing of this motion it was urged in behalf of the defendant Hoeft, that he had a right to hold possession until put out by an action of ejectment, in which action he could have the value of the improvements claimed to have been made by him valued by a jury, and he be compensated therefor; and further that this Court has not jurisdiction over the case, as under the statute the files and record have been transmitted to the court below, and the application, if proper at all, should be made in that court where the record now is.

We have no doubt of our authority to issue all writs necessary or proper to enforce our decree; but we think the court below to which the record has been returned has the power and authority to issue the writ of restitution to put defendants out and put complainant in the possession of the premises described in the decree. The deed under which the defendants claim rights and under which they obtained possession was declared by the decree of this Court to be a forgery and void. The defendants cannot claim any rights as having been conferred by such deed, and the complainant is not obliged to resort to the action of ejectment to obtain possession of the premises which this Court decreed to be hers. The complainant is entitled under the decree of this Court to the immediate possession of the land described in the decree, and to a writ of restitution from the court below on an application properly made to that court. We therefore deny the

motion here, with leave for her to apply to the circuit court for the county of Presque Isle in chancery for such writ.

No costs will be allowed to either party on this motion.

The other Justices concurred.

EDWARD C. MOORE v. JONATHAN C. DAVIS, SERENO W. INSLEE, GARNISHEE, AND WILLIAM J. GRAHAM, INTERVENING CLAIMANT.

Amendments—Change in given name.

Jonathan and John are not in contemplation of law the same; and an amendment of proceedings in garnishment so as to substitute one for the other in the name of the principal defendant cannot be sustained as against an intervening claimant whose rights were acquired in good faith before the amendment was made.

Error to Wayne. (Chambers, J.) June 3.—Sept. 29.

Garnishment proceeding. An intervening claimant brings error. Reversed.

William J. Gray for appellant. Amendments should not be permitted when they would destroy or impair the rights which third persons have acquired without notice: Herm. Executions 56; *Davidson v. Cowan* 1 Dev. 304; *Bank v. Williamson* 2 Ired. 147; *Williams v. Sharpe* 70 N. C. 582; *Foster v. Woodfin* 65 N. C. 29; *Ohio L. & T. Co. v. Urbana Ins. Co.* 13 Ohio 220; cases of amendments held void or disallowed as to subsequent proceedings: *Putnam v. Hall* 3 Pick. 445; *Denny v. Ward* id. 199; *Peck v. Sill* 3 Conn. 157; *Drew v. Bank* 55 Me. 450; *Whitney v. Brunette* 15 Wis. 69; *Greenvault v. F. & M. Bank* 2 Doug. (Mich.) 514; *Emerson v. Upton* 9 Pick. 167; *Hovey v. Wait* 17 Pick. 196; *Milliken v. Bailey* 61 Me. 316; *Dutton v. Simmons* 65 Me. 583; *Flood v. Randall* 72 Me. 439; *Witte v. Meyer* 11 Wis. 295; *Means v. Osgood* 7 Greenl. 146; *Howard v. Turner* 6 Greenl. 106; *Berry v. Spear* 13 Me. 187; *Ligon v. Rogers* 12 Ga. 281; *Shirley v. Phillips* 17 Ill. 471; *President &c. v. Seymour* 14 Johns. 219; *Zimmerman v. Briggans* 5 Watts

186; *Sale v. Compton* 1 Wils. 61; *Terry v. Sisson* 125 Mass. 560; *Bell v. Hall* 2 Duv. 288; Waple's Garnishment 105; *Freeman v. Nichols* 116 Mass. 309; *McCormick v. Wheeler* 36 Ill. 120; notice lis pendens applies to personalty as well as realty and in law as well as at equity: Freeman on Judgments § 199; *Murray v. Ballou* 1 Johns. Ch. 566; *Murray v. Lylburn* 2 Johns. Ch. 441; *Diamond v. Lawrence County* 37 Penn. St. 353; when amendment is made the notice lis pendens dates therefrom: *Clarkson v. Morgan* 6 B. Monr. 441; where a new party is added a new lis pendens is needed: *Curtis v. Hitchcock* 10 Paige 399; *Kellogg v. Fancher* 23 Wis. 21.

George W. Bates for appellee, cited in support of the right to amend: *McLaughlin v. Wilks* 42 Mich. 553; *Parks v. Barkham* 1 Mich. 95; *Merrill v. Kalamazoo* 35 Mich. 211; *Barber v. Smith* 41 Mich. 138; *Kimball &c. Co. v. Vroman* 35 Mich. 318; *Johr v. Supervisors* 38 Mich. 532; if a writ is served on the party intended to be sued, by a wrong name, and he fails to appear and plead the misnomer in abatement and suffers judgment to be obtained, he is concluded and in all future litigation may be connected with the suit or judgment by a proper averment: Freeman on Judgments § 154; *National Bank v. Jaggers* 31 Md. 38: *Lafayette Ins. Co. v. French* 18 How. 409; *Smith v. Bowker* 1 Mass. 76; *Oakley v. Giles* 3 East 167; *Smith v. Patten* 6 Taunt. 115; *Crawford v. Satchwell* 2 Strange 1218; *Guinard v. Heysinger* 15 Ill. 288; and when such averments are made and proven, the party intended to be named in the judgment is affected as though he was properly named therein: *Bennett v. Libhart* 27 Mich. 489; and an intervening claimant not affected cannot complain of this amendment: *Frederick v. Mecosta Judge* 52 Mich. 529; *Owners &c. v. Hale* 1 Doug. (Mich.) 313; *Lyman v. Becannon* 29 Mich. 466; *Kenyon v. Woodward* 16 Mich. 331; *Cook v. Perry* 43 Mich. 625; the indebtedness of the garnishee to the principal defendant, though misnamed, can be shown: *Fearey v. Cummings* 41 Mich. 379; *Farrington v. Sexton* 43 Mich. 454; *Cummings v. Fearey* 44 Mich. 39.

SHERWOOD, J. In a cause entitled as above a judgment was rendered in favor of the plaintiff and against the garnishee defendant for the sum of $71.25, with costs to be taxed, in the circuit court for the county of Wayne, on the

12th day of January, 1885. William J. Graham, the intervening claimant, brings the case into this Court by writ of error.

On December 12, 1883, defendant Inslee was indebted to defendant Davis in the sum of $71.25, and on that day the plaintiff commenced suit against John C. Davis, as a non-resident, under the provisions of How. Stat. § 8087, and summoned Inslee as garnishee of the principal defendant. The writ of garnishment was served upon Inslee on the day it was issued. The notice and papers required by the statute were served on Jonathan C. Davis on January 16, 1884, in Madison, Indiana. No appearance was entered, and on November 9, 1884, judgment by default was rendered for $1110.99 against the principal defendant, still named as John C. Davis. On February 4, 1884, Jonathan C. Davis sold to William J. Graham, the appellant, his claim against Inslee. At the time of this purchase Graham had no knowledge of the proceedings against John C. Davis, and paid full value for the claim in good faith. On November 19, 1884, Graham, under the provisions of How. Stat. § 8085, was granted leave to intervene for his rights to the debt due from Inslee, and participated in the trial. On December 28, 1884, upon the ex parte motion of the plaintiff the proceedings in the principal cause were amended by inserting the name Jonathan C. Davis for John C. Davis. On January 5, 1885, the proceedings in the garnishment cause were amended by a similar change. The court rendered judgment in favor of the plaintiff against the garnishee defendant for the $71.25 admitted to be due, allowed the latter a fee of thirty dollars, and ordered the appellant to pay an attorney's fee of twenty-five dollars and the entire costs of the garnishment proceedings.

The appearance of the appellant by intervention is comparatively new practice. See *Williams v. Pomeroy* 27 Minn. 85; *Kirby v. Corning* 54 Wis. 599; *McMahon v. Austin* 22 N. W. Rep. 543. The appellant has the same rights as if he had sued the garnishee defendant in a separate action, and this proceeding is manifestly to the garnishee's

advantage, because everything is decided in one suit. The right of appeal is likewise preserved to the claimant, because he is precluded, after appearing, from suing the garnishee defendant: Drake on Attachment § 530; and he certainly is entitled to have his rights passed on by this Court.

The record raises two questions: *First*, the validity of the amendment to the proceedings as against the appellant; *second*, the power of the court to impose costs upon the appellant in the manner specified. The disposition of the first question renders the consideration of the second unnecessary.

The rights of the plaintiff and intervening claimant alone are before us for review. The cause was tried by the circuit judge without a jury, who made the following finding of facts, viz.: "That on the 4th day of February, 1884, in Madison, Indiana, the said intervening claimant purchased from the said principal defendant the said debt or claim against the said garnishee defendant, and at the time of the said purchase the said intervening claimant had no knowledge of the proceedings in this cause, and paid full value for the same in good faith, and the same was duly assigned to said intervening claimant, though the said principal defendant was, prior to that date, fully informed of the existence of such proceedings, and knew that the same were designed to reach said indebtedness." If the intervening claimant Graham had examined the records in Wayne county circuit court at the time he made his purchase of the claim against Jonathan C. Davis, he would have found no lien thereon in favor of the plaintiff, or any other person, so far as appears by the record in this case, unless it shall be held that John is the same as Jonathan, and when used in legal proceedings means the same person, and this I do not understand to be the law. *Kennedy v. Merriam* 70 Ill. 228; *Garrison v. People* 21 Ill. 535; *Curtis v. Marrs* 29 Ill. 508; 1 Chit. Pl. 246.

The general doctrine is that no amendment should be permitted the effect of which would be to destroy or diminish the rights of third parties who are interested in the result

of the issue, when such rights have been acquired bona fide without notice by record or otherwise. Herman on Executions 56; *Davidson v. Cowan* 1 Dev. (N. C. L.) 304; *Bank v. Williamson* 2 Ired. (N. C. L.) 147; *Williams v. Sharpe* 70 N. C. 582; *Foster v. Woodfin* 65 N. C. 29; *Ohio L. & T. Co. v. Urbana Ins. Co.* 13 Ohio 220; *Putnam v. Hall* 3 Pick. 445; *Denny v. Ward* 3 Pick. 199; *Peck v. Sill* 3 Conn. 157. Our statute of amendments was intended to protect and preserve rights, not to lessen or destroy them. The intervenor took his interest after the service of the writ of garnishment, and prior to the amendment of the declaration and other proceedings in the case. The amendment could not affect his interest under the assignment of the claim, whatever might be the effect upon the other parties.

It is true that the question of costs is somewhat discretionary with the court in this class of cases, but in making the award thereof some equitable rule of adjustment should be observed, and did we feel at liberty to pass upon that question now, it might be found difficult to sustain the judgment for the amount given against the appellant.

The judgment against the garnishee must be reversed and the proceedings in the garnishee suit dismissed, and the appellant will be allowed to recover his costs against plaintiff.

COOLEY, C. J. and CAMPBELL, J. concurred.

PHILADELPHIA WHITING CO. v. DETROIT WHITE LEAD WORKS.

Contract by correspondence—Shipment of inferior goods—Damages.

1. An undertaking to deliver the *best* quality of specified goods is fairly implied from a request for quotations of the *best*,—an answer giving quotations, but without specifying quality,—an order for a specified quantity of the *best*,—and a shipment in response.

2. The cost of the barrels or cases in which merchandise is shipped does not stand on any different footing from that of the goods, in an action for their price.

3. If one who ships poorer goods than are ordered does not notify his customer of their inferiority he must stand the reasonable and necessary expense of testing them and then of storing them to await the vendor's orders; and these expenses may properly include insurance, freight and cartage.

4. Business correspondence from which the terms of a contract are gathered are the best evidence as to any guarantee implied therein, and if such guarantee is implied parol evidence denying it is inadmissible.

5. Where goods shipped by a vendor are of such a character that they must be used to ascertain their quality, and it turns out to be so inferior to that bargained for that the purchaser is justified in refusing to accept the goods, he cannot be charged for the quantity necessarily used in ascertaining the quality if he promptly rejects the rest on finding it out.

Error to the Superior Court of Detroit. (Chipman, J.) June 4.—September 29.

Assumpsit. Plaintiff brings error. Affirmed.

George W. Radford for appellant. Where purchase is of a defined and well known article, the vendor performs his part of the contract by sending that article; and it is the vendee's concern whether it answers the purpose for which he wanted to use it or not: *Ollivant v. Bayley* 5 Q. B. 288; *Chanter v. Hopkins* 4 M. & W. 399, 406; *Wright v. Hart* 18 Wend. 449; and where the vendor is only a dealer, and not a manufacturer, he could not be held liable if the goods did not answer the purpose, even if he had knowledge of the specific purpose for which they were desired: *Bartlett v. Hoppock* 34 N. Y. 118; *Carley v. Wilkins* 6 Barb. 557; *Seixas v. Woods* 2 Caines 48; *Dounce v. Dow* 64 N. Y. 411; *Swett v. Colgate* 20 Johns. 196; *Moses v. Mead* 1 Den. 378; *Gossler v. Eagle Sugar Refinery* 103 Mass. 331; as to implied warranty, see *Jones v. Just* L. R. 3 Q. B. 197; *Hargous v. Stone* 5 N. Y. 73; *Hart v. Wright* 17 Wend. 267; *Reed v. Randall* 29 N. Y. 358; *Bartlett v. Hoppock* 34 N. Y. 118; *Gaylord Mnf Co. v. Allen* 53 N. Y. 515; *Day v. Pool* 52 N. Y. 416; *White v. Miller* 71 N. Y. 119; *Clark v. Dearborn* 103 Mass. 335; 1 Smith's Leading Cases 250; 2 Kent's Com. 480; there is no implied warranty of the merchantable character of an article of which the vendor is not the manufacturer, and in regard to which the vendee has an equal opportunity for knowledge: *Hoover v. Peters* 18 Mich. 51; *Fraley v. Bispham* 10 Penn. St.

320; *Whitaker v. Eastwick* 75 Penn. St. 229; *Carson v. Baillie* 19 Penn. St. 375; *Hogins v. Plympton* 11 Pick. 97; whether or not a sale is rescinded within a reasonable time is a question of law, when there is no dispute as to the facts of rejection: *Holbrook v. Burt* 22 Pick. 546; *Boothby v. Scales* 27 Wis. 626; *Gammon v. Abrams* 53 Wis. 326; *Cutler v. Hurlbut* 29 Wis. 152; *Williams v. Porter* 41 Wis. 423; *Milner v. Tucker* 1 C & P. 15; *Barnett v. Stanton* 2 Ala. 189; 2 Kent's Com. 480; *Ward v. Reynolds* 32 Ala. 384; *Smith v. Love* 64 N. C. 439; *Wilbur v. Flood* 16 Mich. 40; *Hubbardston Lumber Co v. Bates* 31 Mich. 158.

Griffin, Dickinson, Thurber & Hosmer for appellees.

SHERWOOD, J. The plaintiff is located in Philadelphia. Its business, among other things, is the sale of commercial whiting. It is not a manufacturer. The defendant is a corporation in Detroit. Its business is the manufacture of white lead, zinc, putty and similar articles. This action was brought by plaintiff to recover for three hundred barrels of commercial whiting sold to defendant. The contract for the same is in writing, and contained in several letters passed between the parties, in pursuance of which the goods were shipped to defendant on the 31st of August, and 4th and 14th of September, 1882; the purchase price thereof, less freight, being $530.07. The goods were received by defendant at Detroit in due time,—the first shipment of one hundred and eighty barrels on the 9th of September after the order was given. The best commercial whiting was ordered, and the plaintiff claims the best was sent, and the proofs tend to show such was the fact, and that plaintiff sold but the one quality.

The defendant commenced using the whiting as soon as it arrived, working up two barrels the first day, and from three to four barrels per day until it had used up forty-two barrels, and sold the same out to its customers, who made complaints to defendant very soon after they received the putty manufactured from the whiting. The defendant had in June previous had some of plaintiff's whiting, as the testimony tended to show, and had asked for a rebate on account of its

inferior quality. September 21, 1882, defendant wrote to plaintiff: "It [the whiting] is full of sand and grit, and we are constantly having trouble and complaints about the poor putty made from it, and upon adulterating for commercial putty it is well nigh worthless. It bids fair to ruin our putty trade. Don't think we can make any use of it. What are you going to do about it?" To which letter plaintiff replied, September 30, 1882, that this was the same whiting it was shipping throughout the West, with no complaints; that it did not think commercial whiting would stand adulteration, but was satisfied that when ground with linseed oil alone it makes good putty; that it made only one grade of commercial whiting, and that upon further examination it would run all right. On the same day, September 30th, defendant wrote plaintiff: "On the 21st inst. we wrote you about the quality of the whiting you shipped us, and about the trouble we were having with it. If we do not hear from you by October 10th we will store the remaining whiting at your expense and risk." November 24th defendant wrote plaintiff that the whiting was "miserable stuff," and it had stored two hundred and fifty-eight barrels of it in a storage warehouse, where storage and insurance were running against it, and that they enclosed a bill of the two hundred and fifty-eight barrels and the freight paid on three hundred barrels.

The defendant stored the whiting on the 14th day of November, but did not notify the plaintiff until the last-mentioned letter was mailed, to which the plaintiff replied: "You received our best commercial whiting. We do not quote other than commercial whiting, which was our quotation to you, and from the fact of your having received and used the same goods before, should have posted you as to the grade and quality. We cannot agree with you as to its being miserable stuff, and shall hold you to the payment of the bill as invoiced." There is no question but that the defendant's order was for the "best commercial whiting," but it does not appear that there was any particular quality or grade known by that designation.

The plaintiff's claim, as itemized under the declaration, was as follows:

Aug. 31.	180 bbls. commercial whiting, 25c. each,	$ 45 00
	71,312 lbs. net, @ 56c. per 100 lbs, - -	399 35
Sept. 4.	60 bbls. commercial whiting, 25c. each,	15 00
	27,841 lbs. net, @ 56c. per 100 lbs, -	155 91
Sept. 14.	60 bbls. commercial whiting, 25c. each,	15 00
	23,845 lbs. net, @ 56c. per 100 lbs, -	133 53
		$763 79
Less freight	- - - - -	233 72
		$530 07

The defendant's plea was the general issue, with notice of special defense, claiming damages (1) for payment of freight, $233.72; (2) cost of cartage, storage and insurance, $100; (3) loss of marble dust and oil used with the whiting in the attempt to manufacture putty, $100; (4) injury to the trade of the defendant by reason of the use of said whiting into putty, $1000; (5) difference in price of four cents per hundred by reason of market sale of class of whiting contracted for at the time.

The cause was tried in the Superior Court, before Judge Chipman, by jury, and the defendant recovered the sum of $509.21. Plaintiff asks a review of the case here, and assigns thirty-two errors, the most of which relate to the rulings of the court in receiving or rejecting testimony.

I have examined the correspondence between these parties with care, as well as the other testimony in the case. From these it appears that commercial whiting is an article well known in trade, and that some qualities or grades are better than others, owing to the difference in the quality of the chalk used. This fact seems to have been well understood by the plaintiff. It is referred to in the plaintiff's letter of September 30th, which says: "We make only one grade of commercial whiting, and are just as careful as possible to get it as near as we can. Sometimes chalk varies in quality, which will cause a difference." When the defendant commenced the treaty for the goods, Mr. Rogers, manager for the Detroit company,

wrote: "Please quote us 300 to 500 barrels *best* commercial whiting, delivered in Detroit." Three days thereafter the plaintiff answered: "We are pleased to quote you delivered at Detroit 300 to 500 barrels comrl. whiting, at 56 cts. per 100 pounds; bbls. 25 cts. each." This letter was answered by defendant, in which Mr. Rogers says: "You may enter our order for 300 barrels of your best commercial whiting on the terms named in yours of the 18th inst., and ship it as soon as convenient." It was upon this correspondence that the plaintiff forwarded the goods now claimed for.

It seems very clear, I think, that the undertaking on the part of the plaintiff was to deliver at Detroit to the defendant three hundred barrels of *the best* commercial whiting, at fifty-six cents per one hundred pounds, and twenty-five cents per barrel. The court substantially so charged the jury, and, I think, correctly.

Having ascertained the true construction of the plaintiff's undertaking, the next question was, had the defendant performed his contract; and, if not, was there anything done or omitted by defendant excusing or waiving such performance? Considerable testimony was taken to ascertain the quality of the whiting delivered, and a large number of exceptions were taken to the rulings of the court admitting the testimony upon this point, and tending to show the qualifications of the witnesses or want of knowledge to speak upon the subject; also tending to show the purposes for which commercial whiting is used. Of this character were the various questions raised and rulings made and excepted to, in the plaintiff's assignments of error numbered one, two, three, four, six, seven, eight, nine, ten, thirteen, nineteen, twenty-two, twenty-three, twenty-four, twenty-five, twenty-six and twenty-seven. No error, however, is discovered in any of these rulings prejudicial to the plaintiff, and it is not important that they should be considered in detail. Neither was any error committed in any of the charges given by the court, or in the refusals to charge.

It was insisted that no question could be made but that the plaintiff was entitled to recover for the barrels; that the

contract price for those was separate from that of the whiting. The whiting was the article desired by defendant. The barrels became a necessity in making the transportation and delivery, and were of no consequence to the defendant except in the use made of them in connection with the goods purchased. They were in fact a part of the goods, and if the defendant could not be made liable for the whiting it could not be for the barrels.

We fail to discover any error in the rulings or charge of the court on the subject of damages. It was the defendant's duty to receive and take charge of the goods when they arrived in Detroit, and he had a right to expect that they would be of the quality ordered; and if the plaintiff failed to furnish the article purchased by the defendant, and promised by plaintiff to be the best commercial whiting, but did furnish an inferior quality, and ship and deliver the same to the defendant at Detroit, as and for the goods promised, without notifying the defendant of the inferior quality of the goods, the plaintiff would be liable, unless the defendant chose to keep the goods, for all necessary charges and expenses in testing the article until defendant found out the difference in quality, and in addition thereto all other necessary, legitimate and approximate damages it sustained, arising directly from the failure of the plaintiff to redeem its promise as to the character of the article delivered. This would include all those expenses incurred in the means taken and things done which would be expected of any careful, prudent business man engaged in the trade under like circumstances. Insurance, freight, cartage and storage paid upon the goods were proper items of damage, and it was not improper to introduce evidence containing the footings of these items as claimed by the defendant. The fifteenth, sixteenth, seventeenth, twentieth and twenty-first assignments of error, all relating to these subjects, cannot, therefore, be sustained.

I think the following from the charge of Judge Chipman states the law correctly: "If you find for the defendants, I think they are entitled to what, under the undisputed testi-

mony in the case, the cartage, freight and storage amount to, together with the difference in price—in the market price—between what they purchased this whiting for, and what other whiting cost them at that time."

There was no error in admitting the exhibits offered in the case. They contained the contract between the parties upon which both relied, and were indicative of the understanding of the parties, and explanatory of the course pursued by each, and furnish reasons rebutting the presumptions claimed by plaintiff's counsel. Plaintiff offered to show by the deposition of Mr. Geofley, a member of the plaintiff company, that no guaranty of the quality of the whiting was given. This was objected to, upon the ground that the contract of sale was in writing, and that the writing contained the only evidence admissible upon that subject. The court so ruled, and we see no error in the ruling.

All that was objectionable referred to in the eighteenth assignment of error was fully remedied and removed in the charge of the court given in the paragraph above quoted.

It is claimed the court should have allowed the plaintiff to recover for the value of the forty-two barrels used or sold by defendant in testing the article before he found out its inferiority. Had this been done, simple justice would have required the allowance to the defendant of the damages it sustained in the use it made of the plaintiff's goods in testing the quality, and this, according to the undisputed testimony, was at least $1000, so that it clearly appears the plaintiff has not been injured by the action of the court upon this point complained of. Certainly the defendant derived no benefit from the amount used.

The article appears to have been, however, one which must be used before its quality can be ascertained. It was not apparent upon examination, and in such case it is the right of the defendant to make use of so much thereof as, under all the circumstances, may become actually necessary for that purpose, without liability for the value of the same if it fails in the test to fulfil the plaintiff's contract. The charge of

the court submitted this part of the case fairly to the jury in the following paragraph thereof:

"The question arises whether the goods were of such a character that, upon being received by the defendants, they could determine whether the goods were in accordance with the contract or not. If they were such goods that any one could determine by mere inspection of them, the mere sight of them would determine their character, then there would be no difficulty in this case whatever—there would be nothing to leave to you; and if you find they were such goods, then your verdict must be for the plaintiff. But the contention of the defendant is that they are not such goods; that they are of such a character that it is impossible, without actually trying them in the process of manufacture, to determine what kind of goods they are; that the question whether they are the kind of goods ordered at all, or whether they are the quality of goods that were ordered, can only be determined by the process of actual use. Now, you have heard the testimony upon that point, and you are to determine where the truth lies; whether that is so, or whether it is not so. If that is so, then the mere acceptance of the goods would not constitute an acceptance, and the defendants would have the right under the law to go a step further and to try to make experiment as to the quality of the goods, and as to whether they were such as fulfilled the contract which had been made between the parties. Now, in regard to this matter of trial, it must be reasonable; it must be such a trial as under all the circumstances of the case the subject-matter—that is, the goods—rendered necessary. The party cannot go on under the guise of making an experiment for an unreasonable length of time, or use an unreasonable quantity of the goods. The party must act with promptitude, and that promptitude must be reasonable in view of all the circumstances of the case. What would be reasonable promptitude in one case would not be promptitude at all in another case; so that in this case, as in other like cases, your duty will be to determine as to the degree of diligence the defendants used in ascertaining whether this article was the article they had contracted for, and as to whether the quantity which they used was such as did not go beyond a reasonable amount for the purposes of experiment. There were three hundred barrels in all. A certain number of barrels were used; was there too much used? Was the experiment continued so long as to amount to an acceptance of the goods?—as to amount to

an actual entering into a use of the goods? All these are questions for you to determine, and you must determine them by the testimony in the case. Now, in regard to the degree of promptitude. If you find that the goods were not up to the mark; if you find that the experiments and the use were such as you would assume to be reasonable—then the next question is, what did the defendants do in regard to the goods? It is claimed by them in testimony, and I think virtually admitted, that they stored the goods and notified the plaintiff that the goods were stored and subject to their order, and that was done shortly after or about the time, as I understand it, that these experiments, as they claim they were, ceased. Now, as I say, they must act promptly. They could not retain the goods for any great length of time after they knew that the goods were bad, and yet, by writing a letter of that kind, absolve themselves from paying for the goods. Neither could they continue their experiments too long, or use too great a quantity in their experiment." Benjamin on Sales, § 655 et seq.

On a review of the whole case—and it is all before us—we find no error in the rulings or charge of the court, and The judgment should be affirmed.

COOLEY, C. J. and CAMPBELL, J. concurred.

58 38
69 138

JOSEPH W. DONOVAN v. HALSEY FIRE ENGINE COMPANY, JOHN GALLOWAY AND JONAS H. ROWE.

Action on assigned claim to payment for services—Amendment of declaration on appeal—Set-off—Implied assumpsit—Written assignments.

1. A declaration in assumpsit can be amended on appeal from a justice to show that plaintiff claims as assignee.
2. Where notice of set-off was withdrawn it was not error to exclude the testimony it would have covered.
3. Where a corporation has received the benefit of services it cannot repudiate its indebtedness therefor on the ground that its by-laws did not permit it to run in debt without the order of its directors, especially if the directors have never denied liability on that ground.

4. Acceptance of beneficial services raises an implied assumpsit.

5. An assignment of the claims of a laborer against the company which employs him need not be in writing.

Error to Wayne. (Jennison, J.) June 4.—September 29.

ASSUMPSIT. Defendants bring error. Affirmed.

Stewart & Galloway for appellants. Assumpsit will not lie unless there is some contract relation express or implied: *Woods v. Ayres* 39 Mich. 345; nor unless there is a request to pay: *Child v. Morley* 8 Term 610; *Stokes v. Lewis* 1 Term 20; *Naish v. Tatlock* 2 H. Bl. 319; *Hayes v. Warren* 2 Str. 933; *Richardson v. Hall* 1 Bro. & B. 50; *Durnford v. Messiter* 5 M. & S. 446; if one has become a surety of another, and is compelled to pay as such surety, the law will imply a promise on the part of the principal to repay: *Exall v. Partridge* 8 Term 310; *Kemp v. Finden* 8 Jur. 65; *Blaisdell v. Gladwin* 4 Cush. 378.

J. B. McCracken for appellee.

SHERWOOD, J. This was an action of assumpsit, commenced before a justice of the peace in Wayne county against the defendant engine company. The plaintiff's declaration was on all the common counts, and on demand he filed the following bill of particulars:

To money paid out in its behalf on bill of J. T. Hurley & Co.,	$ 24 50
Money paid on insurance,	15 00
Money paid on Chope's judgment,	165 00
Money paid on Robert's wages	75 00
	$279 50
	2 00
	$277 50

The defendant pleaded the general issue and gave notice of set-off for money due on subscription price of two thousand shares of stock, but which set-off was on the trial withdrawn. The justice, on November 26, 1884, gave judgment for plaintiff for $277.50, and $3.50 costs. The defendant com-

pany appealed to the circuit, and defendants Galloway and Rowe became its sureties on the appeal-bond. The cause, on appeal, was tried before Judge Jennison, by jury, and the plaintiff again recovered judgment. The case is now before us on error; the record containing a bill of exceptions.

The judgment at the circuit was rendered against all the defendants, and all join in the writ of error. Ten errors are assigned, all of which are relied upon. The plaintiff claims to recover for the items mentioned in his bill of particulars as assignee thereof. The declaration originally was silent upon the subject of his being assignee, and the court allowed an amendment to the effect that he was assignee. We think, under the testimony, the amendment was properly allowed, and we have been unable to discover any error committed in receiving any of the testimony.

Objection was made to excluding testimony to the effect that assignors of the plaintiff and the plaintiff owed the defendant company for stock. We think the ruling was correct. The notice of set-off, the record shows, was withdrawn, and this rendered that testimony immaterial as the issue then stood. The plaintiff testified that he purchased the claims of several different parties, and it tended to show they were claims for work and labor done, money paid, and other things furnished to and for the defendant company, and were valid claims, and that the company had recognized them and its liability therefor. The amount of the claims did not seem to be controverted; the largest one being at the time in judgment against the company. The court submitted both the validity of the claims and the assignments thereof, together with the plaintiff's interest therein, to the determination of the jury, and they found for the plaintiff.

We see nothing in the charge exceptionable. It was based upon the testimony in the case, and there were sufficient facts to support it.

Some point was made on the hearing that by the by-laws of the company no debt could be contracted except by order of the board of directors. There is nothing, however, in this point. There seems to have been no question about the legal

existence of the defendant, or the fact that it did business and employed the services of these men whose claims were held by the plaintiff, or that the board ever refused payment upon any such ground, although the board had its attention particularly called to them, and they were all transferred to its books. In fact, the largest by far was already in judgment against the company. Under all these facts the company could not repudiate its liability on the ground suggested.

There is no pretense that the company did not receive good and valuable service for the amount of the claims sought to be recovered, and that it was for the benefit of the company and with its knowledge. The implied assumpsit alone, under such facts, is sufficient to create the liability. *Hosmer v. Wilson* 7 Mich. 294; *Ward v. Warner* 8 Mich. 519. It was not necessary that these claims should have been transferred to the plaintiff in writing. If it was proved to the satisfaction of the jury that the plaintiff was the owner of them at the time the suit was brought, that was sufficient, and the verdict of the jury settled that question. *Draper v. Fletcher* 26 Mich. 154; *Blackwood v. Brown* 32 Mich. 104; *Herbstreit v. Beckwith* 35 Mich. 93; How. Stat. § 7344; *Briscoe v. Eckley* 35 Mich. 112.

No error appearing in the record, and the jury having settled the facts, the judgment must be affirmed.

COOLEY, C. J. and CAMPBELL, J. concurred.

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CHARLES MCCOOL v. CITY OF GRAND RAPIDS.

Streets—Defects—Injury to horses.

How. Stat. § 1443 gives a right of action against a municipality for any injury its neglect to keep its streets in repair may cause to horses traveling therein. A horse that was driven on a trot was permanently injured by stepping on a cobble-stone of which there were several scattered about the street, and there was evidence that they

could be seen by the driver. An action against the city for the injury was taken from the jury. Upon review the Supreme Court was equally divided and the result was not disturbed.

Error to the Superior Court of Grand Rapids. (Parrish, J.) June 14.—September 29.

CASE. Plaintiff brings error. Affirmed.

Frank A. Rogers and *Moses Taggart* for appellant. In case of a statutory liability for injury, if the negligence of defendant to observe the statute is the prime cause of the accident, the right to recover is not affected by the contributory negligence of the plaintiff: *Flint & Pere Marquette Ry. Co. v. Lull* 28 Mich. 510; *Grand Rapids & Indiana R. R. v. Cameron* 45 M. 451; *Grand Rapids v. Wyman* 46 Mich. 516; *Burnham v. Byron Township* 46 Mich. 555; *Dotton v. Albion* 50 Mich. 130.

J. W. Ransom for appellee. A municipal corporation is not an insurer against accidents upon the streets and sidewalks; nor is every defect therein, though it may cause the injury sued for, actionable; it is sufficient if the streets are in a reasonably safe condition for travel in the ordinary modes: 2 Dill. Mun. Corp. § 1019; *Blake v. St. Louis* 40 Mo. 571; *Richmond v. Courtney* 32 Grat. 792; *Centerville v. Woods* 57 Ind. 192; *Seward v. Milford* 21 Wis. 485; *Raymond v. Lowell* 6 Cush. 524–534; a court can hold as matter of law that a highway is sufficient: *McMaugh v. Milwaukee* 32 Wis. 200; and when it appears that no care was taken to avoid danger, there can be no recovery, and the court can direct a verdict: *Quincy v. Barker* 81 Ill. 300; *Schaefler v. Sandusky* 33 Ohio St. 246; a person who voluntarily attempts to pass over a dangerous place in a street or sidewalk, which he knows to be dangerous, cannot be regarded as exercising ordinary prudence, and therefore can not maintain an action against the city to recover for injuries sustained, even if the city would otherwise be liable: *Durkin v. Troy* 61 Barb. 437; *Belton v. Baxter* 54 N. Y. 245; *Horton v. Ipswich* 12 Cush. 488; other defects in the street than that which caused the injury cannot be shown unless it is also shown that the injury from the defect in question necessarily followed in consequence of the other defects: *Ring v. Cohoes* 77 N. Y. 83.

CHAMPLIN, J. How. Stat. § 1443, provides that if any horse shall receive any injury or damage by reason of neglect of any city to keep in repair any public street, the city whose duty it is to keep such public street in repair shall be liable to, and shall pay the owner thereof, just damages which may be recovered in an action on the case: provided, that in all actions brought under the act imposing the liability, it must be shown that such city has had reasonable time and opportunity, after such street became unsafe or unfit for travel, to put the same in proper condition for use, and has not used reasonable diligence therein.

This action is brought to recover, under this section of the statute, damages for an injury to plaintiff's horse, occasioned by stepping upon a stone and breaking the horse's leg. The declaration, after averring the duty of the city of keeping its streets in repair, alleges that

"the defendant, on, to wit, the 9th day of October aforesaid, and for, to wit, thirty days immediately preceding said 9th day of October at, to wit, the city of Grand Rapids aforesaid, disregarding its duty in the premises, failed to keep said Cherry street between the point where a certain other street known as South Division street intersects said Cherry street, and the point where a certain other street known as Sheldon street intersects said Cherry street at, to wit, the city of Grand Rapids aforesaid, in good repair, and in a condition reasonably safe and fit for travel; but said defendant did on, to wit, the 9th day of October, 1883, and for, to wit, thirty days immediately preceding, negligently allow on said Cherry street, between the points above mentioned, a large amount of small stones, commonly called cobble-stone, to accumulate, gather and remain, and that the traveled part of said street, between the two points above mentioned, was, on said 9th day of October, and for a long time immediately preceding, to wit, thirty days, covered and full of said small stones, which rendered it reasonably unsafe and unfit to travel along and upon, and whereas said plaintiff was, on the 9th day of October, 1883, the owner and lawfully possessed in his own right of a certain horse of great value, to wit, $250, and by reason of the negligence aforesaid, and the failure of said defendant to keep said Cherry street in a reasonably safe and fit condition for travel, while said plaintiff, by his servant and employes, was, on said 9th day of

October, 1883, without fault or negligence on the part of said plaintiff, or his said servant, driving said horse on and along said Cherry street, between the point where said South Division street intersects said Cherry street and a point where said Sheldon street intersects said Cherry street, and by reason of the unsafe, unfit and dangerous condition of said street, and by reason of the stones being in said street as aforesaid, and without fault or negligence on the part of said plaintiff, or his said servant and employes, said horse stepped on one of said stones in said street and was then and there injured and damaged, and one of its legs was then and there fractured and broken, and said horse was then and there made wholly worthless, and subsequently, in consequence of the injuries then and there sustained on said 9th day of October, had to be killed, and said horse was of great value, to wit, of the value of $250, and said plaintiff was obliged to and did lay out and expend divers large sums of money in endeavoring to cure and save said horse of the injuries sustained as above set forth, to wit, the sum of one hundred dollars, to wit, at the city of Grand Rapids aforesaid, to the damage of said plaintiff, one thousand dollars, and therefore he brings suit," etc.

The plea was the general issue. After the evidence, which is all returned in the record, was introduced, the judge of the Superior Court instructed the jury to return a verdict for the defendant. The only exception taken is general, and is in these words: "We take an exception to the ruling of the court."

The instruction of the court was proper for two reasons:

1st. Because of the contributory negligence on the part of plaintiff's servant. The plaintiff was a butcher, and at the time of the injury the horse and wagon of plaintiff was being driven by his hired servant in delivering meat to plaintiff's customers. The negligence of which the defendant was guilty consisted, as alleged in the declaration, of allowing a large amount of small stones, commonly called "cobble-stone," to accumulate, gather and remain for, to wit, thirty days preceding the accident in the street, which at that point was covered and full of said small stones, which rendered it reasonably unsafe and unfit to travel along and upon, and that defendant's servant, without fault or negli-

gence, was driving plaintiff's horse along Cherry street, and by reason of said stones being in the street, the horse stepped upon one of the stones, and was then and there injured and his leg broken.

The evidence of plaintiff showed that there were scattering stones in the street "from the size of a goose's egg to six inches in diameter," and that they were plainly to be seen by a person driving along the street before they were reached from the direction the plaintiff's servant came. Several of the plaintiff's witnesses testified that it was unsafe to drive a horse through that portion of the street on account of the number of stones in it. One of plaintiff's witnesses testified that "it wouldn't be very safe for a man to run a horse through, but it would be safe if a man should drive careful." The plaintiff's servant testified that he reached the stones about twenty or twenty-five feet after he left Sheldon street, and the accident occurred about fifty-five feet from Sheldon street, and that he was driving on a slow trot. If the street was in the condition described by plaintiff's witnesses, it was certainly a careless and negligent act for the plaintiff's servant to attempt to drive over such defects upon a trot, and it is quite clear that the accident would not have happened if the man had driven carefully. The accident happened in the day-time, and the defects were plain to be seen, and the driver does not claim that he did not see them in time to reduce the speed of his horse to a walk. Where defects are obvious in a street, such as are alleged to exist here, and a person willfully or negligently keeps on at a rapid speed and neglects to exercise that care which the circumstances require of him, and an injury is produced in consequence of such negligence, he acts at his own risk and must suffer the consequences. *Abernethy v. Van Buren Township* 52 Mich. 383. Such was the case here, as disclosed by the evidence on the part of the plaintiff, and it would be unjust to hold the defendant liable for an injury caused by the reckless driving of the plaintiff's servant.

2d. The burden of proof was on the plaintiff to show that the city had had reasonable time and opportunity, after the

street became unsafe and unfit for travel, to put it in a proper condition for use, and that it had not used reasonable diligence to do so.

There was no attempt to show that any officer of the city had any knowledge or notice of the condition of the street. Nor does the evidence disclose at what time previous to the accident the street became unsafe or unfit for travel. What the evidence did show was that there were several loose cobble-stone in the traveled part of the street. Some of the witnesses testify, in a general way, that they were all over the street; but those who particularized said there were six to eight where the horse was hurt scattered around, and from twenty to two dozen in the street between Sheldon and Division streets. Mr. Bissell's coachman, who was a witness for plaintiff, stated that he had driven a carriage over this portion of the street almost every day for a long time previous to the accident, and afterwards. Other witnesses stated the street was used for heavy wagons.

I am inclined to think, with the judge of the Superior Court, that the proof failed to show that the condition in which the street was, brought it within the statute rendering the city liable as for a defective highway. The proof showed that the horse was injured by stepping upon a single stone. The existence of other stones in the street had nothing to do with the injury. If the city is liable, it is so because it neglected to remove the single stone which was stepped upon; and if liable in this case, every city and township is liable for a defective highway in which a single stone chances to be in the traveled part of the way, in case injury is occasioned by a horse accidentally stepping thereon. I am not prepared to extend the statutory liability to such cases, and I think the judge of the Superior Court was correct in so holding.

The judgment should be affirmed.

COOLEY, C. J. I agree on the last point above stated.

CAMPBELL, J. Plaintiff sued the city of Grand Rapids for the value of a horse whose leg was broken by stepping on a loose cobble-stone in one of the streets. The court below

held no cause of action was made out, and directed a verdict for defendant.

There was contradictory testimony, but plaintiff is entitled to claim that if there was evidence enough to make out a case, it was for the jury and not for the court to pass upon its truth. The question is, therefore, whether there was testimony showing such a condition of the street in question as would put the city in fault for allowing it to continue.

The testimony for plaintiff tended to show that Cherry street where the accident happened, was at that place on a descending grade which began to descend or increased in descent a short distance above the place in question, and that scattered over this vicinity were a considerable number of loose cobble-stones of various sizes; that the street at this point was according to some testimony lower than the gutters at the sides, and according to most of it lower than the crosswalk above, and the stones extended across the traveled part of the highway, and were in the way of horses passing over it.

There was also testimony tending to show that from the turn of the hill just above, the stones were not readily noticeable to persons driving over the brow of the slope and down the street to this point, and there was also evidence, although conflicting, that there had been habitual neglect to keep loose stones raked off from this part of the way for a considerable time, and that this condition was notorious.

Some witnesses familiar with the street testified that it was in bad condition and dangerous for horses. This testimony the court struck out on the final charge, on the ground that the jury alone could form opinions, and that witnesses could only describe facts which they were to pass upon. The court also held that every one who passed over the road was bound to see the obstructions and avoid them, and that a failure to do so was negligence which would defeat a right of action.

There was testimony which, if believed, indicated that the road was made dangerous to horses by these loose stones, and enough for the jury to act upon. And it was not improper to allow those persons who were familiar with the road to

say whether or not it was in bad condition. All intelligent persons in the habit of using teams, or seeing them used, are capable of forming some judgment about the condition of highways, and it is not possible by mere verbal description to enable a jury to see the exact condition. In all such cases the opinions and the facts on which they are based, so far as the witness can give them, form a safe basis for a jury to act upon. Where, as in this case, the city officials and the other witnesses differ in their descriptions, the jury can use its own good judgment in deciding between them.

It cannot be held as matter of law that every one who runs over a stone in a highway in the day-time is negligent. Everyday experience shows that such things do not necessarily strike the eye of persons driving along the road, and in this case there was testimony to the effect that persons going over the hill and down the road would not be certain or likely to notice them so as to drive safely among them. The jury may or may not have thought there was negligence here, and they should have been allowed to pass upon it. There are many cases in the books where recovery has been had for such obstructions. We are not at liberty to form or express opinions upon the facts. But there was enough to go to the jury on all the elements of the action.

The judgment should be reversed, and a new trial granted.

SHERWOOD, J. concurred.

COOLEY, C. J. I do not concur.

JOHN J. FELLS, ADM'R FOR BENJAMIN HARRISON v. LEVI L. BARBOUR AND WALTER REMO.

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Tax-deeds—Assessment rolls in evidence—Estoppel.

1. A State tax-deed may be executed and acknowledged by the Deputy Auditor General; and its validity does not depend on its being recorded if no question of priority is made.

2. Assessment rolls with the certificate of the assessor or board of review attached are admissible in proof of the regularity of tax-deeds, where the tax or collection roll fails to show that such certificates were made; and it is discretionary with the trial judge to admit such evidence out of its order.

3. One whose title is obtained from an execution purchaser is in such privity with the defendant in the execution that if the latter has mortgaged the land he cannot let it be sold for taxes and bid it in so as to cut off the mortgagee's rights; nor can he cut them off by taking tax leases.

4. The purchase of bids at a tax-sale operates as a payment of the taxes so far as a previous mortgagee of the land, or his assignee, is concerned.

Error to Wayne. (Chambers, J.) June 9.—Sept. 29.

EJECTMENT. Plaintiff brings error. Reversed.

Ervin Palmer and *F. A. Baker* for appellant. State and county tax rolls are invalid if the signatures or copies of them are lacking: *Sibley v. Smith* 2 Mich. 501; *Clark v. Crane* 5 Mich. 151; *Colby v. Russell* 3 Me. 227; especially as the certificates need not be copied: *Tweed v. Metcalf* 4 Mich. 596.

H. C. Wisner for appellee. Certificates required to be attached to assessment rolls are no part of the tax roll: *Tweed v. Metcalf* 4 Mich. 579; *Bird v. Perkins* 33 Mich. 31; one who has bought the State's title stands precisely as though he had bought at the original sale: Comp. L. (1857) § 1091; *Aud. Gen'l v. Sup'r of Monroe* 36 Mich. 74–5; and he is under no obligation to pay previous taxes: *Lacy v. Davis* 4 Mich. 140; *Dubois v. Campau* 24 Mich. 368; *Black-*

wood v. Van Vleit 30 Mich. 118–21, criticising *Lacy v. Davis; Sands v. Davis* 40 Mich. 14.

SHERWOOD, J. This action is ejectment, to recover the possession of lot five, Scoville & Whipple's subdivision of the "Loranger Farm," in the Twelfth ward in the city of Detroit. The suit was commenced in the life-time of the deceased, and continued in the name of the present plaintiff since his death, under the provision of the statute for that purpose. How. Stat. § 7817. Two trials have been had at the circuit, both resulting for the defendant. On the last trial the verdict was directed by the court, and judgment having been entered thereon, the plaintiff brings error.

It was stipulated that Thomas Hurst was owner of the property in question in 1873, on the 4th of November, and that defendants were in possession when this suit was commenced, April 9, 1883, and claimed title thereto adversely to the plaintiff. On the trial the plaintiff gave in evidence (1) a mortgage dated November 4, 1873, given by said Thomas Hurst to Benjamin Harrison, to secure the payment of the sum of $1000; (2) a sheriff's deed, dated December 23, 1881, duly executed, given on foreclosure of said mortgage, for the consideration of $1685, to the said Benjamin Harrison, which deed, according to the certificate of the sheriff, was to become operative December 23, 1882.

The defendants, to maintain their defense, offered in evidence three tax deeds, given on sales of said lot for the State and county taxes assessed thereon for the years 1875, 1876 and 1877, to the defendant Barbour. These deeds were all signed, executed and acknowledged by Hubert R. Pratt, deputy Auditor General, and were all admitted in evidence, against the objection of counsel for plaintiff that "the deeds were not those of the Auditor General," and also that they were not recorded.

We are unable to discover that the recording of these deeds could make for either party, as the case is presented. Certainly it could not affect their validity, and no question of priority is made. This Court has already decided that

execution of the deeds and the acknowledgment thereof by the deputy Auditor General is sufficient. *Westbrook v. Miller* 56 Mich. . We do not think the court erred in admitting these deeds in evidence.

The counsel for defendants next offered in evidence a lease of the lot in question to the defendant Barbour for the term of one hundred years, given by the comptroller of the city of Detroit, on a sale made thereof for the general city taxes assessed against the lot for the year 1875; also a similar lease given to said Barbour for the city taxes of 1876, and two others, running to the same party, for the taxes assessed against the property in each of the years 1877 and 1878; the term in the last three leases being in each for ninety-nine years. These four leases were all received in evidence by the court, subject to the objection of incompetency, and plaintiff's counsel excepted, and here the defendants rested their case.

It is claimed by the defendants that these leases—all except that made for the tax of 1875 (which they abandoned)—are all executed in accordance with the statute, and are prima facie evidence in favor of defendants' right to possession. Sess. Laws 1857, §§ 246-253,—Charter of Detroit. The principal reliance of defendants, however, appears to be upon the tax titles from the State.

For the purpose of showing these tax titles invalid, the plaintiff, in rebuttal, introduced from the county treasurer's office the tax-rolls for 1875, 1876 and 1877. The tax-rolls contain no certificates of the board of review, nor copies of certificates nor any signatures thereto. They do contain warrants signed by the city assessor, attached thereto. At the time the assessments were made under which these tax-deeds were given, the assessment roll consisted of a properly arranged written statement, containing the names of the resident property owners of the township or ward, a description and amount of their property, and that of non-resident owners, and the assessor's valuation of each parcel of land, entered, signed and properly certified by him, and approved by the proper board of review, with the certificate of approval en-

dorsed thereon or attached thereto. Comp. L. (1871), § 987; also see §§ 990, 991, 995, 999. The assessment roll thus prepared and completed by extending the amount of tax to be collected thereon, was required to be kept in the office of the supervisor in townships, and in the office of the person discharging the duties of assessor in cities. § 995. The tax-roll, or collection roll as it is not unfrequently called, consisted of a copy of the assessment roll, without the certificate or signatures of the assessor or board of review thereon or thereto annexed, together with the supervisor's warrant to the collector attached. It was held by the Supreme Court of this State that the collection roll was not invalid by reason of not containing these certificates or copies thereof. See *Tweed v. Metcalf* 4 Mich. 599; *Bird v. Perkins* 33 Mich. 31. The same point seems to have been similarly decided in *Van Rensselaer v. Witbeck* 7 Barb. 133; and to the same effect upon this point is the case of *Sibley v. Smith* 2 Mich. 502. How this question would be decided under present legislation it is unnecessary now to decide.

It seems quite clear that under the testimony offered by the plaintiff upon this point the tax titles would have been invalid, but the defendants' counsel, against the objection of plaintiff, were permitted by the court to introduce in evidence the assessment roll proper, showing the necessary certificates, thereby removing the apparent difficulty. This ruling of the circuit judge was excepted to by plaintiff's counsel. We think, however, the testimony was properly admitted. The proof was competent and material when offered. The order might not be in compliance with rules, but that was within the discretion of the circuit judge. With this testimony in, as the case then stood, the tax deeds were at least prima facie valid.

Plaintiff's counsel further insists that, by reason of Barbour's relation to the property, he can claim nothing under the tax deeds as against the title of the plaintiff, and that they are no defense to this suit. The plaintiff's title was derived through the mortgage given by Hurst. While Hurst owned the property, it was his duty to pay or redeem the same from

all taxes assessed against it, and he could not cut off the mortgage by purchasing a tax title upon the property. The rule is well stated by Chief Justice Cooley in a case in this Court, in which he says: "It is conceded that there are a great many cases in which parties standing in particular relations to the land, or to the owner or other person interested therein, are not suffered to acquire tax titles and rely upon them as against other claimants. Some of those are very plain, and it is quite unnecessary to do more than name them. A tenant for example, who has covenanted to pay the taxes cannot be suffered to neglect this duty, and then acquire a tax title which shall cut off the title of his landlord. Neither shall the purchaser in possession under an executory contract be allowed to cut off the rights of his vendor by a like purchase, nor a mortgagor that of his mortgagee. A tax purchase made while such a relation exists is made in wrong; and the law in circumvention of dishonesty will conclusively presume that it was made in the performance of duty, and not in repudiation of it." *Connecticut Mut. L. Ins. Co. v. Bulte* 45 Mich. 113, 120.

It will be recollected that on the 4th day of November, 1873, Hurst gave the mortgages, and the record shows that subsequently the property was sold on an execution against Hurst to Hawkins, and was by him, on the 21st of August, 1877, sold to defendant Barbour and Theodore S. Darling; and Barbour and Darling, on the 7th of October, 1878, on tax sale for taxes of 1877, bid off the property for the taxes of that year, and also became the purchasers of the bids made by the State in 1876 and 1877 for the taxes of 1875 and 1876, and that Darling assigned his interest in all these bids to Barbour on the 15th day of August, 1881, and the tax titles were all issued to Barbour. It will be thus noticed that parties interested in the property had a right to redeem from the sale first made as late as the 30th of September, 1877. How. Stat. § 1094. From this statement it is shown that the defendant Barbour was one of the owners of the original Hurst title for nearly six weeks before the time for redemption from the first tax sale expired and that he derived his

title by mesne conveyances from Thomas Hurst, the mortgagor.

By virtue of the execution sale, and the transfers of the interest of the purchaser thereunder, the defendant Barbour acquired all the interest and rights that Hurst had in the mortgaged premises at the time the levy was made. How. Stat. § 6108. It was his privilege to pay or redeem from the sale on the Harrison mortgage at any time from the 21st day of August, 1877, until the 23d day of December, 1882. The sheriff made his levy on the 26th of July, 1875, and the sale of the property upon the execution against Hurst was made on the 28th day of December, 1875. On the 29th day of March, 1877, the deed given upon said sales became operative. The defendant then held, so far as this record shows, the title of the mortgagor, and precisely the same interest that the mortgagor did before the execution levy. It was the mortgagor's duty to pay the taxes remaining unpaid while he owned the property, and when the defendant acquired all the mortgagor's interests in the property it became his duty to discharge the unpaid taxes standing against the property, which was redeemable, and he could not, by neglecting and refusing so to do, take an assignment of the certificates of sales and hold them till redemption had expired, and thereby obtain the deed of the State upon such certificates, and thus cut off the mortgagee's rights under his mortgage.

There is no reason why the defendant should occupy any more favorable position than the mortgagor did when the execution sale was made. The defendant got no greater rights under his purchase on that sale, so far as the record shows, than he would have received had the mortgagor voluntarily conveyed to the defendant the equity of redemption to the property; and no one, I apprehend, will contend that the mortgagor could have cut off the mortgagee's rights, or the rights of his assignee, by obtaining the deed of the State under such circumstances; and the same rule applies to the leases. Certainly equity and justice require the application of this doctrine as well to the defendant as it would have done to the mortgagor had he retained his interest in the land, and

I do not think the rules of law prevent it. I think the case is within the reasoning of the Court in *Connecticut Mut. L. Ins. Co. v. Bulte* 45 Mich. 113.

The plaintiff or mortgagor was in possession during the entire period of the occurrence of the transfers and several changes referred to. If the defendant did not take possession immediately after his title matured under his execution purchase, his right thereto remained, and entitled him to the rents and profits. The defendant had from the month of March until the 30th of September to redeem from the first tax sale, after he had obtained [the property] under the execution sale. His purchase of the bids under the sales made for taxes operated as a payment of the taxes, so far as the mortgagee or his assigns are concerned.

This disposes of the case so far as relates to this trial. The judgment must be reversed. I think upon the other ground stated it would be difficult to sustain the judgment; but it is unnecessary to consider that subject now. A new trial will be granted.

COOLEY, C. J. and CHAMPLIN, J. concurred.

CAMPBELL, J. I am not satisfied that defendants were under any obligation to redeem from the tax sales, and think they could hold the titles.

HARVEY STORRS v. JAMES R. STORRS, ROXA STORRS AND MARTIN V. STEFFY.

Attempt to defeat execution for alimony.

1. A man deeded land to his son, and the son and his wife deeded back a life estate. Troubles arose in the family and the son's wife got a divorce and a decree for alimony to satisfy which she levied upon and sold her husband's interest in the land. The father filed a bill against the son, the divorced wife and the purchaser to compel a reconveyance, on the ground that there had been a parol agreement for his support which had not been fulfilled. It appeared, however, that no one had heard of this agreement before and that both father and son had repeatedly dealt with the land as if no such agreement

existed, and that they were on friendly terms and the father's suit was apparently for the real purpose of defeating the wife's levy. *Held*, that his bill was properly dismissed.

2. Levy upon a remainderman's interest and the sale thereof on execution do not affect the right of the owner of a life interest to control and possess the property during his life.

Appeal from Shiawassee. (Newton, J.) June 9.—Sept. 29.

BILL for reconveyance. Complainant appeals. Affirmed.

A. R. McBride for complainant.

Wm. A. Fraser and *Hugh McCurdy* for defendants Roxa Storrs and Steffy.

CHAMPLIN, J. Complainant states that in 1874 he was the owner in fee of one hundred and twenty-eight acres of land in Vienna, Shiawassee county, Michigan; that in that year he and his wife, Ruth, executed and delivered to their son, James R. Storrs, a deed of this land, and that, soon after, James R. and his wife, Roxa, executed and delivered to complainant and wife a deed of the same land, which granted to them a life-estate therein; that the conveyances were made upon the parol understanding that James R. and Roxa were to support, maintain and care for complainant and wife during their lives; that soon after the delivery of such deeds his wife Ruth died, and he married again, and continued to live on the land with his second wife; that James R. and his wife were living on a farm purchased by complainant for them in Argentine; that their house burned and then they came to complainant's for shelter, which resulted in trouble in the family; that they made it so unpleasant for his wife that she left him, and has since died; that they failed and neglected to support, maintain and care for complainant; that Roxa has obtained a divorce from her husband, and a decree for alimony, under which she has levied upon and sold the interest of James R. in the land, and that defendant Steffy is the purchaser; and he asks that the defendants may be decreed to reconvey the premises to him on the ground that James R. and Roxa have failed to perform the oral agreement upon which the conveyances were made, and that Steffy purchased with notice

of that fact and of the fact that complainant was about to file his bill of complaint to compel a reconveyance.

There are statements in the bill of the family history and outside transactions which have no material bearing upon the equities under consideration, and they will not be noticed here.

It appears that no complaint was ever made by complainant of his treatment by Roxa, and no claim was ever made of the existence of the parol agreement alleged in the bill for support until about the time of commencing this suit, while the existence and legal validity of the deeds have been asserted by the complainant and by James R. in the most solemn form in other litigation respecting the land in question. Mortgages have been executed upon the land, and are still outstanding, by the complainant and James R. acting in conjunction, and based upon the title and ownership conferred by such deeds. It furthermore appears that the complainant and his son James are on friendly terms, and nothing is alleged in the nature of unkind treatment from him, or an unwillingness or refusal on his part to carry out the arrangement between him and his father. He has made no answer to the bill of complaint, but has suffered it to be taken as confessed. The allegations of the bill and the burthen of the proof seem to have been directed against the conduct of the defendant Roxa, and it is impossible from this record to escape the inference that the bill is filed with the assent and for the benefit of James R., to prevent the defendant Roxa from realizing the alimony decreed to her in the divorce suit. If there was anything wrong or inequitable in that decree, it should have been appealed from. It cannot be affected by these indirect proceedings. Her levy and sale do not affect the rights of complainant to the possession and control of the premises during his life. We do not think the complainant has established such a case as entitles him to the relief prayed, and the decree dismissing the bill of complaint is

Affirmed, with costs.

The other Justices concurred.

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THOMAS S. BROWN v. ELIZA BELL.

Wills—Exclusion of testimony—Inheritable interest—Personal representatives—Testamentary provisions—Withdrawing motion to strike out—Issue not pleaded.

1. How. Stat. § 7545 provides that in suits to which the heir, personal representative, etc., of a decedent is a party, the party adversely interested cannot testify as to matters known only to himself and the deceased. *Held*, that this only applies when the estate is in some sense one party and the heir, representative, etc., is the other; and that it will not exclude such testimony from the proponent of a will claiming under it, where the contestant is not within the terms of the statute as an heir, devisee or representative of the estate.
2. The interest of the heirs of an intestate is the estate remaining after payment of debts.
3. The personal representative of a deceased person is his executor or administrator, whose interest, while it lasts, is the amount of the assets of the estate; for these he is responsible until the debts are paid or he is otherwise discharged by order of court.
4. A testator's disposition of his property has no bearing upon a contest of his will except as it tends to show whether or not he was sound of mind.
5. Where a motion to strike out testimony on being consented to by the other side, is withdrawn in order to save a ground of error, the appellate court will not feel bound to consider the objection made to it.
6. Where the contestant of a will does not allege undue influence in his pleadings, and submits his case upon the theories of mental incompetency and the defective execution of the will, there is no error in refusing requests to charge that suggest for the first time the theory of undue influence.

Error to Wayne. (Chambers, J.) June 10.—Sept. 29.

Appeal from disallowance of will. Contestant brings error. Affirmed.

Walker & Walker and *Atkinson & Atkinson* for appellant.

A. F. Wilcox for appellee.

SHERWOOD, J. On the 5th of April, 1857, Thomas Brown of Greenfield in the county of Wayne, made his last will, by the provisions of which he gave to his wife all his estate, both real and personal, for and during her life, with remainder after her death to his son, Thomas S. Brown, the proponent in this case, to whom he gave immediate possession of all the property.

The testator died on the 9th day of April, 1857, living but four days after the making of the will. He had been sick about eight months previous to his death, confined to his house during winter, and to his bed for about three weeks before his death, and died of consumption, aged about sixty years. At this time his property consisted of a farm of forty acres, with some personal property; and his household, of his wife, his son, the proponent, and his wife, and a grandchild, being a child of a deceased daughter. A married daughter, Mrs. Fulton, lived in the immediate vicinity. These, with two other children of his deceased daughter, constituted his immediate circle of relatives. James Carroll, a young man sixteen years of age, also lived at the house and assisted in carrying on the farming. A few days before the will was made, a physician, an old acquaintance of the family, had been called, and it was ascertained, and the family understood, that there was no help for the testator and his death was but a question of a few days. Two daughters of Mrs. Fulton staid at his house that night to assist the family in taking care of the deceased. That night the deceased made the will offered for probate, and the two daughters and young Carroll were called into the testator's room and signed the will as witnesses thereto. The will was draughted at the request of the testator by his son the proponent, who with one of the granddaughters, one of the Fulton girls, now Mrs. Blackman, are the only persons surviving of all who were present at the execution of the will. After the will was made, signed and witnessed as above stated, it was handed to the widow of the testator, who, as appears, kept the same until she died in the spring of 1882. Soon thereafter proponent took the will to the probate office. for the purpose of

having it probated, in the county of Wayne. The probate was contested by a granddaughter, Eliza Bell, on the grounds that the testator was in such poor health and so far enfeebled both in mind and body as to be incapable of making the will offered for probate. The probate court denied the application. The proponent thereupon appealed to the circuit, where on a trial before a jury, the will was sustained, and contestant brings the case here on writ of error.

Proponent, contestant and Mrs. Blackman were all sworn in the case, and the principal question in this Court arises on the right of proponent to testify as to facts equally within the knowledge of the testator in his life-time. It was an important question, inasmuch as the only subscribing witness surviving at the time of the trial was pecuniarily interested in defeating the will. The counsel for proponent, when he had proponent upon the stand, proposed to prove by him that the testator made an agreement with him several years before his death, by which he (proponent) was to have all the property, and he was to take care of his parents as long as they lived, and the will, so far as it related to proponent, was only in accordance with the testator's agreement and often expressed wishes, and that proponent had fulfilled the agreement upon his part.

The statute under which this testimony is claimed to be incompetent reads as follows: "That when a suit or proceeding is prosecuted or defended by the heirs, assigns, devisees, legatees, or personal representatives of a deceased person, the opposite party, if examined as a witness in his own behalf, shall not be admitted to testify at all to matters which, if true, must have been equally within the knowledge of such deceased person." How. Stat. §7545.

We do not think the statute quoted applies to this case. The contest is not between the estate, or the representative of the estate, and the proponent. The statute applies only when the estate is in some way one of the parties, and the heirs, assigns, devisees or legatees are the others. The interest of the heirs in an intestate estate is the amount thereof after the payment of the debts of the deceased. The repre-

sentative of a deceased person is his executor or administrator, and his interest, while it lasts, is the amount of the entire assets of the estate, and he is held responsible for them until he can show himself discharged by the payment of debts, or is relieved by the order or direction of the court.

The application for the probate of this will is made neither by an executor named in the will, nor by any one acting as the legal representative of the estate of the deceased. This contest is between two persons who claim an interest in the estate, and as to the estate proper are third persons and represent no one but themselves. In that regard they stand in no different situation from what they would had a creditor made application for the probate of the will. The only questions involved in this application are: Did the deceased in his life-time make this will, and was he of sound mind and memory at the time? The disposition made of the property therein is of no consequence except as it may throw some light upon the fact whether he was of sound mind when he made it. The will does not increase or decrease the estate. The object of this statute is to prevent fraud and false swearing whereby estates become unjustly depleted in cases where no person on the part of the estate, except the deceased, has any knowledge of the facts necessary to sustain the claim in favor of the estate, or to make good the defense of the estate when unjust claims are attempted to be enforced against it, and we see no occasion for extending the scope of the statute by judicial construction. It is limited in its reason and spirit by fair construction to contests on litigation upon claims between other persons and the deceased, existing prior to his death; to such suits and proceedings as the deceased would have been, if living, a necessary party to, and since which his heirs, devisees and legatees, personal representatives or assigns, are compelled to prosecute or defend for him in his place. The court committed no error in admitting the testimony objected to upon this subject, and referred to in the first and sixth assignments of error.

Dr. Glassier was permitted to give his testimony as an expert. It appears he was present at the trial and heard the

testimony of the witnesses as to the condition of the health of the testator during the last few weeks of his life (and there was no dispute in their testimony upon that subject). He was then asked the following question: "Taking that condition as testified by these witnesses as correct, what, in your opinion, would be the condition of his mind three or four days before he died, with reference to his testamentary capacity?" The objection to this question was incompetency and immateriality. The witness answered: "I should think he was sane." It is not probable that the jury were misled by the form of the answer, but after the answer was received, contestant's counsel asked that the answer be stricken out. To this motion counsel for proponent acceded, and asked the court to sustain the objection to the testimony. Counsel for contestant then withdrew his motion to strike out the testimony of the doctor relating to testamentary capacity, and told the court he preferred to allow it to stand under the objection taken at the time.

The ruling of the court on these two motions does not appear, but certainly, under the statements of counsel, the contestant is not in a situation to complain of error, if one was committed. Fairness to the court and the other side required the contestant to have allowed the objectionable testimony to be stricken out upon his own motion if he believed it to be of that character, and not have retained it for the purpose of review in this Court in case of failure in the contest at the circuit. Under the circumstances we must hold that the course pursued by contestant relieves us from the further consideration of this exception.

The third ground relied upon for a reversal at the circuit is that the court, as contestant alleges, refused to give the jury the following requests in the charge, viz.: (1) That, under the facts and circumstances attending the execution of this will, the fact that the will was drawn by the devisee himself is a strong element of suspicion and should cause the closest scrutiny. (2) That, under the facts attending the execution of this will, legal presumption arising from the fact that the will was drawn by Thomas S. Brown, the principal devisee

therein, is that it was executed under undue influence, and unless that presumption has been satisfactorily overcome by the evidence, the jury must and should find for the contestant.

In a case where undue influence is charged in procuring a will to be made, requests upon that subject would be entirely proper, and under a proper state of facts the substance of these requests might be given. No undue influence is alleged by the contestant in her pleadings, so far as the printed record shows, and the case seems to have been tried and finally submitted to the jury upon the theory, so far as contestant was concerned, that the will was not executed according to the statute, and that the testator was not of sound mind when he made it. The first intimation that undue influence was relied upon, or to be relied upon, appears in these requests to charge; but such influence is not relied upon in contestant's pleadings, and nothing more upon the proofs is claimed than a suspicion, which is clearly dispelled by the undisputed facts in the case. We do not think the omission of or refusal to give the charges requested in the case presents any ground of error.

We have examined this record carefully and have been unable to discover any error therein. The trial seems to have been a fair one, and the rulings and charge of Judge Chambers unexceptionable, and

The judgment must be affirmed.

COOLEY, C. J. and CAMPBELL, J. concurred.

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Eliza Thomas v. David Collins.

Tax-sales—Conflicting statutes.

1. A sale under section 70 of the General Tax Law (1 How. Stat., p. 1285) for taxes which accrued before the passage of such law, is invalid, because (1) the title of the Act—"to provide for the assessment of property and levy and collection of taxes thereon"—relates to future proceedings only; and (2) the subsequent Act (No. 11 of 1882) which repeals former laws relating to taxation, leaves them in force for the sale of lands for taxes already levied.

2. A statute cannot be modified or superseded by one of earlier date, or perhaps by one of the same date which precedes it in the authorized publication of the laws.

3. The constitutional provision that the provisions of an act must be covered by its title was mainly to protect the Legislature from passing laws not fully understood.

Error to Newaygo. (Fuller, J.) June 10.—Sept. 29.

Ejectment. Defendant brings error. Reversed.

E. L. Gray and *Geo. Luton* for appellant.

William D. Fuller for appellee.

Campbell, J. In this case plaintiff recovered below upon an Auditor General's deed purporting to be made under the Tax Law of 1882, for taxes returned under the laws previously existing for the year 1881. Testimony was introduced to show that of these taxes the highway tax was not returned delinquent by the highway officers, although included in the sale, and also that a bridge-loan tax was unauthorized by law, as not legally voted by the township. The court below refused to allow the tax deed to be assailed for those or any other causes, although it was admitted on the trial that valid objections existed if they could be shown, and ordered judgment for plaintiff.

This Court was equally divided upon the constitutionality of the Tax Law of 1882, authorizing proceedings on the

equity side of the circuit courts to procure a sale. But the members of the Court who gave their opinion in favor of the statute expressed no opinion upon the conclusiveness of the title so given. This is the first case which has distinctly presented that question upon a trial in ejectment on such a deed.

But it is claimed by defendant that the sale itself is not so far covered by the law of 1882 as to give it the benefit of such presumptions. And while I adhere to my opinion that the tax law is invalid as to all the proceedings connected with the sale, yet even if that law were held good the other questions do not necessarily depend upon how that point is decided, if that statute is inapplicable to the tax returns of 1881.

Section 70 of the General Tax Law of 1882 does attempt to provide in terms that for such taxes sales shall be made under the new law. But it is insisted that this section fails to cover them—*first*, because not within the title of the act; and *second*, because the old law was by another statute, supplementary but approved on the same day, kept in force as to old taxes.

The General Law (Act 9 of 1882) is entitled "An Act to provide for the assessment of property and the levy and collection of taxes thereon." This law is not either so drawn or so entitled as to indicate that it was meant to operate as a compilation or revision of the body of tax laws. Except in section 70 it contains no reference to existing laws, and does not by name or allusion modify or repeal them. Its provisions, with that exception, are prospective. Act number 7 covers the subject of the sale of State tax lands, by amendment of a law of 1881, and Act number 11 is an omnibus repealing act, including in its repeal all of the former general tax legislation, as well as several other statutes on similar subjects. This repeal, however, was not absolute, but qualified. The repealing clause declares that those laws "be, and the same all are hereby repealed, so far as relates to the future assessment of taxes, and the steps to collect the same. They remain in force only for the completion of all

proceedings heretofore begun for the collection of taxes, except as otherwise provided by law, and for the protection of all rights gained thereunder, and conveyance of all land heretofore sold or that may hereafter be sold, and all actions commenced and now pending under the provisions thereof."

The title of Act number 9 in its ordinary meaning would not suggest to any one that it was intended to provide for any taxes not thereafter assessed, or that it was designed in any way to interfere with existing cases. The law of 1869, with a precisely similar title, was held in *Clark v. Hall* 19 Mich. 356, and in *Smith v. Auditor General* 20 Mich. 398, to be entirely prospective in operation, and in the latter case the title was considerably discussed. That statute made no material change in the methods or conditions of sale, so that the present question was not involved, but it made important changes in regard to other rights of land-owners, which were held not within the title, and not therefore covered by the legal effect of the act. In the present case the language does cover the sale, but if the title and the rest of the act refer to the future only, this would not save it, because the Constitution itself invalidates all that is not fairly indicated by the title.

But we are not left to this alone. Act number 11 is by its title as well as its language made applicable to existing taxes, and the extent of the repeal must depend upon its terms. Whether treated as a subsequent statute,—as perhaps it should be, because not passed till afterwards by the Legislature,—or as a contemporaneous one, it cannot be supposed that the provisions of Act number 9 can invalidate any portion of it. If section 70 is in force, then so much of Act 11 as refers to future sales becomes entirely nugatory. There is no principle which can give to an earlier statute such an effect over one passed after the Legislature adopted it. By its express terms Act 11 repeals the old laws "so far as relates to the future assessment of taxes and the steps to collect the same." It continues them in force for the protection of all rights accruing, the completion of proceedings begun for collection, and expressly for the "conveyance of land heretofore sold, or

that may hereafter be sold." If section 70 applies, no land could thereafter be sold under the old law at all.

The changes made are radical, not only as to the time and manner of sale, but as to the notice, and the right of redemption, and the power of the Auditor General to give relief. That such revolutionary changes should be looked for under a title which apparently had no bearing on them, would be beyond the ordinary rules of construction. That the Legislature had attention called to section 70 by the title, and yet immediately, with a comprehension of that fact, passed another law on a different theory, cannot be reconciled with probability. The main purpose of the constitutional clause invalidating so much of every statute as is not included within the title was to protect the Legislature from passing laws not fully understood. The insertion of section 70, and the passage of Act 11 as supplementary to the statute containing it, can only be regarded as showing inadvertence somewhere.

I think the sale for taxes of 1881 was not within the legitimate purview of the provisions of Act 9 as contained in its title, and that the sale was unauthorized. If it could be made under that law, I have on other occasions given my reasons why it is invalid for other reasons. But I think it is not covered by that statute.

The judgment should be reversed and a new trial granted.

SHERWOOD and CHAMPLIN, JJ. concurred.

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WALDO M. JOHNSON AND RICHARD O. WHEELER v. EDWARD H. MEAD AND JOHN SCUDDER.

Limitation of actions—Successive writs.

Where the continuity of an action is interrupted by an interval between the return-day of one writ of summons and the issue of an alias writ, the institution of the action will not bar the operation of the statute of limitations.

Error to Wayne. (Jennison, J.) June 10.—Sept. 29.

ASSUMPSIT. Defendants bring error. Reversed.

Douglass, Bowen & Douglas for appellants. In issuing successive writs—capias, alias, pluries and testatum capias,—they must correspond with each other in the names of the parties and the cause of action, or they may be set aside as irregular; the plaintiff indeed may issue one capias after another, without any alias, pluries or testatum clause; but where the regular succession is observed, each subsequent writ should bear teste on the return day of the preceding one: 1 Burrell's Pr. 102, citing Tidd's Pr. 714; 1 Arch. Pr. 74, 332; 1 Dunlap's Pr. 119; under the New York practice before the code, instead of keeping the original writ alive by a succession of writs, each bearing teste on the return day of the previous writ, the plaintiff might at his election continue the alias writ down to the writ actually served upon the defendant, and to which he appeared, by continuances regularly entered on the continuance roll; the entering of these continuances, although a matter of form, was indispensable to save the statute of limitations: *Beekman v. Satterlee* 5 Cow. 519; *Soulden v. Van Rensselaer* 3 Wend. 472; *Bank of Orange County v. Haight* 14 Wend. 83; there being no such connection between the several writs in this cause as will keep alive the original process, the last writ must be treated as a new writ for a new suit: *Axtell v. Gibbs* 52 Mich. 639.

Conely, Maybury & Lucking for appellee. The continuance could be entered at any time, even by the attorney, on the back of the writ at his chambers: *Bank of Orange Co. v. Haight* 14 Wend. 86; *Schlosser v. Lesher* 1 Dall. 411; *Pennock v. Hart* 8 S. & R. 369; and where the writs of capias and summons specify the nature of the action which is to be declared upon, it is not necessary to enter the continuances, in order to prevent the bar of the statute of limitations: Angell on Lim. § 318; in South Carolina it is held that the second writ cannot be considered a continuance of the original suit unless it is issued within a year and a day after the first writ is returned: *Bank v. Baker* 3 McCord 281; *Parker v. Grayson* 1 N. & Mc. 171–3; in one case in New York, seventeen years elapsed between the original writ of capias, and the testatum capias: *Ontario Bank v. Rathbun* 19 Wend. 291; see *Baskins v. Wilson* 6 Cow. 473.

SHERWOOD, J.[1] The plaintiffs brought assumpsit against the defendants, who were copartners doing business under the firm name of E. H. Mead & Co., upon two promissory notes and four acceptances made by the defendants in their copartnership name. All of the notes and acceptances were past due on the 5th day of February, 1877, the amount of which aggregated $6488.88, besides interest. Defendants pleaded the general issue, and Mead gave notice thereunder that action upon all the claims was barred by the statute of limitations. The cause was tried before a jury, and plaintiff had judgment for $9777.46. Both defendants appeal, and assign error separately. Mead assigns as error that the court refused to charge the jury that "the statute of limitations had run upon the plaintiffs' claim as against him, and that they should therefore find a verdict in his favor," and that a joint judgment should not have been rendered against the defendants. Defendant Scudder assigns as error that a joint judgment was rendered against the defendants.

The suit was commenced by summons issued October 20, 1883, returnable November 6, 1883. It was returned November 7, 1883, personally served in October, on defendant Scudder, and defendant Mead not found, and the return was filed November 17, 1883, at which time an alias writ was issued for defendant Mead, returnable December 4, 1883, and returned December 5, 1883, not found. December 5, 1883, a pluries was issued, returnable January 8, 1884, and returned January 10, 1884, not found. The record then continues:

"January 10, 1884, second pluries writ issued, returnable February 5, 1884. Return 'not found,' dated February 6, 1884. Writ and return filed February 8, 1884.

February 11, 1884, third pluries writ issued, returnable March 4, 1884. Return 'not found,' dated March 5, 1884. Writ and return filed March 29, 1884.

March 29, 1884, fourth pluries writ issued, returnable May 6, 1884. Served upon defendant Elvin H. Mead, April 26, 1884."

[1] This opinion which is that of a minority of the court, states the facts.

November 26, 1883, the plaintiffs filed their declaration. January 3, 1884, defendant Scudder pleaded to the declaration the general issue, and on the 8th day of July, 1884, the defendant Mead filed his plea of the general issue, and gave notice of the statute of limitations as above stated.

Nothing has ever been paid on either of the claims; neither does it appear that any new promise to pay any or either of them has ever been made. The statute had not commenced to run upon either of the notes or acceptances when the suit was brought, and the suit, so far as the record shows, was properly brought against both defendants, and personal service was duly had against defendant Scudder. Defendant Mead was not found. An alias and four pluries writs were issued. There was an interval of eleven days between the return-day of the first writ and the issuing of the second, and one day between the return-day of the second and the issuing of the third; and between the return-day of the third and the issuing of the fourth, two days; and between the return-day of the fourth and the issuing of the fifth, one day; and between the return-day of the fifth and the issuing of the sixth, twenty-five days.

Defendant Mead was personally served on the 26th day of April, 1884, with the last writ, but claimed upon the trial that, inasmuch as at that time more than six years had elapsed since the last claim sued for had become due, the statute was a bar in his case; also that as to him the original suit had been abated, because of the failure to properly issue successive pluries writs; that between the dates of the return of the sheriff to the third pluries writ and the filing of that writ more than twenty days had been allowed to elapse. The defendant Mead insists that, in order to preserve the right claimed by the plaintiff to have the suit continued by the original writ, "the regular succession must be observed; each subsequent writ must be teste'd on the return-day of the preceding one, and must correspond with it in the names of the parties."

There is no doubt that, under the practice as it has always existed, the alias and pluries writs must be issued with the

intention in good faith to continue and prosecute the suit commenced by the original writ, and that it was absolutely necessary that the writ should be returned, and the return filed, before the original writ could be continued by the issuing of an alias or pluries. Under the practice as it formerly existed, all writs were made returnable in term. This rendered it necessary, on the return of the writ non est inventus, to prepare a continuance roll with a placita of the term of which the first writ was returnable, after which the writ was entered according to its tenor, and this was followed by entries of appearance of the plaintiff, the return of non est inventus, and an award of an alias or pluries writ returnable at the following term. The process was thus continued by regular continuances "of the sheriff, who still has the writ from term to term, down to the term of issuing the effectual process," and this roll was permitted to be made up and filed after the return of the process on which the service was had. By leave of the court they might be entered at any time. 2 Burr. Pr. 237, 238; *Livingston v. Ostrander* 9 Wend. 306; *Davis v. West* 5 Wend. 63; 1 Tidd Pr. 128, 129, 147; *Ontario Bank v Rathbun* 19 Wend. 291.

An examination of the authorities will show that the continuance roll for a long time came to be regarded very much as a matter of form, although it is said in some cases, if the object is to prevent the statute of limitations from running, a strict compliance should be shown. We have no statute upon the subject, but the effect of continuing the suit by the successive issuing of writs has always been regarded as an arrest of the running of the statute when done in good faith with the intent of prosecuting the suit. *Howell v. Shepard* 48 Mich. 472.

Under our practice, original writs may be made returnable in vacation as well as in term (Circuit Court Rule 13), and the old practice of resort to the continuance roll can hardly be held to apply. In this case the record shows the longest interval between the filing of one writ and the issuing of the other was two days; and inasmuch as the return and filing of the one was precedent to the issuing of the

other, we see nothing unreasonable in the time taken for issuing the pluries writ. It must be regarded as sufficiently regular to save the running of the statute against the plaintiff's claim. We do not think the filing of the pleas affected the question one way or the other. The defendant had to appear in order to make his plea of the statute of limitations.

The liability of the defendants upon the claims set forth in the declaration was a joint one, and the judgment against both was properly rendered.

We find no error in the rulings or charge of the court, and judgment must be affirmed.

CAMPBELL, J. In my opinion the interval between the successive writs interrupted the continuity of the action, so that the limitation became a bar to recovery.

The judgment is reversed and new trial granted.

COOLEY. C. J. and CHAMPLIN, J. concurred with CAMPBELL, J.

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JAMES P. GARDINER v. HIRAM B. FARGO AND FRED. B. PECK.

Set-off—Partnership settlement—Individual debts.

1. The statutory right of offset is meant to save the expense of litigation by cross actions; it does not exist where defendant could not sue at law for the demand he seeks to set off, and it cannot therefore extend to the settlement of accounts between partners.

2. A partner after drawing cheques upon the funds of the firm for his personal use, and charging them against himself, was succeeded by another partner, and sold out his interest to the new firm. *Held*, that the new firm could not sue him at law for the amount of the cheques, nor use them as offset against an action brought by him against the firm; the mutual liabilities of the old firm should be settled by an accounting.

3. A partner's sale of his interest in the assets of the firm does not, it seems, assign his personal indebtedness thereto unless the instrument of transfer expressly includes it.

Error to Allegan. (Arnold, J.) June 10.—Sept. 29.

ASSUMPSIT. Defendants bring error. Affirmed.

Smith, Nims, Hoyt & Erwin for appellants. A partner who has gone out of the firm and sold his interest to the new firm, must turn over the entire assets, including all money which he has previously chequed out in the firm name to pay personal debts: *Trump v. Baltzell* 3 Md. 295; *Chandler v. Dorsett* Finch 431; *Spittal v. Smith* Taml. 45; there is no occasion for an accounting in equity: *Wheeler v. Arnold* 30 Mich. 304; *Russell v. Grimes* 46 Mo. 410; *Hunt v. Rogers* 7 Allen 469; *Edwards v. Remington* 51 Wis. 336; any balance standing to the credit of the firm in bank passes by the assignment to the defendants: *Burress v. Blair* 61 Mo. 133; assumpsit lies against a copartner for money paid him on a dissolution and adjustment of the concerns of the copartnership more than was actually due: *Bond v. Hay* 12 Mass. 34; *Beidler v. Shallenberger* 42 Ia. 203.

Pope & Hart for appellee, cited upon the settlement of a partner's accounts with the firm, *Oven v. Hetherington* 66 Ind. 365; 2 Lindley on Partnership 698; *Coffing v. Taylor* 16 Ill. 457; *Hasselman v. Douglass* 52 Ind. 252; *Murdock v. Mehlhop* 26 Iowa 213; *Beckley v. Munson* 22 Conn. 299; *Finlay v. Fay* 17 Hun 67; *Learned v. Ayers* 41 Mich 677; *Headley v. Shelton* 51 Ind. 388.

CHAMPLIN, J. This action is assumpsit to recover the amount due upon a joint and several promissory note made by the defendants and payable to the plaintiff. The defendants pleaded the general issue, with notice of set-off, and filed a bill of particulars containing their matters of set-off.

The plaintiff and defendant Fargo, on the 19th day of March, 1884, were copartners in business in Muskegon, Michigan, and had been for about one year prior thereto, prior to which time Gardiner had been conducting the business alone. On the 19th day of March, 1884, the defendants purchased of the plaintiff all the goods, personal property, fixtures, book accounts of every kind and nature, of the firm of Gardiner & Fargo, as far as the interest that the plaintiff as copartner with said Fargo had therein; and also plaintiff's interest in the book accounts owned by the said

Gardiner & Fargo. The plaintiff and defendant Fargo, at the same time, and as a part of the transaction, executed and delivered receipts in full to each other, acknowledging full settlement and satisfaction of all their dealings with each other, and dissolving the copartnership theretofore existing between plaintiff and defendant Fargo. The note in question was given by the defendants to the plaintiff as a part of the purchase price on said sale. The defendants in the court below sought to set off against their note declared upon by plaintiff several cheques drawn by the firm of Gardiner & Fargo (as it was claimed) upon the funds of the firm, and which were used by plaintiff to pay his individual indebtedness while plaintiff and defendant Fargo were copartners. These cheques were drawn either by the plaintiff or by the book-keeper of the firm of Gardiner & Fargo. The stubs of the cheques, which were in the store and among the books and papers belonging to and used by the firm of Gardiner & Fargo, showed upon their face what bills, and to whom, they were drawn to pay, and a memorandum was left on all the stubs of the cheques except two, "Chg. J. P. G." thus showing that they were to be charged in the accounts of the firm to the plaintiff, James P. Gardiner, and that all these stubs showed that the cheques were drawn to pay bills of the plaintiff.

To the offer of the several cheques in evidence, designated in the bill of exceptions by numbers from 1 to 12 inclusive, the plaintiff's counsel objected for the reason that the evidence offered was immaterial and irrelevant, because by the terms of the bill of sale from the plaintiff to defendants, already in evidence, no indebtedness of the plaintiff owing to the firm of Gardiner & Fargo was transferred thereby to the defendants, and that the several cheques, or the amounts thereof, were not a proper set-off against the plaintiff's claim on the note sued upon in this case; which objection was sustained by the court. The defendants also offered to show that the plaintiff, while he and defendant Fargo were copartners, took fifty-one gallons of oil belonging to the firm of Gardiner & Fargo, of the value of $6.63, and that no

memorandum of this fact appeared on the books of the firm, and that defendants had no knowledge of the same until they had bought the interest of plaintiff. This offer was also objected to as not proper set-off and the testimony refused. The several cheques were again offered as set-off on the part of defendant Fargo, and the testimony objected to as not being proper matter of set-off on the part of defendant Fargo. All these offers and refusals of the testimony are the grounds on which the first, second, third and fourth errors are assigned.

The defendants' claim, as quoted from their brief, is that "the defense does not consist of a set-off by an account owing by the plaintiff to one of the defendants and appearing on the books of the firm, and is in no way governed by *Learned v. Ayres* 41 Mich. 677, or similar decisions cited by plaintiff, but rather an attempt to show that the plaintiff owes a legal duty to the defendants to deliver to them the merchandise and pay to them the money drawn from the firm's funds. Where there is a duty, there is a corresponding liability. The plaintiff and defendant Fargo having been copartners, it must be presumed that each had a knowledge of the sum contributed by each, the amount of profits, expenses and losses, and the sum drawn by each during the existence of their copartnership, and the knowledge of these facts, together with what all had a right to assume,—good faith and open dealing between the partners,—the value of each partner's interest in the concern was easily ascertained. The partnership assets consisted of merchandise, credits and moneys. It cannot be important where the merchandise, credits or money happened to be at the time of sale. So long as they belonged to the copartnership, Gardiner's interest in all passed by the sale to the defendants."

The presumption of knowledge of the facts above stated, coupled with the terms of the written assignment, in which it is expressly stated that Gardiner grants and conveys all the goods, personal property, fixtures, book accounts, of every kind and nature, of the firm of Gardiner & Fargo, "*as far* as the interest that the said James P. Gardiner, as copartner, has therein," is conclusive that

the indebtedness of Gardiner to the firm was not sold or assigned. The indebtedness appeared upon the check-book of the firm, and it is presumed that at the time of the sale of Gardiner's interest in the firm assets it was known to both partners, and it is not included in the bill of sale. The liability, if any existed, did not pass by the sale and assignment. Whether there was a liability in fact could only be ascertained after an accounting. If that should develop the fact that Fargo was also indebted to the firm in an equal or greater amount, what appears as a liability of Gardiner would disappear. The right of offsetting a liability or demand against the plaintiff is a statutory right, and the claim must be such as the statute permits to be set off. The statute is not broad enough to extend to settlement of accounts between partners. The object of the statute is to save the expense of litigation in cross-actions, and does not exist in cases where the defendant could not bring an action at law to recover the demand sought to be set off from the plaintiff. These defendants could not bring an action at law against Gardiner to recover the amount of the checks as the individual indebtedness of Gardiner to the firm of Gardiner & Fargo. *Learned v. Ayres* 41 Mich. 677. Neither can they make the defense available as a set-off in a suit by him against them to recover the amount of the note in question.

The other items of set-off were submitted to the jury under proper instructions.

The judgment of the circuit court must be affirmed.

The other Justices concurred.

BELLE H. WHEELER v. JAMES S. P. HATHEWAY ET AL.

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Order pro confesso—Claims against estate—Voluntary payments.

1. A joint defendant in equity who has allowed the bill to be taken as confessed as to himself, is not thereby precluded from bringing an action at law involving the same subject matter, if the bill itself made out no case for relief. And ordinarily a suit in equity is no bar to an action at law. Whether it could be so in any case without a plea in abatement or in bar—*Q.*
2. Where an executor has given bond as residuary legatee, claims against the estate need not be proved in the customary way to make them a valid debt.
3. A claim against an estate need not be proved before commissioners if the executor, as residuary legatee, has conceded his liability for it if the debt should appear to have been assumed by the testator.
4. Money voluntarily paid in the reasonable belief that it is due, and after investigation or the opportunity therefor, and without fraud on the part of the recipient, cannot be recovered back as paid under a misapprehension.

Error to Macomb. (Stevens, J.) June 11.—Sept. 29.

Scire facias. Defendants bring error. Affirmed.

T. M. Crocker and *Norris & Uhl* for appellants. An order pro confesso operates as an admission that complainant may take decree: *Griswold v. Fuller* 33 Mich. 271; *Hunt v. Wallis* 6 Paige 377; *Stockton v. Williams* Har. Ch. 241; Jennison's Ch. Pr. 277; Chancery Rule 11; *Hart v. Lindsay* Walk. Ch. 74; as to defense inuring to benefit of defendants who have let the bill be taken as confessed, see *Buchoz v. Lecour* 9 Mich. 234; *Emerson v. Atwater* 12 Mich. 314; *McCabe v. Farnsworth* 27 Mich. 52; as to payments made in mistake of fact—in this case upon facts withheld by the payee, see *Mowatt v. Wright* 1 Wend. 355: 19 Am. Dec. 508; also *McArthur v. Luce* 43 Mich. 437; *Wayne County v. Randall* id. 140; *Tabor v. Mutual Life Ins. Co.* 44 Mich. 325.

Richard A. Watts for appellee. Another suit pending is not a bar; it only suspends or abates the second and its pendency

must be shown under plea in abatement: 1 Chit. Pl. 454; *Near v. Mitchell* 23 Mich. 382; *Sullings v. Goodyear Company* 36 Mich. 313; a suit pending in equity cannot abate or bar a suit at law; it can only be stopped, controlled or restrained by a court of equity acting by way of injunction, or some other prohibitory measure; *Evans v. Lingle* 55 Ill. 455; if the first action must have been ineffectual then its pendency will not abate or bar the second, because in such a case the latter is not vexatious: Gould's Pleading, ch. 5 § 126; *Wales v. Jones* 1 Mich. 255; *Blackwood v. Brown* 34 Mich. 4; *Phillips v. Quick* 68 Ill. 324; one who voluntarily pays an obligation which he acknowledges as binding on him is bound by the payment: *Gates v. Shutts* 7 Mich. 133; *Moore v. Det. Loc. Wks.* 14 Mich. 266; *Hull v. Swarthout* 29 Mich. 250; *Mut. Life Ins. Co. v. Wager* 27 Barb. 354; *Morton v. Ostrom* 33 Barb. 256; *Farmers Bk. of Amsterdam v. Blair* 44 Barb. 641; 4 Wait's A. & D. 476–7; the statute of limitations is a personal privilege which may be insisted upon or waived by the debtor: *Brigham v. Fawcett* 42 Mich. 542; *McClatchie v. Durham* 44 Mich. 435; and a defendant who has not pleaded the statute must be deemed to have waived it: *Vore v. Woodford* 29 Ohio St. 250; *Borders v. Murphy* 78 Ill. 87; *Grattan v. Wiggins* 23 Cal. 16; *Boyce v. Christy* 47 Mo. 70; *Brendel v. Strobel* 25 Md. 395; *Steamer Senorita v. Simmonds* 1 Or. 274; *Rankin v. Turney* 2 Bush 555; *Longfellow v. Longfellow* 54 Me. 240; *Parker v. Irvin* 47 Ga. 405; *Taylor v. Courtnay* 15 Neb. 196; *Lockhart v. Fessenich* 58 Wis. 589; *Wilcox v. Kassick* 2 Mich. 165; *Ripley v. Davis* 15 Mich. 75; *Marx v. Hilsendegen* 46 Mich. 337; and plaintiff may recover, even though the proofs show that his cause of action did not arise within the statutory period: *Brickett v. Davis* 21 Pick. 404; *Pegram v. Stoltz* 67 N. C. 144.

Cooley, C. J. This is scire facias upon a judgment rendered upon the bond of James S. P. Hatheway, given as executor and residuary legatee under the will of Gilbert Hatheway, his father. The purpose of the suit is to recover the balance remaining unpaid of a legacy of ten thousand dollars given by the will to the plaintiff, who was the testator's daughter. The plaintiff obtained judgment, and the defendants bring the case to this Court by writ of error.

After the executor had given bond as residuary legatee for

the payment of debts and legacies under the statute, he discovered, as he claims, that he was mistaken and had been misinformed by the testator in respect to the amount of his estate; that whereas he had been led to suppose that there would be a large surplus above the amount of debts and specific legacies, it was soon made apparent that there would be no surplus at all, and if the condition of the bond was performed by him, he might be loser instead of gainer by accepting the gift made to him subject to the payment of debts and legacies. He therefore filed his bill in equity to have himself and his sureties relieved from the obligations of the bond, and for a decree that the estate should be administered upon in the ordinary way. This Court held it could give him no such relief as he sought. *Hatheway v. Weeks* 34 Mich. 237. Criticism is now made of the decision in that case, that it was made without taking notice of the fact that the testator had made assurances in respect to the amount of his property which the residuary legatee relied upon, and which proved erroneous; but as no fraud was charged the circumstance was very likely passed over by the justice who prepared the opinion as one of no legal significance. And we can hardly think the counsel who argued that case relied very much upon it; for a rehearing was never applied for.

It seems, however, that this plaintiff was a defendant in that equity suit, and allowed the bill to be taken as confessed, while another defendant, the village of New Baltimore, to which a large gift was made by the will, interposed the successful defense. The order pro confesso as to this plaintiff has been suffered to stand to this time, but no decree was ever taken, and nothing further done after the case on its merits had been passed upon. It is now urged on behalf of the defense, that the plaintiff, by allowing the order pro confesso to be entered, admitted the equity of the case then made by the bill, and is now entitled to share in the estate only in accordance with that equity. If, therefore, the estate is insufficient to pay debts and legacies in full, she should have only her just proportion.

This argument is made without any plea setting up, either in abatement or in bar, the suit in equity. Whether it would have been available if any plea had been interposed is on general principles more than doubtful; a suit in equity not being, as a rule, any bar or impediment to a suit at law. *Joslin v. Millspaugh* 27 Mich. 517; *McGinn v. Hanlin* 29 Mich. 476; *Kinney v. Robison* 52 Mich. 389. But if it were otherwise as a rule, the defense is not available in this case; for the bill in equity, as this Court determined, made out no case for relief, and the Court would have granted none, even on a default. It was not a case for equity at all.

The principal question on the trial of this cause in the circuit court was whether the residuary legatee was entitled to set off against the legacy to the plaintiff a sum which he had paid as the amount of a mortgage upon the plaintiff's homestead. The homestead had been purchased for the plaintiff by her father in the manner to be shortly stated, and the mortgage was upon it at the time of the purchase. Whether the father had undertaken for the payment of the mortgage was, after his death, a question between these parties; the son admitting that, if such were the case, he, as residuary legatee, must pay it. It was finally paid by the husband of the plaintiff, and the amount refunded to him by the residuary legatee, but with reservation, as he claims, of a right to inquire afterwards into his obligation to make payment.

It is now contended on behalf of the defense that the mortgage did not constitute a valid claim against the estate of Gilbert Hatheway, because it had never been proved and allowed by commissioners or in the probate court, as provided by statute, and the time for proving and allowing it had gone by. This contention would seem to be sufficiently answered by the cases in which it has been decided that where the executor gives bond as residuary legatee, the claims against the estate are not to be proved in the customary way. *Probate Judge v. Abbott* 50 Mich. 278, 479. But if it were otherwise it would be of no moment in this case. No such question was raised between the parties before the plaintiff's husband paid the mortgage, or before the amount was refunded

to him; but it was conceded that if the testator had assumed the payment of the mortgage the residuary legatee should pay it. Upon that concession he must stand now.

The assumption of payment by Gilbert Hatheway, if there was one, was very circuitous and indirect. It appears by the evidence that Mr. and Mrs. Wheeler were married in August, 1871. In the May preceding, Mr. Wheeler received from Gilbert Hatheway the following letter:

"NEW BALTIMORE, MACOMB COUNTY, MICH., May 5th, 1871.

Mr. Adolph Wheeler—DEAR SIR: I returned home late last evening. Belle very soon read me the business portion of your letter, and I will here first say I intended to have written previous to this, in reference to you and her engagement, but various matters prevented, and only time now to say on that point, that Belle always talks freely with me, and if all did not meet my approval you would have been informed previous to this.

As to the house and premises, if it suits you and her, there is no need of my seeing it. My money, however, is nearly all employed, as business men usually think best to keep it. I, however, have this day written Moore, Foote & Co., Detroit, to send you their cheque for $500, payable at the bank in Detroit to your order. This you doubtless can get cash for in Adrian. Then make the best bargain you can for the house and premises; pay $500 cash down; $2500, if you can't get the property no less, to be paid about the middle of June, and $2500 to be paid on the mortgage at any time within one year, with interest on this $2500 from the time the seller moves out of the house. He should not ask interest while he occupies the premises. This last $2500, I presume, would suit me to pay in the fall; but in making bargains of this kind usually prefer all the time possible, as it generally results, if I pay before the time expires, the whole or part of accrued interest will be discounted. If you can bargain, not varying much from the above, do so; make the agreement in the name of Appleton Hubbard as your friend, who agrees to buy and pay as aforesaid,—the $500 paid down should satisfy Mr. Hardy that the balance will be surely paid as agreed—and deed to be given to Appleton Hubbard on payment of all but the last $2500, and subject to the same. It may be so that I can pay the whole by August as well as of later times. This Hubbard resides in Massachusetts. I buy tax titles, etc., in his name; have full power of attorney

from him and from his wife to convey real estate. In this way the curious at present will not be gratified, and I needn't visit Adrian. Will try and see you in Detroit when on your way. GILBERT HATHEWAY.

P. S. If there is insurance on the house the seller should transfer the same. This, if talked about before the bargain is fully completed, the seller usually transfers without any money being paid him by the buyer therefor. The agreement can be made to the effect that Mr. Hardy agrees to sell Appleton Hubbard for the price you and he agrees on, describing the property, and that he and his wife will deed, etc., etc., being paid all but the last payment of $2500 and interest, and that $500 have this day been paid Mr. Hardy towards the consideration to be paid."

After the receipt of the foregoing letter Wheeler saw Mr. Hardy and made purchase of the place, and an agreement of purchase was drawn as between Mr. Hardy of the one part, and Appleton Hubbard of the other, which Hardy signed. Mr. Wheeler also received, in a letter purporting to come from Moore, Foote & Co., on account of Gilbert Hatheway, the sum of $500, which was paid to Hardy on the agreement. The agreement was then sent to Gilbert Hatheway, and the following letter received in response:

"NEW BALTIMORE, MACOMB CO., MICH., May 11, 1871.

Mr. Adolph Wheeler, Adrian, Mich.—DEAR SIR: Yours of 10th received, with the agreement, and as you intend to be in Detroit next Monday, I return the agreement, as I think there should be inserted in both agreements the foling: 'On or before May 1st, 1872,' between the word 'paid' and the word 'with', on first page 10th line, of ours, and on 11th line on the other agreement, very close to the written part of each agreement where I have marked with the pencil thus 'X.' By such interlineation I have the right to pay at any time previous to May 1st, 1872, and they cannot call for it until that time. If the mortgage by its terms is not payable until about that time, then no need to have the interlineation put in; or if from any talk you have had with Mr. Hardy, it is not best to say anything more to him about the agreement, all well as it is.

Please bring the agreement with you to Detroit, and can there decide about sending that to Mr. Hubbard to sign per-

sonally, and mail to you at New York city, and you then mail one to Mr. Hardy, etc.

And please ascertain the date of the mortgage to Mary Cutler, the amount, and where payable, with rate of interest.

Thus much oblige, in haste, yours truly,

GILBERT HATHEWAY."

The agreement was subsequently returned to Mr. Wheeler, duly signed by Appleton Hubbard as purchaser, and Mr. Wheeler also subsequently received the sum of two thousand five hundred dollars by mail, purporting to come from Moore, Foote & Co., on account of Gilbert Hatheway. This also was paid to Hardy on the agreement, and completed payment for the place with the exception of the sum of two thousand five hundred dollars payable on the Mary Cutler mortgage. Hardy deeded to Hubbard, subject to the mortgage, June 15, 1871, and Hubbard and wife by Gilbert Hatheway, as attorney in fact, deeded to the plaintiff, July 17, 1871. This last deed contains a covenant of warranty and of freedom from incumbrances "except a $2500 mortgage which said Appleton Hubbard is to pay."

These are the material facts in the case which concern the liability of Gilbert Hatheway to pay off the mortgage. They leave, as we think, no question that Gilbert Hatheway intended to pay the Cutler mortgage himself and vest in his daughter a homestead free of incumbrance. But he intended to do this as a matter of gift; and if he failed to go far enough to make himself legally chargeable with the payment of the mortgage, James S. P. Hatheway and his sureties, who have only undertaken for the payment of debts and legacies, would not be compellable to complete the intended but still inchoate gift by causing the mortgage to be paid off.

The contention of the defense, in substance, is that Gilbert Hatheway never undertook for the payment of the Cutler mortgage. What he intended to do must be gathered from what he did; and what he did was to procure Appleton Hubbard to assume its payment. Why he did this is perhaps not important, but it may have been because Hubbard was

under pecuniary or other obligations to him which would by such payment be discharged. The defense offered to go into evidence of the relations between Gilbert Hatheway and Hubbard, by way of explaining this transaction, but were not permitted to do so, and one of the errors relied on in the case is the exclusion of evidence on this subject. But without such evidence the defendants contend that all that appears is that Gilbert Hatheway procured Hubbard to promise the payment of the mortgage: he made no promise himself.

On this branch of the case I shall speak for my brethren and express their views: it not being so clear to me as it is to them that Gilbert Hatheway ever became liable for the mortgage debt, though I agree that he clearly intended to pay it.

When Gilbert Hatheway, intending to purchase a homestead for his daughter, told Mr. Wheeler to "make the best bargain you can for the house and premises," and particularized the terms of payment he should agree to, he in effect made Mr. Wheeler his agent for the purpose. When he directed him to have the contract of purchase made in the name of "Appleton Hubbard, as your friend, who agrees to buy and pay as aforesaid," adding "it may be that I can pay by August as well as of later times," and explaining that "this Hubbard lives in Massachusetts, I buy tax titles, etc., in his name; have full power of attorney from him and from his wife to convey real estate. In this way the curious at present will not be gratified, and I needn't visit Adrian;"— Mr. Wheeler and the plaintiff had a right to understand from all this that Mr. Hatheway was using the name of Hubbard, not as that of a party who was in fact to make payment, but only for his own convenience, and for reasons personal to himself. Hubbard was in fact, as he was presented to them, a species of lay figure in the case, whose introduction would baffle the curious, while at the same time it would cause no inconvenience, since Hatheway, by means of the power of attorney, could make conveyance at any time without the necessity for a resort to the nominal principal. But the payment, in which the interest of Wheeler and the plaintiff cen-

ered, was not left to be made by this to them unknown man, but by Hatheway himself, whose ability they knew to be ample, and who, while naming early times for payment, intimated a probability that he could pay still earlier. In all this there was a plain assumption that Hatheway and not Hubbard was principal in the transaction; that the name of the latter was merely borrowed for the occasion, and that his nominal undertaking was the real undertaking of Hatheway. This being so, it was immaterial what the real relations between Hatheway and Hubbard were. The plaintiff and Wheeler were not concerned with them, and it would have been an impertinence on their part to have insisted on inquiring into them.

If this view is correct it must end the case, for James S. P. Hatheway has then only paid what, under his bond as residuary legatee, he was bound to pay. But there is another view which is perhaps equally conclusive. The following special question was put to the jury: "Did James S. P. Hatheway, at and during the negotiation ending in the payment by him of the $2750 mortgage, reserve and claim the right to afterwards examine and see if it was a legal claim against the estate of his father?" The answer returned was in the negative. If no proper evidence was excluded, and no error committed in the submission of this branch of the case to the jury, the answer must be conclusive. The case would then be one of the voluntary payment of a claim which was made on strong grounds of apparent right; and a payment made voluntarily under such circumstances cannot be recovered back. No assumpsit which will support an action or a set-off can arise upon a transaction which from its very nature is a finality, unless it has been brought about by fraud, or has been entered into under some such misapprehension of the party's rights as will deprive it of the conclusiveness it would otherwise possess.

But in this case the defense insist that the payment is not binding because it was made under a misapprehension of facts on the part of James S. P. Hatheway, brought about by the failure of Mr. Wheeler to make full disclosure when he was

called upon to do so. It appears that after the death of her father the plaintiff by letter called the attention of James S. P. Hatheway to the mortgage, and he replied as follows:

"NEW BALTIMORE, February 14th, 1872.

DEAR SISTER: Yours in relation to mortgage is at hand; in reply, will say that unless there is writing signed by father, that he agreed to pay the mortgage, the estate is not holden for it; or, in other words, if the place belongs to the estate, of course then I will have to pay the mortgage for the benefit of the estate, or lose what has been paid therefor. Therefore you can readily see the situation of it. No doubt but what father would have paid the mortgage if he had lived, but now it changes all things, except when his name is signed by him, agreeing to carry out certain things.

When I see you, I can explain more fully. Father's estate is in very bad shape. Have not been able to attend to my business much of any since his death. I find a great many unsettled matters, the most of them against the estate, where he had drawn money upon them, the last three years of his life. Can't as yet find any more than property enough to pay the legacies, and am not yet sure of that. I have been away most of the time since my last writing looking up his business.

Hoping this will be satisfactory until I see you, I will bid you good morning. Haste. JAMES."

Mr. Wheeler testified that in response to this letter he visited the writer, taking with him the deed from Gilbert Hatheway to his daughter, and those letters instructing him to purchase the place. "In this interview I told him that I called to see him in relation to the mortgage, and handed him the deed to look at. He looked the deed over all through; then I read him all that portion of the letters instructing me to buy the place. During the reading of the letters he said: 'That sounds like father,' and when I finished reading the letters he made no denial of liabilities. He said there was a number of claims presented against the estate that he knew nothing about, that had taken all the available money on hand; and that if he didn't get around to pay the mortgage when wanted, for me to take it up, and he would see I had my pay from the estate. That was the

language. I then went home. After I got home I wrote him about the matter."

The following is the subsequent correspondence:

"DEAR BROTHER: Mr. Hardy informed me recently that Mary Cutler requires the payment of the mortgage she holds against our place by the 15th or 20th of this month, by the 20th say. I take the first opportunity of writing you in regard to it.

Will it be convenient for you to pay it on the 20th? If not, what disposition shall I make of it? My money is so invested it will be impossible for me to take it up.

If you can't make the money by the 20th, please write me at once what to do, and oblige

Yours, very truly. ADOLPH WHEELER.

May 1, 1872."

"MARION, May 9th, 1872.

BROTHER WHEELER: On my arrival here I find a letter from Eve, stating what you had written in reference to the mortgage. All I can say now is, I am expecting to get some money while I am east, and also have some demands to pay against the estate, and if I have enough left on my return will immediately pay the mortgage; but cannot tell how matters will shape. For fear anything may happen that I cannot take care of it at the time you state, you had better take it up and I will pay you as soon as I get the money to pay it with.

Yours, in haste. JAMES."

"NEW BALTIMORE, July 25th, 1872.

BROTHER WHEELER: Please send me the amount due upon the mortgage, which you think belongs to me to pay, and I will send a check for the same; or, if you are coming this way, would prefer to arrange it here.

If not coming, please send the deed which you showed me here, as I would like to look it over again, and will return it to you. By so doing you will oblige JAMES."

After receiving the letter of May 9th, Mr. Wheeler paid and took an assignment of the Cutler mortgage, and on August 2, 1872, he received from James S. P. Hatheway the amount he had so paid. The important fact which Wheeler failed to disclose in the interview he had with his brother-in-law was that Hubbard had in person signed the contract of purchase. Without that fact being known, it is said James

S. P. Hatheway might naturally suppose that Mr. Hubbard was in no way personally connected with the transaction; whereas in truth he had done what Gilbert Hatheway had not,—promised in writing to assume the mortgage. Had James S. P. Hatheway known this, it is thought not likely he would thus have made payment.

How that may be we cannot know. It does not appear that he inquired for the contract, though he knew one had been made. It does not appear that on the other side there was any intention to deceive or mislead. Hubbard's connection with the transaction appeared on the deed itself; and the parties might well have thought, after the deed had been given, that it was immaterial how the contract was signed which was superseded by it. But why Mr. Wheeler was more bound to know that the contract was important to be seen by James S. P. Hatheway than the latter was to inquire into it, is not apparent. The Court does not think he was. James S. P. Hatheway made sufficient investigation to satisfy himself, apparently, that his father directed the purchase of the homestead as a gift to the plaintiff, and that the deed which the father gave as attorney contained a provision evidently intended to secure to the plaintiff protection against this mortgage. Having looked so far into the facts, he directed the mortgage to be paid, and as his action in so doing was entirely voluntary, he cannot now reconsider and have it annulled. The proposed set-off cannot therefore be allowed.

In the elaborate brief presented for the defense in this case, and followed by oral argument, other points are made and argued with much ingenuity, but we have now examined all we think it important to discuss in this opinion. In those not discussed we all agree that no error appears.

The judgment must be affirmed.

CAMPBELL and SHERWOOD, JJ. concurred.

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JAMES A. HOUGH AND JOHN WAGLEY, JR., v. GEO. W. DICKINSON, ALONZO H. WILLIAMS AND LEWIS S. DAVIS.

Transfer of goods by debtor—Good faith.

1. In trespass for the seizure of stock in trade plaintiff can recover for the use of his store for the time he was excluded from it by the officers levying on the goods, and he can therefore show what such use was worth as an item of damages.
2. In an action involving the good faith of a transfer of goods the transferee may properly show what he had been told as to the financial standing of the other party to the transaction, by way of rebutting any presumption that he knew it was bad.
3. Such a knowledge of facts as will put an ordinarily prudent man on inquiry will affect the good faith of one who takes a transfer of goods from an embarrassed dealer. Actual participation in the fraudulent intent of the latter is not necessary to defeat the transfer.
4. The rule of the criminal law that the proof of fraud must be so conclusive as to leave no rational doubt of its existence does not apply in civil cases, where it may be shown by a preponderance of proof, and even by circumstantial evidence.
5. It cannot be said that the transfer of property to pay a debt, if intended to cut off the redress of other creditors, cannot be made a fraudulent act by reason of delay and hindrance to which the others are subjected.
6. Where the good faith of a debtor's transfer of goods is in question the relationship of the parties to the transfer is a fact for the jury even though the transferee is a creditor.

Error to Emmet. (Ramsdell, J.) June 11.—Sept. 29.

TRESPASS. Defendants bring error. Reversed.

Pailthorp & George and *Taggart & Wolcott* for appellants. Every man is held to intend the natural and necessary consequences of his acts, and in cases of fraud this presumption has always been held conclusive: Wait on Fraud. Conv. §§ 7–10, and *Kirby v. Ingersoll* 1 Doug. (Mich.), 478, 493.

Benj. T. Halstead and *James J. Brown* for appellee. Possession of property unlawfully taken gives the right to sue for the trespass: Cooley on Torts 445; 1 Hilliard on Torts 493; *Hoffman v. Harrington* 44 Mich. 183; a sale to a bona fide purchaser is not invalidated by the fact that the vendor made it with intent to hinder and defraud creditors: *Spring Lake Iron Co. v. Waters* 50 Mich. 13; the law never presumes fraud; the burden of proof thereof rests upon the creditors whenever they assail a transfer for fraud: Bump on Fraud. Conv. 559; relationship is not a badge of fraud: id. 96.

SHERWOOD, J. The plaintiffs in this case are merchants doing business in Cross Village, in the county of Emmet, and the defendants were the sheriff and two of his deputies in said county, in January, 1882, at the time the grievances complained of are alleged to have been committed. The suit is trespass, brought by the plaintiffs to recover of the defendants the value of a stock of goods levied upon by the sheriff while in the hands of the plaintiffs, upon an attachment issued out of the court against the goods and property of Pier & Wagley, another firm of the same village. Plaintiffs claim that they bought the stock of goods of Pier & Wagley in good faith and for a fair consideration, without any intent on their part or any knowledge of any intent on the part of Pier & Wagley, to hinder, delay or defraud any of the creditors of Pier & Wagley, and that while they were peaceably in the possession of the stock of goods the defendants came and took forcible possession of them, and converted them to their own use. The defendants admit that they took forcible possession of the goods; but assert that they were the goods and stock of Pier & Wagley, and subject to levy under the attachments; that they were not purchased in good faith by Hough & Wagley, or for a fair consideration, but that the plaintiffs took them knowing, or having good reason to believe, that Pier & Wagley were selling for the purpose of hindering, delaying or defrauding their creditors.

Three trials of the case have taken place at the circuit, two resulting in disagreement of the jury, and upon the last

a verdict was obtained for the plaintiff for $2453.23. The defendants bring error. The record contains all the proceedings had upon the last trial.

The first assignment of error relates to testimony offered to prove the value of the use of the store in which the goods were kept, and the plaintiff's business carried on, while the defendants occupied it under their levy. This was part of the damage necessarily sustained by the plaintiffs after their expulsion therefrom. The testimony was properly admitted. For the purpose for which the court admitted the testimony objected to, contained in the second assignment of error, it was competent and no error was committed in overruling the objection thereto. The remaining twenty-three assignments of error all relate to the charge given by the court, or to his refusal to charge as requested. At the request of counsel for the plaintiffs the circuit judge charged the jury as follows:

"(6) Pier & Wagley might as lawfully sell their goods to Hough & Wagley as to any other parties, and if made in good faith, and without intent to defraud the creditors of Pier & Wagley, then the title of Hough & Wagley is perfect, and the jury should find for the plaintiffs.

(7) The law presumes that all persons transact their business honestly and in good faith until the contrary appears from a preponderance of the evidence, and the burden of proving fraud in this case is on the defendants.

(8) All persons are presumed to be innocent of intentional wrong until they are proved guilty, and all persons are presumed to transact their business in good faith and for a lawful purpose until the contrary is shown; and when an act can as well be attributed to an honest intent and purpose as to a corrupt or unlawful one, then the jury are bound to attribute the act to an honest intent and to a lawful purpose.

(9) A fraudulent intent cannot be inferred by the jury without proof, but it must be proved like any other act to the satisfaction of the jury; and unless such fraudulent intent is proved on the part of both Pier & Wagley and Hough & Wagley by a preponderance of evidence, the verdict of the jury should be for the plaintiffs.

(10) The goods being in the possession of Hough & Wagley when the sheriff came with his writ, the title is presumptive in Hough & Wagley, and cannot be overthrown except by satisfactory evidence.

(11) The law will not presume fraud from the relationship of the parties. A sale from a husband to a wife, or from a brother to a brother, when there is an actual change of possession, is presumed to be valid until the contrary appears by a preponderance of evidence.

(12) To establish fraud in this case on the part of Hough & Wagley, it is not enough for the jury to find that Pier & Wagley sold with intent to defraud their creditors, but defendants must also show that Hough & Wagley participated in that fraudulent intent.

(13) The jury are instructed, even if they believe from the evidence that Pier & Wagley sold the property in controversy to Hough & Wagley for the purpose of defrauding, hindering or delaying their creditors, still if the jury further believe from the evidence that Hough & Wagley, at the time of the purchase, had no notice or knowledge of such purpose, then the sale would not be fraudulent or void as to Hough & Wagley by reason of the fraudulent intent of Pier & Wagley, and the verdict should be for the plaintiffs.

(14) If Hough & Wagley purchased in good faith, the payment of $400 debt due from James E. Wagley to John Wagley, Jr., said debt being so applied with the consent of all the parties, and gave to Pier & Wagley, for the difference between the debt, $400, and the price of the goods, $1800, five hundred dollars in cash and their three negotiable promissory notes for $900, making a total of $1800, the price of the goods as alleged, Hough & Wagley got a good title as against creditors of Pier & Wagley, even though Pier & Wagley sold the property with intent to defraud their creditors.

(15) When property goes to pay an honest debt, that use of it is lawful, although it may cut off the redress of all others, and although intended so to do; and all the qualifications of delay and hindrance in such a case will not make the act fraudulent.

(16) The title of this property in Hough & Wagley is not in any manner impaired or affected, unless it shall appear that Hough & Wagley did not purchase for a valuable consideration, or had previous notice of the fraudulent intent, if any, of Pier & Wagley.

(17) The fact of the relationship of Pier & Wagley and Hough & Wagley is not of itself sufficient to establish fraud or a fraudulent intent on the part of either. And when the evidence is positive that there was no fraudulent intent, the

fact of relationship is of but very little weight, and not sufficient to overcome such positive evidence.

(18) It is always competent to show the relationship of the parties to an alleged fraudulent conveyance, but the relationship will not warrant the finding of fraud in this case without evidence that Hough & Wagley knew that Pier & Wagley intended by the sale to hinder, delay and defraud the creditors, if such was their intent.

(19) If the jury find the facts to be that Hough & Wagley paid full value for their goods; that there was an immediate change of possession; that James E. Wagley, of the firm of Pier & Wagley, was indebted to John Wagley, of the firm of Hough & Wagley, in a large sum; that by consent of all the parties said sum was applied on the purchase price of the goods; and that Hough & Wagley are not shown to have been indebted to Clark & Co., or that Hough & Wagley knew of any fraudulent intent on Pier & Wagley's part, if such there was,—these facts are all circumstances to show the transaction a fair one.

(20) There is no fraud in the case unless you find—*first*, that Pier & Wagley sold to Hough & Wagley with intent to defraud their creditors; *second*, that Hough & Wagley had notice of the intent, or had good reason to believe that such was their intent, and purchased with that notice to aid and assist Pier & Wagley in carrying out that purpose. Both of these elements must exist.

(21) That if the jury find, after a full consideration of all the facts in this case, the defendants have not shown by a preponderance of evidence that Pier & Wagley intended to defraud, hinder or delay Clark & Co. in the collection of their debt, and that Hough & Wagley participated in such fraud, then they must find that the defendants have failed to make out their case, and the plaintiffs are entitled to a verdict.

(22) If the jury find for the plaintiffs, their verdict must be for the value of the goods taken and for the use and occupation of the building by defendant, with interest at seven per cent. from the date of levy and seizure, such amount to be determined by the jury from the evidence.

(23) Fraud will not be presumed upon slight circumstances. The proof should be so clear and conclusive as to leave no rational doubt of its existence, and the general rule is that fraud is to be fully proven, and is not to be lightly inferred."

To the giving of each of the foregoing requests counsel for defendants excepted. Counsel also excepted to the giving of each of the following charges by the court:

"*First.* The jury are instructed that it is not material whether the parties to this transaction believed they had a right to make the sale and purchase in question or not. The law concerns itself rather with the acts of the parties and their necessary and material result, than with the emotions of their minds. Whenever the effect of a particular transaction with a debtor is to hinder, delay or defraud creditors, the law infers the intent, though there may be no direct evidence of a corrupt or dishonorable motive, but on the contrary an actual honest motive existed. The law interposes and declares that every man is presumed to intend the actual and necessary consequences of his own acts, and the courts must presume the intention to exist when the prohibited consequences must necessarily follow from the act unless the contrary is shown by satisfactory evidence.

Second. You will determine whether or not Pier & Wagley in making the sale to Hough & Wagley intended to hinder, delay or defraud their creditors by putting their property in a situation to be out of reach of their creditors. If you should find that they did not sell to Hough & Wagley with the intent or for the purpose of hindering, delaying or defrauding their creditors, then you need not consider the case further than to estimate the damages of the plaintiffs, and your verdict will be for the plaintiffs as instructed in their requests to charge."

The charge as given in the ninth request is not in accordance with the rule as laid down by the courts upon that subject. A fraudulent intent on the part of Pier & Wagley, and *notice or knowledge of such intent on the part of Hough & Wagley*, is sufficient to avoid the sale, *without any proof whatever of actual fraudulent intent* on the part of these latter parties.

It is generally held that knowledge of facts sufficient to put an ordinarily prudent man on inquiry is all that is required, and the charge of the court went too far. Waite on Fraud. Conv. §§ 379–383; *Atwood v. Impson* 20 N. J. Eq. 150; *Green v. Tantum* 19 N. J. Eq. 105; *Jackson v.*

Mather 7 Cow. 301; *Prewit v. Wilson* 103 U. S. 22; *Willey v. Snyder* 34 Mich. 60.

The twelfth and twenty-first requests, we think, are subject to the criticism that their tendency was to mislead the jury. Actual participation in the fraudulent intent of Pier & Wagley, if any, was not necessary to make them liable; but if they knew or had notice of such intent on the part of the former, the jury might properly find against them. These requests as given require too much.

In the twenty-third request, as stated in the record, and which was given by the court, the jury was told "the proof of fraud should be so clear and conclusive as to leave no rational doubt of its existence." Such is not the rule in civil cases. It applies only in criminal proceedings. Fraud, like any other fact, may be proved by any facts or circumstances which satisfy the mind by a preponderance of the evidence in any given case of its existence, and many times it is inferred, and properly so, from circumstances, and often can not be proved in any other way. *O'Donnell v. Segar* 25 Mich. 367. Mr. Justice Campbell, in discussing this question in *Watkins v. Wallace* 19 Mich. 77, where the language used by the court was, "the proof must be clear and conclusive," says: "No such rigid rule prevails in any civil case. Common sense teaches every one to be cautious in arriving at conclusions which are prejudicial to character and honesty, but if the testimony produces a rational belief, a civil jury cannot be required to discard it because it is not conclusively established." In these views I fully concur. The charge was erroneous, and it is difficult to say the jury were not misled by it.

The fifteenth request was misleading, and had better have been omitted. It was too general, and referring to the seventeenth request, it will be sufficient to say the jury and not the court were to weigh the fact of relationship of the parties, and give it such effect under the circumstances as they deemed proper.

No other errors are discovered in the record which we

regard as harmful to the defendants; but for those noticed and herein considered

The judgment must be reversed and a new trial granted.

COOLEY, C. J. and CAMPBELL, J. concurred.

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LEVI H. SCHOFIELD v. ELIZA H. WALKER.
IN THE MATTER OF THE ESTATE OF ELIZA H. DISBROW.

Probate law—Facts known to decedent—Undue influence.

1. In a proceeding to probate a will, a legatee is not disqualified from testifying to matters which, if true, must have been equally within the knowledge of the testator. Section 7545 has no application to such a case.

2. Where the probate of a will is contested upon the ground of undue influence exercised over the mind of the testatrix by her pastor and his wife, in whose family she was a boarder, and where the trial judge correctly and fully instructed the jury upon the subject of undue influence, it was not error to refuse the following instruction: "If you find that a confidential relation existed between the parties, as the contestant claims, and that Mrs. Disbrow reposed her confidence in Mr. and Mrs. Schofield, and that they had such influence over her as is claimed, that influence must be kept free from selfish interest and cunning and overreaching bargains, and in their dealings with her no selfish advantage must have been taken of this influence. Such influence must be exercised in good faith, and not abused. It must be directed with reference to Mrs. Disbrow's best interest, and not to further their own selfish interests at her expense." The language was inapplicable to the case before the court.

3. Neither was it error, in view of the charge as given, for the court to refuse to give the following instruction: "If you find this confidential relation in fact existed, and the Schofields possessed the influence over Mrs. Disbrow as it is claimed they did, and that she reposed her trust and confidence in them as claimed, the situation would impose a solemn obligation upon the Schofields to abstain scrupulously from attempting to derive any pecuniary benefit to themselves which selfish motives might suggest at the sacrifice of those interests which they were bound to protect; for if confidence is reposed in that matter, it creates a high and sacred trust, and an obligation and duty which must be observed. If confidence is reposed, it must be faithfully

acted upon and preserved from any intermixture of imposition. If the means of personal control are given, they must always be restrained to purposes of good faith." The language is obscure when applied to the facts of the case. The rule of technical morality does not require that a person occupying confidential relations to a testator must do or say nothing to influence the action of the testator in his favor. If the influence exerted is not what in law is termed "undue influence," technical morality is not violated by its use.

4. Influence obtained by modest persuasion and arguments addressed to the understanding, or by mere appeal to the affections, cannot properly be termed undue influence in a legal sense; but influence obtained by flattery, importunity, superiority of will, mind, or character, or by what art soever that human thought, ingenuity, or cunning may employ, which would give dominion over the will of the testator to such an extent as to destroy free agency, or constrain him to do, against his will, what he is unable to refuse, is such an influence as the law condemns as undue when exercised by any one immediately over the testamentary act, whether by direction or indirection, or obtained at one time or another.

Error to Kent. (Montgomery, J.) June 11.--Sept. 29.

Appeal from probate. Contestant brings error. Affirmed.

Blair, Kingsley & Kleinhans, for appellant, cited *Bachelder v. Brown* 47 Mich. 366; *Hatch v. Peugnet* 64 Barb. 190; where a person makes a will in favor of his priest or religious adviser to the exclusion of the natural objects of his bounty the law presumes undue influence, and to sustain the will there should be some proof beside the making of it: *Marx v. McGlynn* 88 N. Y. 357; courts sit to enforce what has not inaptly been called a technical morality. If confidence is reposed it must be faithfully acted upon, and preserved from any intermixture of imposition. If influence is acquired it must be kept free from the taint of selfish interest, and cunning and overreaching bargains: Story's Eq. Jur. § 308; *Taylor v. Taylor* 8 Howard 200; see *Jacox v. Jacox* 40 Mich. 480.

J. C. Fitz Gerald and *Allen D. Adsit* for appellee. The contestant of a will is no more a party to the proceeding to probate it than any other person not named in the will who is legally interested in the estate, adverse to its validity: 3 Redf. Wills 63 *n.* 39; 1 Wms. Ex'rs (6th Am. ed.) 333; *Allison v. Smith* 16 Mich. 416; *Benoist v. Murrin* 48 Mo.

48; *Stevens v. Hope* 52 Mich. 66; *Patton v. Allison* 7 Humph. 329; *Grignon v. Astor* 2 How. 319; in New York, under the peculiar statute of that state, "an executor propounding a will may testify not only in regard to the execution of the will, but also as to other transactions and communications with the deceased:" *Whelpley v. Loder* 1 Demarest 368–377; *Children's Aid Society v. Loveridge* 70 N. Y. 387; in *Orr v. Cox* 3 Lea 619, under a statute providing that "in actions or proceedings by or against executors, administrators or guardians, in which judgments may be rendered for or against them, neither party shall be allowed to testify against the other as to any transactions with, or statements by the testator, intestate or ward, unless called to testify by the opposite party," a contest over a will was held not to be a suit by or against an executor in such a sense as to bring the parties within this exception, and the parties were held competent to prove conversations with or declarations of the testator bearing upon the issue; a proceeding of this character was a contest between those claiming under the will on the one side, and those claiming against it on the other, and did not fall within the reason or principle of the exception under the statute; a person interested only in the event of a suit or proceeding could not be disqualified from being a witness on the ground of being a party to it: *Mull v. Martin* 85 N. C. 406; *McFarlane v. Clark* 39 Mich. 44; *Lawyer v. Smith* 8 Mich. 412.

CHAMPLIN, J. In this cause the paper writing alleged to be the last will and testament of Eliza H. Disbrow was propounded for probate in the probate court for the county of Kent, by the said Levi M. Schofield, proponent, in and by a petition filed in said court, upon the 15th day of July, 1884, which petition was in the usual form. The said contestant appeared, and filed her answer to said petition, thereby objecting, as one of the heirs-at-law and next of kin of said deceased, to the allowance and probate of said paper writing as the last will and testament of said Eliza H. Disbrow, deceased, for the reason that the said deceased, at the time of the making and execution thereof, was not of sound mind or testamentary capacity; that she was under restraint and undue influence at the time of the execution thereof, and was unduly influenced to make the same by the

said proponent and his wife, Mrs. Levi M. Schofield, the legatees and devisees named in said instrument; and that the said instrument was not, in fact, the last will and testament of said deceased. And upon the hearing of said matter, the probate judge of said court having decided in favor of the validity of said will, an order was entered in said cause allowing the same, and admitting it to probate as the last will and testament of said Eliza H. Disbrow, deceased, from which order or decree of said probate court an appeal was taken by said contestant to the circuit court for the county of Kent. And said appeal having been duly perfected, an order was entered framing the issue in said cause as follows, to wit: "Whether the paper writing probated by the probate court of Kent county, as the last will of said deceased, is, in fact and law, the last will of said Eliza H. Disbrow, deceased." And the said cause having been brought to trial before a jury duly impaneled to try the same upon the issue thus framed, the said jury found the said issue in the affirmative, and judgment was thereupon rendered by said court in the usual forms, upon and in accordance with the said verdict, declaring the said will to be the last will and testament of said Eliza H. Disbrow, deceased.

On the trial in the circuit court, Mrs. L. M. Schofield, who was named as a legatee in the will, was produced as a witness by the proponent, and asked the following questions:

"*Question.* Now, I will call your attention to this will. Before this will was made, did you have any conversation with her upon the subject of her making her will?"

Whereupon the attorneys for said contestant objected to said question, and to the witness answering the same, for the reason that said question was incompetent and inadmissible, for the reason that the said witness, Mrs. Schofield, was made incompetent and disqualified as a witness in her own behalf, being a person for whose benefit the suit or proceeding was prosecuted, and a party in interest, and therefore the statute (How. Stat. § 7545), was a bar to the admission of her testimony on the point in question, and excluded her from answering the said question, and from testifying on the point,

for the reason that the matter, if true, must have been equally within the knowledge of the deceased, Mrs. Disbrow, and not known to any other person; and that the said circuit judge overruled the said objection and allowed the said question to be put, and answered by said witness. And the said witness answered the said question as follows:

Answer. Well, there was in January. I suppose this would be what would come under that head. In January she was very much troubled. In the morning she came down, she would say, 'I could not sleep; my mind is in such a condition, I cannot sleep.' I wanted to know what was the matter. She said her affairs was not in a shape that she would want to leave them if she should drop off. I said: 'Put them in a shape that you can relieve your mind. Don't let such a thing as that keep you awake.' For she would feel very badly when she didn't get her sleep, and she said she wanted to talk to me about it. I said I had nothing to say on that question; that must be for herself; she must go to her lawyer and make her own will; I had nothing to do with that. She was then going down to Mr. Taggart's every day for four or five days, and then she said: 'I feel easier. I have got that thing settled.'"

This constitutes the first assignment of error. The ruling of the court was correct. The contestant had introduced testimony tending to prove that Mrs. Schofield had exerted an undue influence over the testatrix in making her will, and she was introduced for the purpose of rebutting this evidence. She was not a party to the proceedings to establish the will. She may be interested, but such interest is remote and contingent. The debts must first be paid, and these may consume the whole estate. Under statutes or practice where interested persons are disqualified, she would be a competent witness. *Freeman v. Spalding* 12 N. Y. 373; *Lawyer v. Smith* 8 Mich. 411–424. But our statutes have removed the disqualification of a witness on the ground of interest, and there appears to be no reason why she is not a competent witness.

The second assignment of error is substantially the same as the first, and must be overruled for the same reason.

The third and fourth assignments of error are based upon the refusal of the court to give the following instructions, namely:

Third. If you find that a confidential relation existed between the parties, as the contestant claims, and that Mrs. Disbrow reposed her confidence in Mr. and Mrs. Schofield, and that they had such influence over her as is claimed, that influence must be kept free from selfish interest and cunning and overreaching bargains, and in their dealings with her no selfish advantage must have been taken of this influence. Such influence must be exercised in good faith and not abused. It must be directed with reference to Mrs. Disbrow's best interests, and not to further their own selfish interests at her expense.

Fourth. If you find that this confidential relation in fact existed, and that the Schofields possessed the influence over Mrs. Disbrow that it is claimed they did, and that she reposed her trust and confidence in them as claimed, the situation would impose a solemn obligation upon the Schofields to abstain scrupulously from attempting to derive any pecuniary benefit to themselves which selfish motives might suggest, at the sacrifice of those interests which they were bound to protect; for if confidence is reposed in that manner, it creates a high and sacred trust and an obligation and duty which must be observed. If confidence is reposed, it must be faithfully acted upon and preserved from any intermixture of imposition. If the means of personal control are given, they must always be restrained to purposes of good faith.

The confidential relation alluded to in the above requests refers to the evidence introduced by the contestant, tending to prove that the proponent of the will was, at the time of the death of Mrs. Disbrow, and had been for two years prior thereto, pastor of the Westminster Presbyterian church, of which Mrs. Disbrow was a member and constant attendant up to the time of her death, which was very sudden, and while she was walking upon the street; and Mrs. L. M. Schofield was the wife of her pastor. She resided in her pastor's family, and by her will made Mr. and Mrs. Schofield her sole legatees and devisees of all her property.

The contestant's counsel claims that these requests should have been given to the jury for a standard of conduct or

morality that should govern the jury in their deliberations over the point whether Rev. Mr. Schofield and wife did what they ought not to have done in obtaining this will when confidential relations existed between them and the old lady. And they insist that when such relation exists, a different kind of conduct is required on the part of beneficiaries under a will, where they procure the testator to make the gifts to them, than would be required of strangers; that in such cases there is a "technical morality" which imposes a duty, where confidence is reposed, to faithfully act upon it and preserve it from any intermixture of imposition; and if influence is acquired it must be kept free from the taint of selfish interest and cunning and overreaching bargains. The question presented is whether the charge of the court sufficiently covered the point presented.

Upon an examination of the charge of the court we are satisfied that the court in a clear and perspicuous charge to the jury, covered the whole law applicable to the case, and that his refusal to charge in the language of the request was not error. He instructed the jury upon the law covered by the requests that

"The contestant claims that she has put evidence in tending to prove that Mrs. Disbrow made this will in favor of her religious adviser and his wife, both of whom it is claimed were her confidential and trusted friends, to the exclusion of the contestant, her niece, and a natural object of the testatrix's bounty; and that Mr. and Mrs. Schofield had constant opportunities of exerting undue influence, and that the will is unreasonably and extravagantly in their favor. If you find from all the evidence in the case that such confidential relations in fact existed between the parties as claimed by the contestant, and that the opportunity for undue influence existed, as claimed, and if you find as a fact that the will presented was unreasonably and extravagantly in favor of Mr. and Mrs. Schofield, to the exclusion of the natural objects of Mrs. Disbrow's bounty,—if you find all this as a fact, it will not be without considerable significance; for an inference may legitimately be drawn therefrom which would be unfavorable to the freedom of action which a will requires. If you find as a fact the existence of the confidential relations claimed by the contestant to exist in this case, and that the trust and

confidence claimed was in fact reposed, their dealings, while they are to be closely scrutinized for the detection of any advantage being taken, yet if the influence they possessed was not in fact exerted, and did not in fact procure this will, then the will is her will, and should stand notwithstanding the existence of the confidential relations and the confidence reposed; for the law does not, because of the existence of confidential relation or confidence reposed, however full the confidence or close the relation, incapacitate persons occupying such positions of trust from receiving the bounty of the testatrix; and does not impose upon them the duty of refusing such bounty, or of advising or persuading testatrix not to give it."

The foregoing instructions were given at the request of the contestant's counsel, and he further instructed the jury, upon this branch of the case, upon his own motion, as follows:

"The proponent's theory of the case is that the deceased, Mrs. Disbrow, had suffered from ill treatment at the hands of her brother, her only relative living here, and the only near relative she had seen for many years; that Mr. Schofield, in the matter of her differences with her brother, befriended her, and advised her for what he conceived to be her good; that her life at Mr. Ball's became so unpleasant that she felt she could not live there longer, and that she was received into the family of the Schofields as a boarder, partly because of her desolate condition, and was from thence considered and treated as one of the family; and that she, from her association with the Schofields, and because of her kindly treatment, conceived and entertained a strong affection for the members of the family, and that, induced by such affection and by the expectation of continuing to share the home of the Schofields during life, she freely, without compulsion or undue influence, made the will in question in their favor, and did not even inform them of the fact until after a lapse of considerable time from the date of its execution. Such is the theory of the proponents. If that theory is maintained, this is a valid will.

The contestants, on the other hand, contend that the Schofields took advantage of the intimate and confidential relations established between them, and overpowered the will and mind of the testator, and induced her to make a will in their favor. And if you find the fact to be that they did so

take advantage of the situation, and overpowered her will and mind, either one or both of them, so that in the making of this will she was not a free agent,—if you find that undue influence was used, in other words, in inducing her to make this will, the will should not be sustained.

* * * * * * * * *

It is not claimed in this case that there is any direct evidence of undue influence; but it is claimed by contestant that she has put evidence into the case which tends to prove indirectly, though not directly, that undue influence was used by the Schofields in procuring this will. And this claim is made from all the circumstances of the case.

It is claimed, among other things, that Mr. Schofield was the religious adviser of the testator; that he and his wife were the confidential friends and advisers of the testatrix, I should say; that they had constant opportunities of exerting undue influence; and that the will is unreasonably in their favor; and that the natural object of the testatrix's bounty, the niece, was absent during this time, and is excluded by the terms of the will, as it appears. If you find that such confidential relations existed in fact, existed between the parties as claimed, and that an opportunity for undue influence existed as claimed, and if you find as a fact that the will presented was unreasonably and extravagantly in favor of Mr. and Mrs. Schofield, to the exclusion of the natural objects of Mrs. Disbrow's bounty, these circumstances will be of some significance, as an inference may be drawn unfavorably to the freedom of action which a will requires. But such inference must be drawn by you as an inference of fact, and you must be able to say that such an inference is justified upon the whole evidence.

Naturally, in determining as to whether the will is unreasonably in favor of Mr. and Mrs. Schofield, you will consider the relations existing between the testatrix and her immediate and near relatives. Her want of affection for her brother may be considered; the fact, if you find it to be a fact, that she had assisted the niece, Mrs. Walker, in times past; the fact of her slight acquaintance with her; that she had not seen her in some fifteen years; together with the evidence tending to show that she entertained kindly feelings towards the Schofields, and expected to remain a member of their family.

You will readily perceive, gentlemen, that an inference might be drawn from the fact of the exclusion from her bounty of near relatives, with whom the deceased had been

on intimate and friendly terms, more strong than would be justified by the exclusion of one against whom the testatrix entertained no kindly feeling, or one who was a comparative stranger. So, in determining the weight to be attached to the circumstance that confidential relations existed, you will consider how far these relations induced trust and confidence on the part of the testatrix; or, on the other hand, how far the testatrix was in her business affairs self-reliant. If such confidential relations existed, the law imposed upon the Schofields the duty of abstaining from attempting to derive benefit to themselves by taking advantage of the situation and of the trust reposed; while if such confidential relations existed, and such trust and confidence was reposed, this is not sufficient to defeat the will, unless advantage was taken of the situation."

We think the charge of the court above given covers the law respecting the technical morality which Mr. and Mrs. Schofield were bound to observe under the facts of this case as indicated by the bill of exceptions. This was not a case where it was claimed that an overreaching bargain had been made between persons occupying confidential relations, wherein a court of equity was appealed to to set the same aside because of a selfish advantage having been taken by the person exerting an undue influence in his dealings with another. The language of the third request applies to a case of this kind, and was inapplicable to the facts before the court.

The language of the fourth request is obscure when applied to the case under consideration. It asserts the rule of law that where there is a trust relation existing, and a confidence reposed in consequence thereof, that situation imposes upon the party occupying such relation a solemn obligation to abstain scrupulously from attempting to derive any pecuniary benefit which selfish motives might suggest at the sacrifice of those interests which he is bound to protect. But what interests are here alluded to that the Schofields were under any obligation to protect? A person of sound mind, who is under no legal restriction, has the undoubted right to dispose of his estate by will to whomsoever he may choose. No kinsman has a vested right therein

and no interests to be protected. The jury had already been instructed, at the request of the contestant, as above cited, that if the influence the Schofields possessed was not in fact exerted, and did not in fact procure the will, then it is her will and should stand, notwithstanding the existence of the confidential relations and confidence reposed; for the law does not incapacitate persons occupying such positions of trust from receiving the bounty of the testatrix, and does not impose upon them the duty of refusing such bounty or advising or persuading the testatrix not to give it.

The contestant seems to contend that the person occupying such confidential relations must do or say nothing to influence the action of the testator in his favor. This is extending the principle too far. Technical morality does not inhibit a person standing in confidential relations to another, who reposes confidence in him, from using or exerting any influence whatever to obtain a benefit to himself of a bounty bestowed by the last will of such other person. If the influence exerted is not what in law is termed "undue influence," technical morality is not violated by its use.

The contestant requested, and the court charged in the language of the request, that "influence obtained by modest persuasion and arguments addressed to the understanding, or by mere appeal to the affections, cannot be properly termed undue influence in a legal sense; but influence obtained by flattery, importunity, superiority of will, mind or character, or by what art soever that human thought, ingenuity or cunning may employ, which would give dominion over the will of the testator to such an extent as to destroy free agency, or constrain him to do against his will what he is unable to refuse, is such an influence as the law condemns as undue, when exercised by any one immediately over the testamentary act, whether by direction or indirection, or obtained at one time or another."

This is a correct statement of the law, and in connection with the other instructions given relative to undue influence, was all that the case required.

There appearing no error in the record, it must be certi-

fied to the circuit and probate courts that the will propounded as the last will of Eliza H. Disbrow, deceased, is her last will, and is entitled to be admitted to probate as such. The proponent will recover costs.

CAMPBELL, J. concurred.

COOLEY, C. J. and SHERWOOD, J. concurred in the result.

THE CROOKSHANK ASSIGNMENT CASES.

Costs on affirmance by equal division.

Costs were withheld where, on review, the court was equally divided.

(Sarah Benedict v. John C. Crookshank and David C. Crookshank.)

Error to Ionia. (Montgomery, J.) June 11.—Sept. 29.

Mitchel & McGarry for defendants appellant

L. H. Jennings and *Morse, Wilson & Trowbridge* for claimant appellee.

(Jane McCabe v. Same defendants.)

Error to Ionia. (V. H. Smith, J.) June 11.—Sept. 29.

Mitchel & McGarry for defendants appellant.

Albert Williams for claimant appellee.

Claims against insolvent defendants, contested under How. Stat. § 8747, by their assignee. Defendants bring error. Affirmed by division.

PER CURIAM. In these cases the Court has been unable to agree in a conclusion, and the judgments will stand Affirmed without costs.

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68 148
68 149
68 151

ADONIRAM J. CASS ET AL. v. JOHN O. GUNNISON, ADMINISTRATOR FOR WILLIS P. HEWITT, IMPLEADED WITH ALBERT H. STEVENS AND WILLIAM OLIVER.

Chattel mortgage on lumber pile—Replevin—Identity.

1. The notes given upon a purchase of goods and the chattel mortgage on such goods to secure the notes are properly put in evidence in an action of replevin brought by the vendor for the property.
2. In replevin for goods bought by some of the defendants from plaintiff to satisfy the purchasers' debt to another defendant with whom they had gone into partnership, the dealings of the firm in regard to partnership matters, after the goods were replevied, were immaterial in the absence of any charge of fraud.
3. Whether a chattel mortgage upon a quantity of lumber is not void for uncertainty if given before the mortgagers have received the lumber and acquired title to it, and before the portion designated in the mortgage has been set apart and identified by the selection, from the mass, of other lumber claimed by a creditor—*Q.*
4. The intention of the parties to a chattel mortgage may aid in ascertaining the exact description of the property it is to cover and in applying it thereto; but it cannot apply the mortgage to property not known to the parties when the mortgage was made.
5. The question whether the parties to a chattel mortgage knew what it was to cover, is one for the jury. So, also, is the good faith of a purchaser of the goods.
6. The issue in replevin is to be determined by the jury upon the facts as they were at the beginning of the suit.

Error to Mecosta. (Fuller, J.) June 11.—Sept. 29.

REPLEVIN. Defendant Gunnison brings error. Reversed.

Mitchel & McGarry for appellant. While parol evidence is admissible to show that a particular article is included within the general words of a description (*Comins v. Newton* 10 Allen 518; *Harding v. Coburn* 12 Met. 333; *Willey v. Snyder* 34 Mich. 60) a mortgage, to be effectual, must point out the subject matter so that a third person by its aid, with such inquiries as the instrument itself suggests, may identify the property covered; and property not

described or indicated, is not affected: *Winter v. Landphere* 42 Ia. 471; *Smith v. McLean* 24 Ia. 322; *Lawrence v. Evarts* 7 Ohio St. 194; *Richardson v. Alpena L. Co.* 40 Mich. 203; a chattel mortgage not filed is absolutely void as against creditors: *Hubbardston Lumber Co. v. Covert* 35 Mich. 259; *Wallen v. Rossman* 45 Mich. 333; *Putnam v. Reynolds* 44 Mich. 113.

Glidden & Marsh and *M. J. Smiley* for appellees. A bona fide purchaser must not only contract but actually pay for the property in question: *Kohl v. Lynn* 34 Mich. 360; *Matson v. Melchor* 42 Mich. 478; *Palmer v. Williams* 24 Mich. 328; *Smith v. Williams* 44 Mich. 241; *Stone v. Welling* 14 Mich. 514, he must have parted with something of value, and not merely given a contract which he could avoid if his title under the deed proved defective: *Blanchard v. Tyler*, 12 Mich. 338; *Warner v. Whitaker* 6 Mich. 133.

SHERWOOD, J. This case was an action of replevin. The writ described the property in litigation. The declaration was in the usual form, and no question arises thereon. The plea was the general issue. The action is brought to recover a quantity of lumber. Defendant Hewitt alone defended. Two trials were had at the circuit. On the first the defendant succeeded, a new trial was granted by the circuit judge, and the second trial resulted in favor of the plaintiffs. After the bill of exceptions was settled Mr. Hewitt died intestate. Defendant Gunnison was appointed his administrator, and he removed the case into this Court for review on writ of error.

The evidence tends to show the following facts, viz.: That in July, 1883, Willis P. Hewitt, who then resided at Muir, Ionia county, formed a co-partnership with Albert H. Stevens and Elmore R. Oliver, who resided at Grand Rapids, under the firm name of Hewitt, Stevens & Co., to operate a mill and carry on the sash, door and blind manufacturing business at Big Rapids. Hewitt owned the mill and manufacturing business, and sold to Stevens & Oliver an undivided one-half interest therein for the sum of $5000, of which they were to pay $3000 in lumber within thirty days, delivered at the mill; $1500 to be secured by their note payable to

Hewitt, and the firm to assume the payment of $1000 of Hewitt's old indebtedness; Hewitt's interest in the partnership being equal to that of both of the other partners. The agreement was reduced to writing, and contained a clause that the title to the property sold to Stevens & Oliver should remain in Hewitt till paid for; that about the 15th of July, 1883, the plaintiffs entered into a contract with Hood, Gale & Co., of Big Rapids, to purchase of that firm about 2,500,000 feet of lumber, being all of certain kinds then in their yard belonging to Hood, Gale & Co., and at certain prices for each grade, to be paid for in three and six months. The lumber was to be inspected and put on board of the cars, as plaintiff should order it, at any time within three months.

Some few days prior to the 3d of August, 1883, Stevens & Oliver, for the purpose of paying Hewitt the $3000 in lumber on their contract with him, made an agreement with the plaintiffs to purchase of them the lumber for that purpose, to be of such kinds as they, Stevens & Oliver, should order from time to time, the quantity to be determined by the price until the $3000 worth should be delivered; the lumber to be delivered on the cars as they should order, and shipped to the mill-yard of Hewitt, Stevens & Co. It was to be pine lumber from the yard of Hood, Gale & Co. A few days prior to the 3d of August, two car-loads and a few wagon-loads, to the value of $155.97, had been taken to Stevens & Oliver, at Hewitt, Stevens & Co.'s yard, and on that day Stevens & Oliver, in order to secure payment to the plaintiffs for the lumber contracted for as above stated, executed to plaintiff three notes of $1000 each, payable in sixty, seventy-five and ninety days, respectively, accompanied by a chattel mortgage, executed in like manner to plaintiffs, which described the property covered thereby as follows: "All their right, title and interest in and to the planing-mill, sash, door and blind factory, and all machinery of every kind and description belonging or appertaining thereto; and also all the lumber *now on hand at said mill and in transit belonging to said first parties,* being the lumber purchased from said second parties; and also all stock manufactured from

said lumber. It being intended that these presents bargain, sell and mortgage all the interest of said first parties in and to said mill and appurtenances under and by virtue of a *contract of purchase and sale*, which said above-described goods, chattels and property, at the date hereof, are situate in the city of Big Rapids, Mecosta county, Michigan, and are free and clear from all liens, conveyances, incumbrances, and levies, *except the right of Willis P. Hewitt* under said *contract* above mentioned."

Hewitt claims that he had no notice of this mortgage, and never heard of it until a long time after he had received the lumber and applied it in payment and satisfaction of his debt; that when he entered into his business relations with Stevens & Oliver he resided at Muir, and they were comparatively strangers to him; that his business interest in the firm was only looked after by its book-keeper, Mr. Finch; and that when he received this lumber he believed it was free from all liens and incumbrances. He further claims that "the lumber was shipped from time to time, as ordered by Oliver & Stevens, up to and including the 23d day of August, at which time the last shipment was made. When Oliver & Stevens wanted a car-load of lumber, the plaintiffs would order it shipped to them from Hood, Gale & Co. Hood, Gale & Co. would bill it to the plaintiffs, and the plaintiffs to Oliver & Stevens. It was delivered on the inspection of Hood, Gale & Co. A portion of the lumber delivered was bought by the plaintiffs of Hood, Gale & Co., after the making of the chattel mortgage. As fast as the lumber was received it was turned over to Mr. Hewitt by Oliver & Stevens to apply on the $3000 indebtedness which was to be paid in lumber within thirty days, and Hewitt received it and gave Oliver & Stevens credit for the same on that account, except a small amount which was not such lumber as Hewitt was to receive, and that this was used by the firm in making repairs on the buildings." And further, that at the time the mortgage was executed, and for a long time thereafter, Stevens and Oliver were both residents of Grand Rapids; that the mortgage was never filed in the

city of Grand Rapids where the mortgagors resided, but on the 13th day of August, 1883, it was filed with the recorder in the city of Big Rapids, and not until the mortgage was filed did the plaintiffs inform him of or show him the mortgage, and then claimed of him their interest thereunder. Hewitt refused to pay Stevens & Oliver's debts, and claimed that the firm of Hewitt, Stevens & Co. had run behind; that it had not paid the $1000 assumed when the copartnership was formed; neither had Oliver & Stevens paid the note of $1500 given to Hewitt at that time, and that the firm of Hewitt, Stevens & Co. was largely indebted to him; that this was the situation at the time this suit was brought; that the plaintiffs took upon their writ 1037 feet only of the lumber delivered prior to and on the day of the date of the mortgage, worth about nine or ten dollars, and that the balance of the lumber seized was lumber shipped after that date, together with a quantity of lumber purchased by the firm of Hewitt, Stevens & Co. that had no connection with the lumber bought by Oliver & Stevens. The appraisal of the lumber was $1740.37, and this, it was admitted upon the trial, should be taken as the value of the property replevied, and that plaintiffs made demand for same before suit brought, which was refused, and that a copy of the mortgage was filed as above stated. Many other facts above stated do not seem to have been seriously contested.

The two principal questions in the case are: *First*, Did the chattel mortgage take effect upon the lumber in question? *Second*, If it did, was Hewitt a bona fide purchaser for value, so as to enable him to hold the property against the mortgagees?

Upon the case as presented to the jury on the testimony, under the rulings made, and the law given them by the court as applicable to the facts, they have found upon these questions for the plaintiff, and that verdict must stand, if no error was committed by the circuit judge.

Twenty-five errors are assigned upon the record. The first and second relate to the admission in evidence of the notes and mortgage. These were properly admitted. The third,

fourth, fifth, sixth and seventh errors assigned relate to the acts and doings of Hewitt and the firm of Hewitt, Stevens & Co. in regard to their firm matters and business after this suit was commenced and the property replevied. The matters queried after, one and all, in these exceptions were entirely immaterial, and in no way aided the court or jury in solving the real questions in controversy. The parties could deal as they chose with each other; sell out to each other or to other persons as they might deem most for their interest. They might continue the business or close it, or either or all abandon it, as they or either of them saw fit, and it is difficult to see how it could change the legal effect of what had been done, or the defendants' obligation in any way to the plaintiffs; and especially must this view be taken so long as no actual fraud is charged against the defendant Hewitt.

The testimony offered, and the deduction sought therefrom, and from this course of examination, against the objections urged by counsel for defendants, were calculated to mislead the jury to the prejudice of the defendants, and the court erred in admitting the testimony. The admission of the accounts in evidence, mentioned in the eighth and ninth assignments of error, however objectionable upon other grounds, was not subject to the objection made,[1] and the motion to strike out of the testimony the chattel mortgage, which is the subject of the tenth assignment of error, was properly denied. The defendants' sixteenth, seventeenth, twentieth, twenty-first, twenty-second, twenty-third, twenty-fourth and twenty-fifth assignments of error cannot be sustained. They involve conclusions to be deduced from the facts, some of which are not conceded and therefore present questions to be considered by the jury. I think, however, the defendants' request contained in the fifteenth error assigned might, with much propriety, have been given upon the undisputed facts appearing upon the record.

[1] The objection made was that the evidence offered did not tend to prove what was claimed.

The defendants' counsel complains of the charges of the court contained in the following assignments of error, viz. :

(12) The court has held, and will now instruct you, that this mortgage, although not as full as might be, at the same time is sufficient to cover the property in question in this suit; in other words, that it did cover the lumber which at that date, August 3d, was sold by Cass, Morrison & Gale to these two parties, Stevens & Oliver; that the parties at the time it was made understood it so to apply; and that this defendant, Hewitt, was afterwards apprised of what this mortgage covered, and was intended to cover.

(13) The court intends you to understand, gentlemen, and in your verdict bear that in mind, that this sale of lumber that was claimed to have been made—some three thousand dollars' worth of lumber—the court intends you to understand that that is the whole amount, whether delivered at that date or any subsequent time by Cass, Morrison & Gale to Stevens & Oliver; that that is the lumber here in question; that the mortgage covered the whole amount of that lumber, and so intended to do at the time the sale was made, although the lumber was delivered by piecemeal, as it were, or car-load, after that time; the greater share of it that the parties bought—three thousand dollars' worth of certain grades of lumber,—and the testimony showing, which is not disputed, that the lumber was in the yard of Hood & Gale.

(14) The defendant Hewitt was not a purchaser for value in good faith of the lumber that was turned out to him by Oliver & Stevens to pay him the three thousand dollars which they had agreed to pay in lumber within thirty days.

It is quite clear that Stevens & Oliver had not the lumber at the planing-mill mentioned in the mortgage, and did not have title to the property described or intended to be described at the time the mortgage was given, and it had not yet been designated or set apart; in fact, neither party could go to the place where the lumber was and point out what was described or intended to be described in the instrument. Really the amount could not be determined until it was delivered, or the quantity designated until the defendant Hewitt had made his selection and given his order for the same. Under such circumstances it was doubtful, to say the least, whether the mortgage was not void for uncertainty even as

between the parties thereto, and still greater must be that doubt when it is claimed that it was notice to third persons of the interest claimed by plaintiffs. Mr. Jones, in his work on Chattel Mortgages (§ 55 et seq.), speaking upon this subject says that "the mortgage must point out the subject-matter of it, so that third persons by its aid, together with the aid of such inquiries as the instrument itself suggests, may identify the property covered;" and I think this Court has substantially adopted the same rule. *Willey v. Snyder* 34 Mich. 60. I fully agree with Chief Justice Cooley, in that case, that "Written descriptions of property are to be interpreted in the light of the facts known to and in the minds of the parties at the time. * * * A subsequent purchaser or mortgagor is supposed to acquire a knowledge of all the facts, so far as may be needful to his protection, and he purchases in view of that knowledge." The facts, however, from which such knowledge may be obtained must exist, and must be found in the description of the mortgaged property, or enough must be stated therein to enable a party by the use of reasonable diligence to ascertain them elsewhere.

While the intention of the parties may aid in ascertaining the true description, it cannot make it. It may aid, also, in applying it to the subject-matter, but it cannot apply it to subject-matter not known to the parties at the time the mortgage was made. And now comes the vital question upon this point: Did the parties themselves know what particular lumber was to be delivered or covered by the mortgage? I have not been able to satisfy myself that they did. In any event, however, it was a question of fact for the jury, and should have been submitted to them under proper instructions from the court. This was not done, but the question was decided by the court in the first two charges stated, and this was error. In the last of these charges we are now discussing, the court, in substance, told the jury that in the purchase the defendant Hewitt made of the lumber he was not a purchaser in good faith; and in this I also think the court erred. In thus charging, the court seems to have assumed

that nothing had been paid by the defendant for the lumber, because he had not conveyed a part of the property which formed a part of the consideration therefor. This was a question to be determined from all the evidence in the case. The testimony tended strongly to show that the contract rights between Oliver & Stevens and Hewitt were something more than the sale of the undivided one-half of the mill machinery, etc. It created partnership relations; gave to them the control and management of the business; gave to them the power to use the name of the firm and bind Mr. Hewitt, and subjected his individual property to the liability of paying firm debts which they had power and authority to contract; gave them the power to sell and dispose of the property of the firm; and although not the right, still the power to collect money due the firm and appropriate it to their individual use. This Hewitt claims was actually done by Oliver in this case. And Mr. Hewitt also swears that in the few months this firm was doing business they were owing him about $4000; that he never drew anything out of the concern, and that in November, 1884, he sold a one-half interest in the mill to a Mr. McElwee for $2000, and the new firm assuming $4000 indebtedness contracted by the firm of Hewitt, Stevens & Co.; and that there was a loss to Hewitt of $1000, the same being sold to McElwee for $1000 less than to Oliver & Stevens. Be this as it may, the case should have been determined upon the facts by the jury,—upon the facts as they existed at the time the suit was brought.

I am unable to discover that the stipulated facts in regard to the title contained in the agreement between Hewitt and Stevens & Oliver is of any particular consequence in the case. If the defendant's testimony was true, Hewitt, as between them, obtained good title to the lumber as soon as it was delivered, and to the extent of its value the debt of Stevens & Oliver to him was paid and canceled, which was less than the $3000. This does not seem to be denied, and I see no reason to believe the jury would not have so found. Stevens also says he knew nothing of the claimed mortgage until after the receipt of the lumber, and the application of its

value as above stated, which does not seem to be contradicted. I think the question of good faith should have gone to the jury. I fully recognize the rule contended for by the able counsel for the plaintiffs, and which is fully sustained by the authorities they cite; but they are not applicable to the case as presented by the testimony on the part of the defendants under their theory, and upon the facts they had the right to have the case submitted by the court to the jury.

For the reason herein given the judgment must be reversed and a new trial granted.

COOLEY, C. J. and CAMPBELL, J. concurred.

MARTHA DEFER v. LEVI H. LOCKWOOD AND CHAUNCEY M. LOCKWOOD.

Bill to compel conveyance.

A man bought a place and put his sister and her family in possession of it. After he died her husband, who was one of the commissioners upon the estate, appraised the land as decedent's property, and the family took a long lease of it. Seven years later, when notice to quit was given for non-performance of its conditions, the sister filed a bill to compel her brother's son and heir to convey the land to her, alleging that her brother had promised her the land in the first place as an inducement to remain in the neighborhood; that it had always been his expressed intention to give her a deed of it, and that he had in fact had a deed prepared, which in his last sickness he asked his wife to get, but which was not then nor afterwards produced. *Held* that upon the facts the bill would not lie.

Appeal from Macomb. (Stevens, J.) June 11.—Sept. 29.

BILL to quiet title. Complainant appeals. Affirmed.

Baldwin, Draper & Jacokes for appellant.

Crocker & Hutchins for appellees.

CHAMPLIN, J. Chauncey M. Lockwood, the father of the defendant Chauncey, died intestate in Wayne county, Michigan, on or about the 11th day of January, 1873, leaving a widow, Lovina Lockwood, and as heirs-at-law the above named defendant, Chauncey M., and a daughter called Lulu, both infants. The daughter died soon after her father. The complainant in this case is a sister of the intestate. She states in her bill that she is the legal and equitable owner of the east half of the northeast quarter of section 18 in township 2 north, range 12 east; that the same is worth $3000; that it is a cultivated farm, and she has possessed and occupied it as her home for more than eleven years; that her brother, Chauncey M. Lockwood, sometime in the year 1870, purchased the land of Thomas Clark, who conveyed it to him by a good and sufficient warranty deed; that previous to his purchasing the land he had a conversation with complainant, in which he proposed to her if she would remain in the neighborhood so that she might take care of their mother, who was an aged woman and resided near this land, and attend to her wants, he would purchase said land for her, and she should have and own the same, and she consented, if the land should be purchased for her and she could have the title to the same, and that she did remain there, and has continued to do so until the present time; that soon after the conversation the land was purchased of Clark, and before it was deeded said Chauncey put complainant in possession, and not long after he came to see her and told her he bought the land for her that she might be near their mother and take care of her in case of need, and promised her she should have a deed of the land, and that he would make one out for her; that, soon after, said Chauncey M. Lockwood made and executed a deed of said land to complainant, which vested the title therein in complainant in fee-simple, and the deed was put in the hands either of another brother, Levi H. Lockwood, or into the hand of Lovina Lockwood, the widow of Chauncey, and after the deed had been executed to complainant, and after she had been in possession of said land more than a year, said Chauncey M. was taken sick in Detroit, and after

an illness of about three months died; that a few weeks before he died she visited him, and had a conversation about the deed; that he then said to her he had executed a deed of said land to her, and that his wife Lovina had it, and she, complainant, could get it from her; that the land was her own, and she need not feel bad, as she would be provided for in case he should die; that after his death she asked Lovina why she had not given her the deed which Chauncey made out to her, and she replied in substance that her hand was in the lion's mouth, and she should have to draw it slowly out; that complainant believes and charges that said deed cannot now be found or produced; that Lovina died seven years ago at her father's in the state of Oregon; charges that she and Levi H. Lockwood fraudulently conspired together to and did destroy said deed, with intent to cheat and defraud her and to destroy the evidence of her title to said land, and that so far as the record of deeds of the county exhibits title to said land, the same stands in said Chauncey M. Lockwood, who has only one son and lawful heir, whose name is Chauncey M. Lockwood, who is a minor aged about twelve years, and resides with his grandfather in the state of Oregon. She prays that she may be decreed to be the owner of said land in fee-simple, and that she may be quieted in her right and title, and that said minor heir may be decreed to execute to her a deed of said land in lieu of the one destroyed, and restrained from prosecuting any suits to recover possession of the land or rent for the use thereof.

The answer of Levi H. Lockwood is the only answer printed in the record. He denies the conversations stated in the bill; denies that the land was purchased for complainant or upon any agreement to purchase the same for her; denies that Chauncey M. ever conveyed or agreed to convey the land to complainant; says that after the death of Chauncey M., his widow, Lovina Lockwood, was appointed guardian of the estate of the infant Chauncey M., and as such guardian leased to John B. Newton, then complainant's husband, the said premises for ten years, with complainant's knowledge; that after occupying said land under the lease about seven

years Newton died, and complainant has occupied the same part of the time since; that he has been appointed guardian of the estate of said minor, and as such served upon complainant a demand of possession for non-compliance with the conditions of said lease, and until after such demand he never heard it claimed by complainant or any one that she ever had a deed of said land, or that any such conveyance was ever executed.

This statement of the issue, as shown by the pleadings, discloses the fact that the claim made by the complainant is directed against the right of the minor heir to the premises, and if established, deprives him of what apparently is his inheritance. She seeks to establish a title to lands in fee-simple without the production of a deed and against the record title. To entitle her to a decree, the fact of the execution and delivery of the deed must be established by convincing proofs.

Much of the evidence introduced by complainant to sustain her bill is incompetent, and must be excluded in the consideration of the case. All conversations and facts testified to by complainant which were equally in the knowledge of the intestate, Chauncey M. Lockwood; all conversations with Lovina Lockwood, as well as those with Stephen Lockwood, were inadmissible. The first, because it is inhibited by the statute; the latter, because it is hearsay.

It appears that Chauncey M. Lockwood, about the time he became of age, left home and went to the Pacific coast, where he engaged in various pursuits, such as mining, herding cattle, carrying mails and engaging in contracts with the United States. In some of these ventures he lost money, and in others he was successful, and upon the whole accumulated considerable property, which, however, was quite scattered, some being in Oregon, some in Washington Territory, some in Virginia and some in Michigan. During his prosperity he evinced a disposition to assist his parents, brothers and sisters, and on different occasions let them have money in various sums. In conjunction with his brother Levi, he pur-

chased of Mr. Clark two parcels of land. The title to one parcel was conveyed to Levi, who gave his father a life-lease thereof, and the other, being the parcel in dispute, was conveyed to Chauncey M. At this time complainant was the wife of John B. Newton. Complainant and her husband were not living together. He was seeking employment in the vicinity of Grand Rapids or Morley, and she was mainly engaged in school teaching in the eastern part of the State. Chauncey desired to get them together, and requested that they should go upon this land and reside there and cultivate the same. They went upon the land soon after, and remained there at the time of Chauncey's death.

The evidence introduced by complainant to prove the execution of the deed of the land to her consists of (1st) admissions of Chauncey M., during his life, to the effect that the land was hers, and that he had executed a deed thereof to her; and (2d) the testimony of Mrs. Lawson as to seeing the deed, and a direction by Chauncey to his wife to deliver the deed to complainant.

The only direct testimony of the existence of a deed from Chauncey to the complainant is that given by Mrs. Lawson. She testifies positively and with particularity to the conversation which took place at the time she saw it, to the handwriting in which the deed was written, the description of the land, and the officer before whom it was acknowledged.

If her testimony is believed, the complainant's case is made out, so far as the existence of such deed is concerned. She testifies that during her brother Chauncey's last sickness she went to see him; that she "went into the sitting-room where he was, and complainant stood by the south window crying, and she spoke to her and said, 'Mat, what are you crying about?' And at that he wheeled around and asked her what she was crying about, and if she thought he was going to die? And she said she didn't know. And he told her in case he died there was a deed made out to her, and told his wife to go and get it, and she did so, and brought it in, and it was made out from 'C. M. Lockwood to Martha Newton.' I saw the deed myself, the land described in the deed. He

said he had bought the land for her, and would fix it all up for her if he lived; but if he didn't, she would have to fix it up herself, or leave it as it was. The deed was signed by him, and witnessed and acknowledged before Seth R. Shetterly, of Utica, as justice of the peace; and he said to me, 'The deed is made for her.' I told him if the deed was intended for her he had better to give it to her now, for something might happen, and he might not get well. He told his wife to take it, and go and give it to her. I don't know what she did with the deed, but he told her to take it and give it to Mrs. Newton. She took it and went out of the room. This conversation took place about two weeks before he died." On cross-examination she says that Mrs. Newton had left the room when he told his wife to take it and give it to Mrs. Newton. She fixes the date of the deed as being in the fall of 1871.

It is somewhat singular that Mrs. Newton should have left the room at a time when she was so vitally interested in what was going on. No reason is given for her leaving, and there is no reason apparent why she should not remain. She testifies that she never saw any such deed, and never had any such deed in her possession. But Mr. Shetterly was introduced as a witness by the defendant, and he testifies that he has no recollection whatever of drawing a deed from Chauncey M. Lockwood to Martha Newton. He testifies to draughting the deed from Clark to Chauncey M. Lockwood, August 16, 1870, and that Chauncey was not present; also to draughting a deed bearing date December 7, 1870, from Levi H. and Phœbe Lockwood to Myron Lockwood. But the most convincing testimony to rebut the testimony of Mrs. Lawson is found in the facts immediately following the decease of Mr. Lockwood, coupled with the unexplained delay of complainant in asserting her rights by suit or otherwise.

Chauncey M. Lockwood died January 11th, 1873. Levi H. Lockwood and Lovina Lockwood were appointed administrator and administratrix of his estate. Commissioners were appointed to appraise the same. They were Homer B. White

and John B. Newton, the husband of complainant. They, together with Levi, went to this land upon which Newton and complainant were then living. Complainant was there present, and they appraised this land as a part of the property and estate of the intestate. If it was true that this property had been deeded to Mrs. Newton, and the conversation had occurred so recently before his death as complainant and Mrs. Lawson claim, is it not probable that complainant would have asserted some claim to it at the time of the appraisal? She did not do so, however, and later, when Mrs. Lovina Lockwood had been appointed guardian of the minor child, Chauncey M. Lockwood, on the 6th day of January, 1874, John B. Newton, the husband of complainant, entered into a written lease of the premises in dispute from the guardian for the term of ten years, and Mr. Shetterly, who drew the lease, thinks that the complainant was present. Under that lease, Newton and his wife occupied the farm, and she knew that he was occupying it under such lease.

These facts are entirely inconsistent with the asserted claim of complainant, and also with the testimony of Mrs. Lawson. It is also in evidence that, after Mr. Newton's death, the complainant made arrangements for tile being laid upon the premises for the avowed purpose of fulfilling the terms of the lease, which required a certain amount of tile to be laid.

The evidence is conflicting upon the point when she first asserted claim of title to the premises, but from the testimony, which need not be here reviewed, we are satisfied that it was not until after she was served by the guardian of the estate with a notice to quit because of non-compliance with the terms of the lease above mentioned, shortly before this suit was commenced. In the meantime Lovina Lockwood, an important witness, has died; time has elapsed, and witnesses are called to testify to admissions made seven, eight and ten years previously, in casual conversations with the deceased—most of them to the effect that he bought the land for his sister Martha, and intended to deed it to her. Whatever his intentions were, we are satisfied that he never executed a deed to the complainant of the land in question.

Were we satisfied that a deed had been made, there is no evidence in this record of a delivery thereof sufficient to vest the title in the complainant.

We have given above, all the evidence there is upon this subject. It is found in the testimony of Mrs. Lawson. The complainant paid nothing for the land, and has no equities based upon the payment of any consideration or of making improvements thereon. If it was a bounty designed for her by her brother, the gift was unexecuted, and it must fail.

There is a mass of testimony introduced by the complainant, for no other purpose apparently than to blacken the memory of Lovina Lockwood, the widow of the deceased. Aside from its being wholly irrelevant to the issue made by the pleadings, and ought not, therefore, to have been introduced in the record, it appears to us to be wholly devoid of truth, and manufactured for the occasion. Besides this, the witness was effectually impeached.

The decree of the court below dismissing the bill of complaint must be affirmed with costs.

The other Justices concurred.

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THE FIRST NATIONAL BANK OF DETROIT AND THE MERCHANTS' AND MANUFACTURERS' NATIONAL BANK OF DETROIT v. THE E. T. BARNUM WIRE & IRON WORKS ET AL.

Set-off by trustee of corporation against individual claim.

1. Where money was placed by a corporation in the hands of its general manager, as trustee, for safe-keeping, and to be paid out in the ordinary course of its business, such trustee cannot offset a debt due to him by the corporation against the moneys in his hands, after a voluntary assignment by the corporation for the benefit of its creditors.
2. A set-off may be allowed in equity in the same cases in which they are allowed at law.
3. A debt accruing to a person in his individual capacity cannot be set off against a debt due from him as trustee.

Appeal from Wayne. (Jennison, J.) June 12–16.—September 29.

Proceedings on petition of the Receiver of defendant corporation to compel payment of moneys by Charles Bewick, general manager of said corporation. Bewick appeals. Affirmed.

Moore & Canfield for the Receiver.

Otto Kirchner for respondent appellant.

CHAMPLIN, J. Proceedings were instituted by the complainants in the circuit court for the county of Wayne, in chancery, to carry into effect a common-law assignment made by the E. T. Barnum Wire & Iron Works, in which proceedings Abram L. Stebbins has been appointed receiver. The receiver filed his petition in the cause to compel Charles Bewick to deliver to him the sum of $11,900, which the petitioner claims as the assets of the assignor in the possession of said Bewick.

The Wire & Iron Works is a corporation organized under chapter 1 of Act No. 187, Laws 1875 (How. Stat. p. 1051). It provides (section 6) that the business of the corporation shall be managed by a board of directors, and (section 8) that its officers shall consist of a president, a vice-president, a secretary and a treasurer, and "such other officers as the by-laws of the corporation shall prescribe." The by-laws of the corporation (article 5, title "Officers") do not provide for any officers in addition to those named in the constituting act. They do, however, provide (article 6, title "President") that, in addition to the usual duties, the president shall "act as general manager, and shall have full authority and supervision over the active business affairs of the company, and its officers and employes." During all the time covered by the transaction in litigation, Mr. E. T. Barnum was both the president and treasurer of the Works. For some time the Works had been in straitened circumstances. It was represented to Mr. Bewick that they were caused by over-manu-

facturing, and that a loan of ready money would tide the concern over its difficulties. Relying upon these representations, he advanced to it a large sum of money upon its note, dated June 16th, 1884, for $26,166.67, payable on demand. It remains wholly unpaid, except the sum of $7,333.33 indorsed thereon.

The respondent Bewick is a stockholder in the corporation. In or about May last he was elected a director, and continues to hold that office. Up to July 3d the office of business manager, or general manager, was filled by Mr. E. T. Barnum. On that day Mr. Barnum resigned, and Bewick was chosen general manager in his place. He is still the business manager, having never resigned the office. At or about the time Bewick entered upon the duties of general manager the company became financially embarrassed and insolvent. On the 28th day of July the Works made an assignment for the benefit of creditors. In the interval, fearing garnishment of its bank accounts with the First and Merchants' & Manufacturers' National Banks of Detroit, it ceased its deposits with them, and it was arranged by the directors, or with their consent, that its moneys should be placed in the hands of Mr. Bewick, as trustee, instead of being deposited with said banks. He gave his receipts for the money—four in number—the first receipt bearing date July 10th, 1884, and the last July 28th of the same year; aggregating in amount $14,300. One of the receipts is signed "Charles Bewick," simply, and all the others are signed "Charles Bewick, Trustee." These funds were deposited by Mr. Bewick with the German-American Bank in the name of "Charles Bewick, Trustee." This was done for the purpose of keeping them separate from other funds which he had on deposit in that bank. He arranged that any money which the corporation might need to use in the course of its business should be paid out of the money received by him, and for this purpose he signed blank checks by the name of "Charles Bewick, Trustee," which he left with Mr. Deacon, the book-keeper of the corporation, with directions to fill up and use as needed. Twenty-four

hundred dollars were thus used previous to the assignment, leaving in his hands $11,900.

On the same day upon which the last money (being $1500) was placed in Mr. Bewick's hands as trustee, the corporation made a general assignment for the benefit of its creditors. There had been talk previous to this of their closing down, and Mr. Bewick, as manager, had given direction to the several foremen to close down on that day. He had caused an inventory to be taken, and had formed an opinion that the assets of the corporation would not pay over fifty cents on the dollar of its liabilities. An inventory was prepared, to be filed in accordance with the statute, after the assignment was made, concerning which the record contains the following:

"It is stipulated and agreed that with the assignment of the said defendant, the E. T. Barnum Wire & Iron Works, there was filed an inventory, a part of which is in the words and figures following, to wit:

ASSETS.

Cash on hand, - - - - - - - -	$ 612 72
in First National Bank of Detroit, -	1,163 88
in M. & M. National Bank, - - -	34 23
in hands of C. Bewick, - - - -	11,900 00
	$13,710 83

It is agreed that there is annexed to the said inventory the following affidavit:

State of Michigan, County of Wayne—ss.: Charles Bewick, of said county, being duly sworn, says that he is the general manager of the E. T. Barnum Wire & Iron Works, in whose behalf he makes this affidavit, and that the annexed and foregoing inventory of the assigned property of the said E. T. Barnum Wire & Iron Works, and list of creditors, are full and true, to the best of his knowledge, information, and belief.

[Signed] CHARLES BEWICK, General Manager.

Subscribed and sworn to before me this 7th day of August, A. D. 1884.

WILLIS G. CLARK,
Notary Public in and for Wayne County, Michigan.

The above inventory was filed on the 7th day of August, 1884, in the office of the county clerk for the county of Wayne."

The testimony respecting Mr. Bewick's knowledge of what the inventory contained is conflicting. He testifies that he was not aware that the item of moneys in his hands was contained therein, and that he was advised that his verification was merely a formal matter. On the other hand, a witness who was present testifies that Mr. Ferry and Mr. Bewick made a careful examination of the inventory, and in some instances compared it with the books, and that this item of $11,900 was spoken of at that time. Mr. Ferry was not called.

Afterwards, at the suit of various creditors, Mr. Stebbins, the appellee, was appointed receiver of the Works. He made a demand upon Mr. Bewick for the sum last named, which was refused upon the ground that the indebtedness of the Works upon its note to Mr. Bewick was a legal set-off against the receiver's claim against him. The court below, on the receiver's petition, made an order directing Mr. Bewick to pay the money to the receiver. From that order Mr. Bewick appeals.

The only question presented by the record is whether the indebtedness of the Works on the note may be set off against the moneys so deposited by the Works with Mr. Bewick.

It is not claimed on behalf of the petitioner that there was any fraud committed by the arrangement under which Mr. Bewick received the money. It was made at a time when it was supposed that by keeping control of its means the corporation would be able to continue business and pay its indebtedness. Yet, in view of the facts, it cannot be doubted that the object was to conceal its funds, and place them beyond the reach of creditors who might attempt to collect their debts by proceedings in garnishment. This the law does not condemn unless such action is taken with the intent to hinder, delay or defraud creditors. No such intent is manifest in this case. There is no authority shown from the board of directors authorizing respondent to apply the money

placed in his hands to the payment of the note held by him. The circumstances repel any such inference, and he does not claim that he was authorized by the board to make such appropriation. The case does not therefore come within the range of those decisions where the directors of a failing corporation have preferred one of their number to the exclusion or detriment of other creditors.

Neither is it of any importance that Mr. Bewick was a stockholder and director of the corporation, except so far as those facts may bear upon the good faith of the transaction. The money was not placed in his hands because he was a stockholder, neither did he receive it in his official capacity as director; but it was placed in his hands as a depositary, in trust; to use the words of Mr. Bewick, "It was there kept in my charge for safe-keeping;" and his right to retain it to offset the corporation's indebtedness to him must be determined by the same principles which would be applied to any other creditor receiving like funds in trust, under the same circumstances, and with the same knowledge of the affairs of the corporation. In this equitable proceeding the same principles relating to the right of set-off will be applied as are applied in proceedings at law; and if at law, in a suit to enforce the payment of this money, he would be entitled to offset his note, he will be permitted to do the same here. 2 Story's Eq. Jur. § 1437.

This leads us to inquire in what relation he stands to the corporation with reference to the $11,900. If it was deposited with him the same as if he was a banker, with the right to use this money in his own business, or for any purpose he chose, as bankers have in case of a general deposit, there can be no doubt that the relation between him and the corporation was that, simply, of debtor and creditor, and he would have the right of offsetting his note against the demand for this money. If, on the other hand, the transaction was such that he is to be considered the bailee of the corporation with respect to this money, and it could legitimately be applied only to the uses and purposes of the corporation under the trust imposed, then he is not a creditor of the corporation

with respect to this money. In the latter case, the money being held in a different right than the money due to him on the note, it cannot be offset against it either at law or in equity. The debts would not be mutual; neither would they be debts accruing in the same right. And although debts accruing in different rights may under special circumstances, where the proof is clear and the equity very strong, be set off, yet there is nothing in the facts and circumstances of this case to bring it within the exception. He claims that the money for which the note was given was obtained by assurances and representations made by the president and general manager, that although the corporation was in straitened circumstances and in need of money, yet the corporation was entirely solvent, and was doing business at a profit, and only needed this money for a short time to tide it over until sales and collections could be made; which representations he claims were false, but upon the faith of which and relying upon their truth, he loaned them the money.

These facts do not create such an equity as would entitle respondent to hold the money as an offset. He was a director in the corporation, and it was his duty to know its financial standing, and it is to be presumed that other creditors who did not stand in official relation and had no opportunity or means of judging of the financial condition of the corporation trusted the concern upon the faith of its being solvent, whose equities, at least, are equal to respondent's.

The controlling facts are that the money was received by him as trustee. The trust was that he should keep it safe, and use it in the business affairs of the corporation. There is no analogy between these facts and that of a banker and his depositor. The banker who receives a general deposit from his customer undertakes, in consideration of the loan of the money and the right to use it as he pleases, to refund the same amount at one time or in parcels, as shall suit the convenience of the depositor; and the depositor is at liberty to draw his check for such amounts upon the banker, which it is the banker's duty to pay. This was not the transaction between

these parties. Here the money was placed in Bewick's possession for safe-keeping, to be used as the business, not of Bewick, but as the corporation required; not to be drawn upon by the check of the corporation, but to be applied by Bewick in accordance with the terms of the trust. It needs no argument to show that any remaining money not so used and applied remained the money of the corporation. It did not, in placing it in Bewick's hands, part with the title to the money. There is no fact or circumstance which indicates such design. On the contrary, it regarded the money as its property, embraced it in its inventory as assets of the corporation, and the correctness of this inventory is verified by the affidavit of the respondent.

These facts distinguish the case from *Scammon v. Kimball* 92 U. S. 362, cited by counsel for respondent as supporting his claim of set-off. There the facts showed that Scammon, who was a private banker, received the funds of the insurance company of which Kimball was assignee, as general deposits, paid interest on them, and they were drawn out by checks of the insurance company as suited its convenience. The company was also indebted to him for losses by fire which it had insured against. The court held that these were mutual debts, which might be offset. The insurance company also held his notes given for stock for which he had subscribed and had not paid, and the court held that these notes could not be set-off against such losses, for the reason that equity regards the capital stock and property of a corporation as held in trust for the payment of the debts of the corporation, and recognizes the right of creditors to pursue such property into whosoever possession the same may be transferred, unless it has passed into the hands of a bona fide purchaser. The principle there laid down would prevent the money in question being applied or held as a set-off against the note of the corporation due Bewick, for the reason that at the time of the assignment the title of the money was in the corporation and passed to the assignee, and constituted a trust fund for the payment of the corporation debts pro rata. With respect to this money the respondent occupies no better posi-

tion than he would if he had obtained possession of some of the machinery or manufactured articles belonging to the corporation and sought to retain them to satisfy his debt. *Key v. Flint* 8 Taunt. 21; *Buchanan v. Findlay* 9 B. & C. 738.

The order appealed from is affirmed with costs.

The other Justices concurred.

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THE RICHELIEU & ONTARIO NAVIGATION COMPANY v. THE THAMES & MERSEY MARINE INSURANCE COMPANY OF LIVERPOOL, LONDON & MANCHESTER.

Marine insurance—Parties to suit on policy.

Where charterers of a vessel have insured it under an agreement with the owners that in case of its total loss the insurance money shall be paid over to them, and have had themselves named in the policy as the parties on account of whom insurance was taken though the loss was made payable to the owners, the latter have such an interest in the policy as will entitle them to sue upon it in their own name.

Appeal from Wayne. (Chambers, J.) June 16.—Sept. 29.

ASSUMPSIT. Plaintiff brings error. Reversed.

Moore & Canfield for appellant. A sole owner of a steamer, to whom a policy of insurance thereon is made payable exclusively, is a proper party to sue on the policy in his own name: Wood on Ins. 319; 2 Pars. Mar. Ins. 448; *Motley v. Ins. Co.* 29 Me. 337; May on Ins. § 446; Barber on Ins. 31; *Hopkins v. Ins. Co.* 48 Mich. 148; *Anson v. Ins. Co.* 23 Iowa 84; *Winchester Ins. Co. v. Foster* 90 Ill. 122; *Western Development Co. v. Emery* 61 Cal. 611; the party insured is the party to be indemnified by the policy: 1 Phil. Mar. Ins. 2; 1 Arnould Mar. Ins. 25; an undisclosed principal may always sue upon a contract made in the name of his agent: Wharton's Agency § 433; *R. R. Co. v. Benedict* 5 Gray 561; Story's Agency § 161; *Ford v. Williams* 21 How. 287; *Maspons v. Mildred* L. R. 9 Q. B. D. 540, 541; Ewell's Agency 383; *Conklin v. Leeds* 58 Ill. 178; Pomeroy's Reme-

dies § 177; 1 Ch. Pl. 8; *O. &c. R. R. Co. v. Middleton* 20 Ill. 629; policies of marine insurance are usually taken out in the name of a broker or agent in his own name, "for whom it may concern," or some equivalent clause, and such a policy will be applied to the interest of the party or parties for whom it was *intended*, by the person who effects or orders it, if such party has authorized its being made beforehand, or subsequently adopts it: 1 Phillips Marine Ins. §§ 383, 385, 386, 388; 1 Parsons' Marine Ins. 47, 48; *Maspons v. Mildred* L. R. 9 Q. B. D. 530; *Protection Ins. Co. v. Wilson* 6 Ohio Stat. 553; 2 Arnould on Ins. 1269; *Browning v. Prov. Ins. Co.* L. R. 5 P. C. 263: 8 Eng. 217; *Daniels v. Ins. Co.* 10 Biss. 116; *Shawmut &c. Co. v. Ins. Co.* 12 Gray 540; *Sunderland Mar. Ins. Co. v. Kearney* 16 Q. B. 925.

Maynard & Swan for appellee. To sue on a contract one must be privy to it: *Sisson v. Cleveland & Toledo Rd. Co.* 14 Mich. 496; *Litchfield v. Garratt* 10 Mich. 429; *Pipp v. Reynolds* 20 Mich. 88; *Turner v. McCarty* 22 Mich. 265; *Halsted v. Francis* 31 Mich. 113; *Hicks v. McGarry* 38 Mich. 667; *Hunt v. Strew* 39 Mich. 371; *Ayres v. Gallup* 44 Mich. 13; *Hidden v. Chappel* 48 Mich. 527; *Van Buren v. St. Joseph &c.* 28 Mich. 404–5; *Clay Fire & Marine Ins. Co. v. Huron &c. Co.* 31 Mich. 355–6; *Hartford Ins. Co. v. Davenport* 37 Mich. 613; *Bates v. Equitable Ins. Co.* 10 Wall. 33; *Friemansdorf v. Watertown Ins. Co.* 1 Fed. Rep. 69; unless a policy contain the words "for whom it may concern," or equivalent expressions, indicative of a purpose to insure others, the rule is that if it insures the interest of one person only, no other person can show that it was also intended to cover his interest: *Finney v. Bedford &c. Co.* 8 Met. 348; *Graves v. Boston &c. Co.* 2 Cr. 419; *Dumas v. Jones* 4 Mass. 647; *Pearson v. Lord* 6 Mass. 81; *Turner v. Burrows* 5 Wend. 541; *Stackpole v. Arnold* 11 Mass. 27.

CAMPBELL, J. Plaintiff sued defendant on a marine policy upon the steamer Spartan, dated April 21, 1883, and running from May 1 to November 30, 1883, covering the usual risks on any of the Great Lakes and river St. Lawrence. The vessel was wrecked on Lake Superior on the 19th of June, and abandonment was made by plaintiff and accepted by defendant as for a total loss. Defendant took posession of the

wreck, and had the vessel repaired, at an expense of over 50 per cent.

The defense rested on the alleged ground that plaintiff was not insured, and could not sue on the policy. It was also claimed that no one was insured so as to create any legal obligation.

The form of the policy, as issued, was in the beginning that defendant by that policy of insurance "on account of Owen Sound Steamship Company,—loss, if any, payable to the Richelieu & Ontario Navigation Company," did make insurance on the property in question upon the terms specified. Nothing appears in any other part of the policy to show who was supposed to be insured, and no name of any one appears for any purpose except as quoted. The property insured is "the body, tackle, apparel and other furniture of the iron steamer called the 'Spartan,'" and it is provided that "the said vessel, tackle, apparel and other furniture are valued at fifty thousand dollars, without any further account to be given by the assured to the assurers, for the same." Provision was made as to the duties of both parties in case of damage, and for total abandonment in certain contingencies stated.

The circuit court for the county of Wayne, where the action was tried, took the case from the jury and ordered a verdict for defendant, and on the trial ruled out nearly all of plaintiff's evidence, most of which was undoubtedly admissible, if plaintiff could sue at all. We must therefore assume, what no doubt was the fact, that all the substantial rulings were made on the theory of an entire want of legal right. And a disposition of that question will dispose of the controversy hereafter, as there is no defense except on that theory.

In the spring of 1883 five Canadian gentlemen who desired to establish a line of steamers to navigate Lakes Superior and Huron, Georgian Bay, and adjacent waters, and to become incorporated for that purpose in accordance with the terms agreed on with plaintiff, obtained a charter for a term of years of the steamships Magnet and Spartan; and,

among other terms of the charter it was stipulated that the charterers should procure an incorporation with all convenient speed, and have a formal agreement and ratification executed by the incorporated company, and that during the entire term insurance should be kept up to the full value of the vessels, in companies to be approved by plaintiff, and in case of total loss the insurance money should replace the vessels, and the rent cease; while in case of partial loss, plaintiff should pay over the insurance to the charterers received under any or all of the policies, in which the loss was made payable to plaintiff; and the lessees were, except in case of total loss, bound to restore the property at the end of the lease, in good order.

An application was made in pursuance of this agreement by one of the charterers to Charles Perry of Toronto, who was endeavoring to get risks under an arrangement with Crosby & Dimick of Buffalo, general agents for defendant, there being reasons of economy which made it desirable to do the business outside of Canada, and save the necessity of compliance with the conditions imposed on such agencies. Perry himself made the applications to Crosby & Dimick who filled up and signed the policy and returned it to Perry who was to deliver it and look after the premium notes. The policy was delivered to or for plaintiff, immediately after its date. Perry, in making the application, as he testified, intended it to be for plaintiff. According to his view, as he swears, he was not holding a direct agency for defendant to act in Canada, as he would have been subject to a penalty for doing so without a license. But he was unquestionably acting in the employment and interest of defendant's general agents in Buffalo, and on their behalf in all that he did, and was paid his commissions and authorized by them to undertake risks.

The premium notes were not required or taken by Perry until June 21, 1883, which was two weeks after the incorporation of the charterers, and they were retained and paid at maturity to defendant. The loss was not known until a few days after these notes were given, and Perry at once

communicated with plaintiff, who gave notice in due time of the abandonment, which defendant accepted and acted on, as before stated, after defendant had taken proper steps to be represented on the survey.

On the 12th of May, 1883, Perry, acting apparently on his own motion, wrote to Crosby & Dimick, intimating his doubt concerning the regularity of the policy by reason of the charterers' having procured the insurance. On the 28th of May he wrote again, asking the issue of new policies, describing the various interests, to be made out to plaintiff, and stated he would return the old policies when he could get them back from Montreal, where plaintiff had its office. Crosby & Dimick replied the next day that it was unnecessary to write new policies, and that all necessary was an endorsement making them cover plaintiff's interest, which Perry was authorized to make and report. They also enclosed blank premium notes which they requested him to have filled out and returned. Perry, as before stated, obtained the notes, and all the other steps were taken, including the abandonment and acceptance, but he seems to have never called the attention of plaintiff to having the endorsements made, and this was not done.

We can see nothing in this policy which is inconsistent with its covering the interests as they actually stood, and while the proposed endorsement would have shown the precise condition of things on the policy itself, it was evidently not supposed by Crosby & Dimick that it would have changed the effect of the policy, or made a new one out of it. The Owen Sound Steamship Company, whose substantial identity was not destroyed by the incorporation, although formally merged in it, had undertaken such obligations to obtain insurance and to restore the property, as gave them a full insurable interest, whether any one else was mentioned or not. 2 Pars. Marit. Law 77, 78, and cases cited. There is no doubt of the common-law right of agents and bailees to insure under such circumstances for the full value of the property insured. *Waters v. Monarch L. & F. Ins. Co.* 34 E. L. & Eq. 116: 25 Law J. (Q. B.) 102; *Crowley v. Cohen* 3

B. & Ad. 478; 3 Kent's Com. 262. And the authorities are clear that where the party thus insured in his own name receives all the insurance money, he must account for it to the real parties in interest. Id.

The policy here is inconsistent with the idea that it was meant to cover anything less than the entire vessel. No one could contract with reference to a total abandonment on any other basis. And the only question really is whether under this policy plaintiff can sue directly in its own name.

Upon this we have no doubt. This policy contains an express promise to pay the money to the plaintiff. It contains no reservation that plaintiff shall be paid according to the amount of any interest which may be shown, or any partial amount. The promise is unconditional to pay the whole of it. It was understood by the defendant that the insurance was in fact made for plaintiff's benefit, and it was really so made. A payment to plaintiff would absolve defendant from any duty to the Owen Sound Steamship Company, if any such duty existed.

Under such circumstances we think the defendant entered into contract relations which plaintiff has a right to assert directly. The case is in all substantial features the counterpart of *Hopkins Manuf'g Co. v. Aurora F. & M. Ins. Co.* 48 Mich. 148, where the beneficiary named was held authorized to sue for the insurance money as the legal payee. As we have so decided ourselves, we need not discuss the decisions elsewhere which were cited to the same effect.

In our opinion, the court below should have directed a verdict for the plaintiff, whose right was not open to any controversy on the undisputed facts, without reference to what was shut out.

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

COOLEY, C. J. and SHERWOOD, J. concurred.

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JAS. W. SHELDON v. THOS. HOLMES, ABIRAM HOLMES ET AL.

Bill to vacate discharge of mortgage—Compound interest.

1. A bill to vacate the inadvertent discharge of a mortgage, and to foreclose it, was dismissed on appeal, where it appeared that seven years after the mortgage was discharged the mortgager had sold the land to his son whose good faith as a purchaser was not to be impeached by any presumption that his relationship gave him opportunities of knowing his father's financial condition, or by any such inadequacy of price as a sum from three-fifths to three-quarters of the value.

2. A party seeking to restore and foreclose a mortgage that has been discharged by mistake and without any fault of the mortgager cannot have it re-instated to secure any extortionate sum made up by semi-annual computations of compound interest, even where the mortgage discharged was made up in that way and had been given to take up a previous mortgage.

3. On dismissal of a foreclosure bill as against a subsequent bona-fide purchaser who has not made full payment, he may still be held for such sums as remain due after he has been notified of complainant's equities.

Appeal from Calhoun. (Hooker, J.) June 16–17.—September 29.

BILL to vacate discharge of mortgage and for foreclosure. Defendant Abiram Holmes appeals. Reversed.

A. M. Culver for complainant.

Edwin F. Uhl for defendant appellant. Compounding of interest is illegal: *Van Husan v. Kanouse* 13 Mich. 303; *Havens v. Jones* 45 Mich. 253; *Hoyle v. Page* 41 Mich. 533; equity may give relief where a mortgage has by accident been discharged: Story's Eq. Jur. §§ 117–120, 133–135, 137, 138; *Broughton v. Hutt* 3 DeG. & J. 501; *Bentley v. Mackay* 15 Beav. 12; but not as against a bona fide purchaser: Story's Eq. 139; Spence's Eq. Jur. 733; *Basset v. Nosworthy* 2 Lead. Cas. in Eq. 1; *Attorney General v. Wilkins* 17 Beav. 285; *Greenslade v. Dare* 20 Beav. 284; *Lane v. Jackson* 20 Beav. 535; *Colyer v. Finch* 5 H. L. Cas. 905–920; *Ogilvie v. Jeaffreson* 2 Giff. 353–379; *Carter v. Carter* 3 K. & J.

617; a clear and meritorious case must appear: *Shepard v. Shepard* 36 Mich. 173; *Tripp v. Hascig* 20 Mich. 254; parties are assumed to know the meaning and application of their voluntary acknowledgments when they are under no incapacity: *Morton v. Preston* 18 Mich. 60; *Sanger v. Dunn* — Wis. —; *Hunter v. Walters* L. R. 7 Ch. App. 75: 1 Eng. 437; *Adair v. Adair* 5 Mich. 204; *Rice v. Dwight Manufacturing Co.* 2 Cush. 80; *Moran v. McLarty* 75 N. Y. 25; *Wheaton v. Fay* 62 N. Y. 275–283; *Phillip v. Gallant* id. 256–263; *Holmes v. Hall* 8 Mich. 66; *Peake v. Thomas* 39 Mich. 584; *Johnson v. Van Velsor* 43 Mich. 208; *Baldwin v. Snowden* 11 Ohio St. 203; *Ins. Co. v. Nelson* 103 U. S. 544; *Russell v. Baptist Union* 73 Ill. 337; *Young v. Duvall* 109 U. S. 573; *White v. Smith* 37 Mich. 291–295; equity will protect from extortion: *Briggs v. Withey* 24 Mich. 144; *Messmore v. Huggard* 46 Mich. 564; *McCredie v. Buxton* 31 Mich. 383; *Millard v. Truax* 50 Mich. 343; *Louder v. Burch* 47 Mich. 109; *Butler v. Duncan* id. 94; *Headley v. Hackley* 50 Mich. 43; *Fox v. Holcomb* 32 Mich. 496.

Cooley, C. J. This is a suit in equity. The purpose of the suit is to obtain a decree vacating a discharge of mortgage which was entered upon the record by inadvertence or error, and also a foreclosure of the mortgage as against a party to whom the mortgagor had conveyed the land after the discharge had been entered, but with notice, as the bill avers, that the mortgage had not been paid.

The facts, as they are disclosed by the evidence, we find to be the following:

Thomas Holmes, the mortgagor, borrowed of complainant on May 29, 1860, the sum of fourteen hundred dollars, and gave him a mortgage in consideration thereof for the sum of fifteen hundred dollars, payable in five years from that date, with interest at the rate of ten per cent. per annum, payable semi-annually. In the spring of 1870 the whole principal sum of this mortgage remained unpaid, and also the interest except about a hundred and seventy dollars which had been paid at different times, and complainant began foreclosure. The matter was however arranged between the parties by the mortgagor giving to complainant a new mortgage for the sum of three thousand seven hundred

dollars, which is the mortgage now in suit. The sum was made up by compounding the interest at ten per cent., semi-annually, and adding thereto certain items of costs, expenses, etc., amounting to $253.62. There was no authority of law for thus compounding the interest, and the amount was increased more than a thousand dollars thereby. There is reason to believe, also, that the items of costs and expenses which were charged were extravagant; but no legal duress is shown or claimed, and we shall enter here upon no inquiry whether the mortgagor could have made defense to any part of the mortgage. It is not to be supposed, however, that such a mortgage would have been given except under the pressure of some great necessity.

On November 25, 1872, the mortgagee went to the office of the register of deeds, where the mortgage was recorded, and in his presence entered on the margin of the record a full discharge of the mortgage. Up to that time only two hundred dollars had been paid upon it, and nobody is able to make any explanation how this discharge came to be made. It is suggested that it was made by mistake when the discharge of a different mortgage was intended, but no evidence is given to that effect, and the discharge therefore remains unexplained and unaccountable. The mortgagor was not aware of it for two years or more thereafter, and when it came to his knowledge, he said nothing about it, but made further payments, the whole, up to March 3, 1877, amounting to $943.39. It seems evident that up to that time the mortgagor had formed no purpose to take advantage of the inadvertent or erroneous discharge.

On March 14, 1879, however, the mortgagor with his wife executed to his son Abiram Holmes, then resident in Chicago, a warranty deed of the land mortgaged, for the nominal consideration of six thousand dollars, receiving, as the parties to the transaction claimed, one thousand five hundred dollars in cash and prior indebtedness, and taking back from the grantee a mortgage of four thousand five hundred dollars. There were circumstances attending this trade indicating great haste, and it is not disputed now that Thomas Holmes

had a purpose to take advantage of the discharge and get rid of paying the mortgage. This he justified to himself by the extortion which the complainant had practiced upon him in taking the mortgage, and in the terms exacted. When the papers were presented for record the register of deeds suspected something wrong and immediately notified complainant, who lost no time in instituting this suit.

The chief contention in the suit was over the question whether Abiram Holmes was aware, when he took the deed from his father, that the mortgage had not been paid, and must have been discharged by inadvertence. The circuit judge found that he was, and gave decree of foreclosure for $9080.19, and charged the defendants Thomas and Abiram Holmes personally with all costs. Abiram Holmes alone appealed.

There is no direct evidence that Abiram Holmes was aware, when he received the deed from his father, that his father was not in justice and equity entitled to make a conveyance free of liens. The indirect evidence, however, is strongly relied upon, and is thought to be conclusive.

First, it is said there was gross inadequacy in the price which Abiram Holmes was to pay for the land. Complainant produced a number of witnesses whose testimony went to show that the land was worth from $8000 to $10,000, whereas Abiram Holmes was to pay but $6000. A consideration of all the evidence does not, however, make out such a case of gross inadequacy as would be evidence of fraudulent purpose; and in a transaction between father and son, especially when the father was considerably advanced in years, as was the case here, and was expected to remain upon the land, as also appears, the fact of low selling price would scarcely excite remark, unless it appeared that some other party might be wronged thereby. But in this case the question in dispute is whether the son knew that any other person was in position to be wronged thereby; and it cannot well be claimed that the mere fact that his father was willing to sell to him at a low price would charge him with notice of an intended fraud. On the contrary, he had a right

to suppose his father's purposes were honest, and that if the father made any concessions in the matter of price, he did so from proper motives. Large farms are not readily sold at the value the owners and their neighbors place upon them, and when one finds a purchaser in his own family he is more likely to accept a low price than if he were to sell to a stranger, and [is] quite justifiable in doing so. And probably the price Abiram was to pay in this case was as large as at a forced sale could have been realized.

Then it is mentioned as a suspicious circumstance that Abiram Holmes procured an abstract of the title to the land, which showed this mortgage to have been discharged. This is charged to have been done for appearances merely and in order that he might be able to make a showing that he was relying upon a clear record. And why, it is asked, should the son, when dealing with his father, go to the record to ascertain what the title was, when presumptively the father would have truthfully told him its exact state? This is a pertinent question, but Abiram Holmes, if he was honest in the transaction, could easily make sufficient answer to it; it is only when we assume that he was dishonest in taking the deed that the procuring of an abstract becomes a suspicious circumstance. Lands, as every lawyer in Michigan knows, were at an early day bought and sold very carelessly, and with little investigation of title; and it often happened after many years' possession and cultivation that a party found to his astonishment that he had no title to land he had bought and long occupied. Experience and observation inculcated prudence; and the reasons for being particular to know what was shown by the record applied as well when one was dealing with his father as when buying of a stranger. There would be a lack of common business caution if he were not thus particular; and common business caution can never, by itself, afford ground of suspicion. Much less can it be proof of intended fraud.

It is further said that for many years Thomas Holmes had been an unthrifty man, and Abiram Holmes had had no reason for believing that he had paid off the mortgage in

question; that it is morally certain, in fact, that he must have known his father had never been able to pay it. The argument drawn from this is that when he found by the abstract from the records that the mortgage appeared to be discharged, he was bound to infer, even if his father had not told him, that a discharge of the mortgage had from some cause been entered without payment and under circumstances which still left the mortgage in force. To strengthen the argument on this branch of the case complainant produced evidence tending to show that Thomas Holmes had for many years been tardy in meeting his obligations for farm and family expenses, and that in 1870 when Abiram went out into the world to act and operate in his own behalf, his father, as he subsequently informed a witness, "told Abiram he had better go if he wanted ever to do anything for himself: to start out now: 'Start out for yourself,' says he; 'I aint in a situation to do anything for you: I can't help you to a dollar, and you will have to start out: you might just as well go now as at any time and begin for yourself.'"

There is nothing in all this that brings home to Abiram a knowledge that his father in 1879 had an unpaid mortgage on his farm, or that fairly charges him with notice that such was probably the case. At most it would only apprise him that his father did not feel that, in addition to supporting his family and meeting his own obligations, he could spare anything to aid his son in getting started in the world. But the son, if he knew of the mortgage, might well refer this inability to the necessity he felt of paying it off. He might well agree with the father that such payment would be the father's first duty. And we find nothing in this record which fairly tends to show that when Abiram Holmes found the mortgage discharged of record, he was notified, either directly or by the circumstances, that the discharge was not made in consideration of payment, as it professed to be.

On the argument much stress was laid on the relationship between Thomas and Abiram, as raising a probability that the latter was fully apprised of his father's embarrassments. But if the relationship were to be accepted as the basis for a

legal presumption that a father laboring under pecuniary embarrassments would explain them to his children and keep them posted in respect to such embarrassments, such legal presumption would do violence to the facts in a great many cases, and would often result in gross injustice. It is matter of common observation in the settlement of estates of deceased persons that the members of the family are surprised at the discovery of demands, liens and embarrassments of which they had before no knowledge and no suspicion. While a person in easy circumstances may delight to have his family understand and enjoy his prosperity in his life-time, and may therefore keep them fully informed concerning it, the man who is embarrassed is found very often to shrink from disclosure, even to his wife, and his own family may be more ignorant respecting his embarrassments than the community in general. And for all that appears this may have been the case with Thomas Holmes.

But if we assume that Abiram Holmes knew of the origin and early history of the indebtedness to complainant, the assumption will fall far short of making out the necessary support to the complainant's case. He would then have known that his father, the owner of a good farm worth five or six thousand dollars, contracted in 1860 an obligation to pay $1500, with seventy-five dollars every six months as interest thereon. This was not a very serious burden, and the son might well suppose the father without difficulty would keep the interest paid. He would know that the amount, even if the interest remained unpaid, could not in ten years be increased to $3700, or even to near that sum by any process which could be justified to the conscience; and when in 1879 he saw by the abstract that there had been a mortgage of $3700 on the land which was also discharged, there was nothing in the circumstances, as they are brought before us in this case, to charge him with knowledge or notice that so large a debt as $3700 had existed at the date of the mortgage. It did not exist in fact, as we have seen; and when Abiram Holmes found the mortgage discharged of record, he was no more called upon to indulge in conjecture

how the discharge came to be made than he was to pry into the reasons for so large a mortgage having been given. He was no more bound to infer mistake in the discharge than extortion and oppression in obtaining the mortgage; it was enough for him, if he proposed to buy, that the party who had taken a mortgage for more than was due him had discharged it; and the reason for the large mortgage and the reason for the discharge were alike immaterial. He had a right, however, to suppose that complainant was a fair man and would demand nothing but what was justly his due; and if he surmised that the parties for some unexplained reason of their own had given and taken a mortgage for an excessive amount but without any understanding or expectation that more should be paid than was justly owing, the surmise would not have been unnatural or unreasonable. He was certainly not bound to assume or suspect that complainant had taken advantage of his father's necessities to oppress him so grossly as was intended.

Complainant in this case had the burden of proving notice to Abiram Holmes not only that there was once a mortgage, but that it was still in existence. The prima facie case was all against him. The mortgage, by his voluntary act, was discharged of record. The mortgagor, even if unthrifty, might well have been supposed able to pay off the original indebtedness, and Abiram Holmes is not proved to have known of any other. The mere fact, therefore, of Abiram Holmes acting upon the proof of payment which the discharge would afford, and which of itself was of the very highest nature, is not suspicious. The fact that Thomas Holmes intended to take advantage of the discharge to cut off the mortgage is not proof that he disclosed the design to his son: on the contrary he would naturally be careful to conceal it, lest by the disclosure the design might be defeated. Complainant attaches importance to the testimony of one Sheridan who had been in the same employment with Abiram Holmes and is supposed to have obtained damaging admissions. According to his statement, Sheridan was a stranger to complainant, but was applied to a year before he gave his testimony, to

ascertain if he knew any facts favorable to complainant. But as he states it, it is plain he was expected to obtain admissions if possible. Complainant subsequently addressed him a letter, and he made this letter the pretext for making inquiries. Abiram, according to the witness, replied that "Mr. Sheldon was a regular old rascal, and made his money by swindling poor people out of it: he said we had him just where we wanted him." Confessions said to have been obtained in this way, especially pending litigation, are utterly unreliable, and are entitled to little or no consideration. It is not at all probable that Abiram Holmes, in response to an inquiry by one who apprised him at the time that he was in correspondence with the antagonist in a pending litigation, would make an admission which could be used by that antagonist as evidence. The very question, as the witness states it, would put him on his guard. But the response, if made as stated, has little significance. Abiram testifies positively that he had no knowledge of the discharge of the mortgage having been erroneous or inadvertent when he took his deed; and if he discovered all the facts afterwards, he would forfeit no rights by expressing, even in the strongest terms, his gratification that the extortion of complainant had through a blunder been defeated.

We find, therefore, that complainant has not made the necessary showing of notice in Abiram Holmes. The decree should therefore be reversed. It may be proper to add, however, that even if notice were proved, the decree ought not to stand. Complainant has come into a court of equity to obtain relief against the consequences of his own blunder for which none of the defendants was in any way responsible. When the bill was filed Abiram Holmes had done nothing which he was not legally and equitably entitled to do. He had simply taken a deed and given back a mortgage; and this he had a lawful right to do even if the mortgage of complainant was still a valid lien on the land. Complainant had no right, on the facts as they then stood, to put Abiram Holmes to the cost of correcting complainant's own error by suit in equity, but he should have taken some step

which put Abiram distinctly in the wrong before the latter could be chargeable with costs. But complainant was bound to do more than this: when he sought equity he was bound to do equity. If it was equitable to restore his mortgage, it was not equitable to do so for more than was justly due. In so far as he had obtained an unconscionable advantage, he should have been compelled, as a condition to relief, to accept the restoration of the mortgage with that advantage surrendered. The decree for more than nine thousand dollars, made up as it has been, is shocking to any just sense of equity. It is not enough for complainant to say the mortgagor consented to give the mortgage in question: that mortgage is discharged, and the parties do not consent to its restoration. Under such circumstances complainant invokes the aid of equity, and appeals to the conscience. To give him more than the original sum loaned, with interest computed thereon according to law, would not be equity and would not be sanctioned by an enlightened conscience.

The Court, however, is inclined to hold that as to any sums still owing by Abiram Holmes on his purchase at the time when, after making such purchase, he was notified of complainant's equities, said Holmes is not entitled to protection, and that complainant to that extent is entitled to foreclose his mortgage. This will give the defendant Abiram Holmes all the protection that is required by any rule of justice, and does not increase his liability, but only appropriates his subsequent payments to the party equitably entitled.

The decree must be reversed, with costs of this Court, and the cause remanded for further proceedings. A reference to determine the payments made by Abiram Holmes will probably be essential.

The other Justices concurred.

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WILLIAM HUDSON v. ERNEST FEIGE.

Log-driving—Hearsay—Refusal to fulfill—Depositions—Striking out name of party—Loss from failure to perform.

1. In an action on an assigned claim for log-driving, plaintiff sought to show by defendant's agent that while the drive was in progress the driver had tried to take in the rear; but it appeared that all the witness knew about it was what one of the driver's workmen had told him. Plaintiff moved to strike out the testimony as hearsay. *Held*, that it was objectionable in the light of an instruction that the driver should have had a chance to go back and take in the rear after the logs were taken out.

2. When one party to a contract has refused to take farther steps in its execution the other need not wait for him to do so, especially if the subject-matter of it is spoiling in consequence of the delay.

3. Depositions lawfully taken and filed in an original suit may be used on appeal. How. Stat. § 7472.

4. Striking out the name of a co-plaintiff is within the Statute of Amendments (How. Stat. § 7636), if it appears to be improperly in the declaration.

5. In an action for services in driving logs the question whether such logs were to be driven as could only be supported by floats is for the jury in view of the circumstances under which the contract was made. It is also for the jury to say whether they could have been run with extra exertion, or run the next year, and when the defendant should have exerted himself to prevent as much damage as possible. And a charge assuming that defendant was entitled to no allowances for losses in these particulars is misleading.

6. Defendant in an action on a contract is entitled to be allowed all the expense he has incurred and loss he has suffered from plaintiff's violation of his contract, so far as he can prove them.

Error to Saginaw. (Gage, J.) June 17.—Sept. 29.

ASSUMPSIT. Defendant brings error. Reversed.

Sweet & Flanders for appellant.

Trask, Grout & Smith for appellee.

SHERWOOD, J. In 1882 and 1883 the defendant, by one Brazee, acting as his agent, purchased a lot of hard-wood logs in the vicinity of Chippewa river, amounting, according to the scale-bills, to 277,470 feet. The defendant claims of this amount 196,480 feet was put into the river by him in 1882, and in 1883, 80,990 feet. The logs put in the stream each year were marked differently. The defendant, by his agent, in the spring of 1882 contracted with one Curry (who was in the employ of the firm of Whitney & Remick) to run the logs purchased in 1882 from where the defendants put the same afloat in said river to the boom limits of the Tittabawassee Boom Company on said stream. The defendant, by his agent, also in like manner contracted with the plaintiff to run the logs put in in 1883 to the boom limits. For the driving of all these logs the defendant was to pay twenty cents per thousand feet. The plaintiff claims for driving 289,760 feet put in the river in 1882, being mostly driven by Curry for Whitney & Remick, and the claim therefor assigned to plaintiff also for driving 68,581 feet of the amount put in in 1883. The defendant, by way of defense, claims that the logs were not all driven in either year by either Curry or Hudson; that many of them were allowed to sink for want of the necessary floats and other usual means to prevent it; that very many of the logs were left back, having floated out upon the banks of the river, where they were left; that Curry abandoned the drive in June, 1882, and would not go back and take in the rear, and that the defendant suffered much in the loss of his logs thus allowed to sink, and in being obliged to look after the rear, and for moneys laid out and expended in having the logs sawed along the line of the river in consequence of low water, and in transporting the lumber to the point where the logs were to have been driven; also that many of the logs were entirely lost to him, in all amounting to more than the plaintiff's claim; and that plaintiff was not entitled to recover any sum whatever. Defendant also claims that the plaintiff was to have extra price for driving these logs, double the price for driving pine, and that he should have taken the pains neces-

sary to keep the logs afloat; that by the terms of the contract made with plaintiff and with Curry, the plaintiff was to drive the logs put afloat by the defendant in the river, and was "to drive them clean." The plaintiff, however, contended that they were to drive those only that would float. The case was tried by jury, and judgment rendered for the plaintiff, and defendant brings error.

It appears from the record that in the month of June, 1882, after Curry had gone down the river with the logs, he refused to go back and take in the rear. This was said to Mr. Brazee, the agent of the defendant, and after this the defendant took charge of the logs in the rear as well as he could. Brazee was called as a witness by the plaintiff, and he attempted to show by him that Curry made an effort to get the logs in the rear in, while the drive was in progress, and it appears all that he knew about it was what he had been told by one Dan Hoe, an employee of Curry. Counsel for defendant moved to strike out this testimony on the ground that it was hearsay. I think this piece of testimony, taken in connection with the following charge of the court, was objectionable, viz.: "Feige might take his logs out at Mt. Pleasant if he saw fit to do so, yet he could not charge Curry or Hudson for taking the logs out at Mt. Pleasant, if the time had not arrived for Curry to go back and take in his rear. After they were taken in at Mt. Pleasant the parties could have gone back on the river and taken in the rear of the logs. Curry ought to have had that opportunity to do so." Mt. Pleasant was the place where the defendant procured his sawing done after he took charge of the logs and brought in the rear. The court having overruled the objection to the testimony offered, substantially said to the jury Feige had no claim to be allowed him in any of the items he presented. This was clearly erroneous under the circumstances detailed in the record. After the plaintiff had neglected to drive the logs, or any part thereof, and informed the defendant's agent he should not do so, it was entirely unnecessary for defendant to wait longer for plaintiff to perform his contract, and particularly was this the case when

logs were being ruined and made worthless by longer detention.

The deposition of witness Curry was properly admitted under the facts detailed, and the amendment of the declaration, by striking the name of Robert Louden therefrom, was clearly within the Statute of Amendments, and the defendant could not be in anywise prejudiced thereby. How. Stat. § 7636. Whether the plaintiff was to run the logs which would not float except as supported by floats or other means, was a question for the jury to ascertain in the light of all the circumstances surrounding the making of the contract, and was a proper matter to be left to their determination. I do not think that part of the charge embraced in the seventeenth assignment of error should have been given. Whether it was made to appear or not that the logs might have been run the succeeding year, or, with extra exertions, in the year the plaintiff and Curry attempted to run them, were questions for the jury; and at what time the defendant should have exerted himself to rescue the logs and get them to some place where the least injury and damage would be sustained, and the least amount of expense would be incurred, would depend upon a variety of circumstances, involving the condition of the logs, the height of the water, and the situation of other drives in the stream; and the legitimate expense incurred in accomplishing what the plaintiff had contracted to do, at the most favorable time and under the most favorable circumstances, after the plaintiff had refused to go back after the logs, might far exceed those in the charge of the court stated, referred to, and to that extent the charge was misleading. The defendant was entitled to be allowed for all the expenses and injury he had incurred and received from the alleged violation of the plaintiff's contract, to the extent he could prove them. No other errors appear in the record requiring discussion; but, on account of those noticed.

The judgment must be reversed and a new trial granted.

COOLEY, C. J. and CAMPBELL, J. concurred.

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In the Matter of Freeman McClintock's Estate.

Gilman J. McClintock's Appeal.

Wills—Advancements—Exclusion of evidence.

1. A testator's certificate that he has advanced to an heir a specified sum over and above all set-offs to date, is not admissible in evidence that such an advancement was made. But if the payment is otherwise proved, the certificate is admissible to show testator's purpose to treat it as an advancement.
2. The effect of a will cannot be altered by any unattested writing.
3. A mere recital of the amount left after striking balances is hardly admissible as evidence of money advances previously made.
4. Heirs can testify as to advancements in a proceeding to determine their rights as distributees under a will, and are not excluded as adversely interested to the representative of the testator's estate.
5. Advancements in a proceeding to determine the rights of legatees, are not to be treated as debts, but as gifts to apply as legacies.
6. Circumstantial evidence is proper in determining whether advancements were made under a will; the omission of a precise man to enter a charge against his estate can be shown for what it is worth.
7. No one legatee is estopped by a finding that has been set aside on the appeal of only one in a proceeding to determine the rights of all of them upon the distribution under the will.
8. Costs may be paid out of the estate where a finding as to the distribution under a will has been set aside on the appeal of one of the legatees.

Error to Shiawassee. (Newton, J.) June 17.—Sept. 29.

Appeal from probate. Claimant appeals. Reversed.

Gilbert R. Lyon for appellant. The law presumes that when a will is made all prior advancements are considered merged, and the testator must be deemed to have graduated the amount of his legacy with reference to prior advances: *In re Peacock's Estate* L. R. 14 Eq. 236; *Taylor v. Cartwright* 41 L. J. Ch. 529; L. R. 14 Eq. 167; *Jones v. Richardson* 5 Met. 250; *Langdon v. Astors* 16 N. Y. 9; *Van Houten v. Post* 33 N. J. Eq. 346; an advancement depends

on the intent, at the time of the gift or conveyance, and cannot be afterwards altered: *Meeker v. Meeker* 16 Conn. 387; *Sherwood v. Smith* 23 Conn. 519; the fact of payment must be proved by other testimony than the parol declarations of the testator: *Fawkner v. Watts* 1 Atk. 407; *Batton v. Allen* 1 Halst. Ch. 99; 2 Wms. Exrs. 1444; *Sims v. Sims* 10 N. J. Eq. 153; the payment may be disproved by the heir to whom it was to be made: *Hoak v. Hoak* 5 Watts 80; *Musselman's Estate*, id. 9.

Wm. M. Kilpatrick for appellee.

CAMPBELL, J. The proceeding appealed from is one to ascertain the rights of parties interested in Freeman McClintock's estate, in order to have a distribution. The matter was brought before the probate court of Shiawassee county, under How. Stat. § 5978, whereby it is provided that all questions of advancement may be heard and determined by the probate court, and shall be specified in the decree assigning the estate. As all parties have assumed that the inquiry can be properly made now, and there is no want of jurisdiction, there is no objection to the course taken. The controversy below and here is confined to the questions relating to a claim that appellant's share of his father's estate has been used up by advances.

In his will, which was made June 13, 1881, decedent, after some specific bequests, made a general residuary bequest to his children therein named, in equal shares. To this, among other things, he attached a proviso "that in case I shall in my life-time advance and pay to any of my children, either son or daughter, any sum or sums of money for his, her or their advancement or benefit in the world, or otherwise, and shall signify the same in writing under my hand, then, if any such sum or sums shall be equal to the share or shares of such child or children, respectively, by me hereby devised and bequeathed for their respective benefit, such sum or sums so paid or advanced shall in that case be accounted in full satisfaction of the share or shares of said child or children respectively in my said estate." Further provision was made for advances less than the whole share, to be properly appor-

tioned on the same principle. The will was probated in April, 1882.

On July 15, 1881, the testator made in writing and signed a paper consisting of a series of certificates of similar form, and each referring to different heirs, which, after referring to the clause in the will touching advancements, recited certain advancements. The one naming appellant was as follows, after the preamble mentioned: "Now, therefore, this is to certify that I have advanced to Gilman J. McClintock the sum of one thousand five hundred and thirty dollars ($1530) over and above all claims and demands or set-off of every kind and nature to this date, July 15th, 1881."

This paper was offered in evidence, not only to show the intention of deceased to regard any moneys given appellant as advancements, but also to show that such advances were actually made to the extent claimed. The court below shut out the testimony offered to show that no such advances were made, and directed a verdict against the claim of appellant.

We have no doubt that if the amount stated in this paper was actually advanced to appellant, the writing was proper to show decedent's purpose to treat it as an advancement. It complies with the method suggested in the will, and while not strictly within the terms of the statute concerning advancements, is within its equity as evidence of intention. But whether it is evidence that advances were actually made is a different question.

The will does not reserve power to destroy the effect of a legacy by any mere writing or entry. If that were its object, and if it could be carried out, a will might be altered by a writing not attested, and this would be in violation of the Statute of Wills, which requires the same formalities as on an original execution. This is very fully explained in *Langdon v. Astor's Exrs* 16 N. Y. 9, where the fact of the advancement of money was held to be the only fact which could operate on the legacy, and the written statement was only held admissible as showing with what intent that act was done. The payment may be proved by any legal evidence, like any other payment.

There is nothing in this instrument which declares when or how this alleged advancement was made. It is not recited to have been made at that date, or to have been made in one sum, and if we look at the other items, all of which form part of this same paper, it appears that such was not probably the case. They all read more like some striking of balances than the record of any present dealing. We have found no authority for holding that a person can make evidence of a money advance to another person by any such recital. Where account-books are received in evidence, as they may be in some cases, it is only where the entries are apparently made of items as they arise, and as contemporaneous res gestæ. But an entry not of particular payments or advances, nor even of any aggregate, but of what remains due as a balance after allowing set-offs and counter-claims, does not come within any rule of evidence that we have discovered. It furnishes no means to determine when or how it was made up, or what items were allowed on debit and credit. The authorities cited do not allow every claim or debt to stand as an advancement by itself, and they do not prevent the whole facts from being investigated. This will makes no direct reference to deducting past advancements, and we need not consider, because there are no means of knowing, what effect they may have if certified. But an ex post facto certification of an aggregate balance cannot prove the fact, whatever it may show as to the intent.

A question was made whether the various heirs are competent witnesses in this proceeding. In our opinion this is not a proceeding in which the estate is on one side and appellant on the other, as it must be in order to require exclusion under How. Stat. § 7545. If there are any parties in opposition each legatee is opposed to every other legatee, but it can make no difference to the executor, as such, into whose hands the assets fall. It is rather analogous to a suit in partition than an adverse proceeding against the representative of the estate, who, among these parties, is a mere stakeholder. We see no reason why they may not all be allowed or compelled, as the case may be, to testify concerning the advances,

which are not treated as debts, but on the contrary as gifts to apply on legacies.

Neither do we think that circumstantial evidence is improper as bearing on the probabilities. Such testimony is often admissible and very important on questions of fraud and insolvency. While a failure to enter a charge is not conclusive that no such charge exists, yet it is not without some weight where a man is shown to be usually precise and punctilious in his entries. It is also possible for a man to have money and yet appear poor, but failure to have it where it can be heard of, and to enter it where cash is generally entered by the same person, is a circumstance receivable for what it is worth.

We think the case was improperly dealt with in the rulings on the hearing, and that it should be reheard. As it is an entire controversy as to the distribution, we do not think that the case of any of the legatees should be estopped by the finding which is now set aside. Appellant should have his costs out of the fund.

The order will be reversed and case remanded for rehearing accordingly.

COOLEY, C. J. and SHERWOOD, J. concurred.

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AUGUSTA MERKLE v. TOWNSHIP OF BENNINGTON.

Townships—Injury from defective bridge—Statements as res gestæ—Responsiveness.

1. How. Stat. §§ 3313-14 giving a right of action for a fatal injury, though in derogation of the common law is a remedial statute and establishes a general rule which applies as well to townships as to other defendants, even though at the time of its adoption townships were not liable for such injuries but became so afterwards

2. An injured person's statement to his physician as to the cause and circumstances of his injury is not admissible as res gestæ if not made until time enough has passed for him to be removed and to get the

doctor. So *held* in an action against a township for fatal injury caused by a defective bridge.

3. The objection that an answer is not responsive is for the party who asks the question to make; he can accept it if he chooses.

4. In an action against a township for an injury caused by a warped plank in a bridge a witness who testified that he had crossed the bridge a month before the accident was asked, "Did you notice the planking?" and answered, "When I went across it was all right." *Held*, that the answer was not fairly open to the objection that it was irresponsive, or an expression of opinion.

5. An answer is not necessarily to be stricken out for uncertainty or ambiguity, but its meaning should be reached by further inquiry.

6. In an action for injury to a person crossing a defective bridge with a team it was error to charge that the fright of the team was no defense *unless the jury found it was caused by something else than the defect*, for that places the burden upon the defense of proving that it was something else; while in fact it was the plaintiff's duty to establish his own case and show the affirmative fact, if it existed, that the defect caused the fright.

Error to Shiawassee. (Newton, J.) June 17.—Sept. 29.

CASE. Defendant brings error. Reversed.

S. F. Smith and *Wm. M. Kilpatrick* for appellant.

Hugh McCurdy and *Gilbert R. Lyon* for appellee.

COOLEY, C. J. The action in this case was instituted to recover damages for the death of the plaintiff's intestate, caused, as is claimed, by a bridge being out of repair on a highway in the defendant township. It was brought under the statute of 1848 (Sess. L. p. 31), as amended in 1873 (Pub. Acts p. 127; How. Stat. §§ 8313, 8314), which is a general statute, and in its first section provides that "Whenever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would (if death had not ensued) have entitled the party injured to maintain an action, and recover damages, in respect thereof, then and in every such case, the person who, or the corporation which would have been liable, if death had not ensued, shall be liable to an action for damages, notwith-

standing the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony." The plaintiff recovered judgment in the court below, and the defendant alleges error.

One error assigned goes to the whole ground of action. The action for causing death by wrongful act, etc., is purely statutory, there being none at the common law, and the defense contend that the statute of 1848, upon which the suit is based, has no application to cases of this nature. When that act was passed townships were not liable for injuries occurring in consequence of defects in their bridges: that liability was created by subsequent statutes. *Commissioners v. Martin* 4 Mich. 557; *Leoni v. Taylor* 20 Mich. 148; *Medina v. Perkins* 48 Mich. 67. Under the subsequent statutes the person injured may recover damages, but it is not expressly provided that his representative may recover in case of his death. His representative can therefore recover, if at all, only through the application to the case of the statute of 1848. But this, it is said, can only be done by very liberal construction of that statute, which, being in derogation of the common law, is to be strictly rather than liberally construed. Such is the argument.

But the statute of 1848 is in the strictest sense a remedial statute, and as such it should receive not a strict, but a favorable construction. It was passed to remedy a great defect in the law, whereby, through the very severity of the injury which a party's negligence or misbehavior had caused, he in many cases escaped responsibility altogether, though these were exactly the cases in which he ought with most certainty to be held chargeable. But a liberal construction of the statute is not necessary to make it applicable in these cases, for we have only to apply it according to its plain language and intent, and it reaches them beyond question. It is general, and applies "whenever" a death has been caused under circumstances which would have given a cause of action had the person survived. It was not made for cases which might arise under the law as it then was, but it was enacted to establish a general and very wholesome rule, as applicable to

causes of action that might arise under subsequent remedial statutes as to those arising under the common law or under statutes then existing. The trial judge was right in overruling this defense.

In making out her cause of action the plaintiff called Anna Merkle as a witness, who testified that she was then—December, 1884—sixteen years of age; that on July 5, 1881, she went with her father, the intestate, to Owosso in a lumber wagon with two horses after a grist; that the road led across the bridge over the Maple river in Bennington; that in crossing that bridge the witness noticed the planks being broken and movable, and that they rattled when the horses went over them; one plank was warped and lifted up on the west side of the bridge. The horses were a gentle team and went over safely. It was in returning that the injury occurred, and the witness described it as follows: The horses "walked onto the bridge and walked up to the plank; they stepped onto the plank with their front feet, and the nigh horse noticed something wrong, and he turned his head to the right and stepped onto it with his back feet and got caught, and he made one jerk and pushed the wagon sideways, and he went off sideways, and I heard something crack and fall onto the bridge. The tongue fell onto the bridge, and after that fell the wagon turned towards the west and ran down the bank and then turned right upside down. I jumped out into the road just before the wagon turned over. The tongue was down at that time and the horses were trying to get loose from the wagon, and they did get loose from the wagon and ran away. Nothing was broken about the wagon. I noticed before I went home that the whiffletree on the nigh side was broken. I ran across the bridge for help, but did not stay to look at it. I noticed then that the plank was turned over and another one laid across. The plank was on the west side of the bridge, running right across, and another one turned towards the north, so it was out of place then. My father fell onto a pile of stones, and was injured very badly, and was not able to walk." He died some four weeks after the injury.

The plaintiff also produced William Hume as a witness, who testified that on July 5, 1881, he was called as a physician to see Mr. Merkle at Mrs. Cook's house, twenty or thirty rods from the bridge; that he found him in quite a good deal of agony, and on examination found that he had received a severe injury to the back and in the region of the kidneys. Witness made up his mind then that Merkle was seriously injured internally and would probably not recover. He asked Merkle to narrate "how the accident occurred, and he said that when he was driving over the bridge, as the horses got upon the plank, he said it was bowing, that both ends had over the end a 2x4 scantling that laid along the edge to hold the plank down. He said, as the right horse stepped upon that plank, the other end flew up—or the off horse—and scared one of the horses and he jumped, and as he jumped he made a severe lunge and the plank raised up under him and the whiffletree broke and the tongue came down, so it just struck the last plank on the bridge and that threw the tongue to the right and the horses ran and the tongue ran into the ground and he was thrown on a pile of stones and he didn't know anything more until he found himself in Mrs. Cook's."

This evidence was received under exception by the defense, and its reception is one of the errors now relied upon. For the plaintiff it is claimed that these statements of the intestate were admissible as part of the res gestæ, and several cases are referred to as authority.

One of these cases is *Insurance Co. v. Mosley* 8 Wall. 397. In that case the question at issue was whether the decedent had died in consequence of an accidental falling down stairs in the night. His widow was permitted to testify that he got up in the night and went down stairs; that when he came back he said he had fallen down the back stairs and almost killed himself; that he had hit and hurt the back of his head in falling, and he complained of his head and appeared faint and vomited. She was up with him all night, and he appeared in great pain. These declarations were held to be properly thus proved, on the ground that they were of

the nature of res gestæ, and substantially contemporaneous with the main fact in issue.

Jordan v. Commonwealth 25 Grat. 943, is another of the cases relied upon. There the question was one of identity of parties who had robbed a woman. The prosecution was allowed to prove that within a few minutes of the robbery the woman gave a description of the robbers to the witness, and that the latter pursued after the parties and caught the respondent, who corresponded to the description which had been given to him of one of the robbers. It was very properly held that what the woman thus promptly said was part of the res gestæ. Similar to this in the promptitude with which the declarations followed the criminal act is *People v. Vernon* 35 Cal. 49, where they were also held admissible. *Burns v. State* 61 Ga. 192, is to the same effect, but it appears to have been decided upon a section of the Code.

In the case of *Waldele v. Railroad Co.* 29 Hun 35, the time which had elapsed after an alleged injury by a railroad train was twenty or twenty-five minutes, and a witness was permitted to testify that the party told him he got hit; that there was a long train, and he stood waiting for it to go, and an engine followed and struck him. This case may be considered authority for admitting the declarations of Merkle that his injury had come from an accident at the bridge, but it scarcely goes further.

reversed in 95 N.Y. 274 (1884)

The cases of *Driscoll v. People* 47 Mich. 415; *Stewart v. Brown* 48 Mich. 383; *People v. Simpson* 48 Mich. 474; and *Brownell v. Railroad Co.* 47 Mo. 239, are scarcely relevant to this. They were well decided, whether this case should be ruled one way or the other.

In this case the point chiefly in dispute was whether at the time the bridge was out of repair. There was strong evidence both ways, and it was very important to the plaintiff that she should corroborate as much as possible the evidence of the young daughter. It was for this purpose rather than to show the general fact of injury and the time and place, that the declarations of Merkle were important. But these declarations were not made on the spot and spontaneously;

they were not strictly or even substantially contemporaneous; but they were made after he had been taken to Mrs. Cook's and a physician had been sent for and procured. They were then made as a narrative of a past event. One very good reason for excluding such narratives is that the party has had time to deliberate and shape them in his own interest, and may be under strong temptation to do so. They are therefore subject to all the suspicions which attend declarations made by a party in his own interest at any time.

The case of *O'Connor v. Railroad Co.* 27 Minn. 173, which was also relied upon, is much like that of *Sisson v. Railroad Co.* 14 Mich. 497, and was decided, so far as this point is concerned, in the same way. It has no relevancy, as we think, here.

In this case, after Merkle had been injured by an accident at the bridge, as it is not disputed that he was, it was for his interest, if he could do so, to fix the responsibility for the injury upon the township. To do this, he must show the bridge to have been out of repair; and it is not necessary to infer a dishonest purpose in his mind to render his evidence unreliable. All questions of doubt under such circumstances would naturally be looked upon with a biased mind, and the longer the time allowed for deliberation, the greater would be the danger that the utterances would be unreliable. But after such lapse of time as appeared in this case, the declarations cannot with any propriety be considered part of the res gestæ any more than if made the next day or the next year. The affair was all over when Merkle had been taken to Mrs. Cook's; he had been removed from the scene of injury; the surroundings were all changed; the time for exclamation or outcry was passed, and nothing for the present remained to be done but to care for the injured man, leaving investigation into the cause of injury to some more favorable time in the future. The statements made by Merkle to his physician were proper enough as between man and man, but they had no legal value and were therefore erroneously admitted.

The defense, in attempting to meet the case of the plain-

tiff as to the bridge being out of repair, called Conrad Dench as a witness and proved by him that he crossed the bridge within the thirty days preceding the time of injury. He was then asked, "Did you notice the planking?" and replied, "When I went across, it was all right." The answer on motion was stricken out. The ruling is now supported in argument on the grounds—*first*, that the answer was not responsive to the question; and *second*, it was an expression of opinion, and for that reason not proper. The objection that an answer is not responsive, is one to be made by the party who puts the question; not by his antagonist. If the answer is in itself proper evidence, the party who is examining the witness has a right to take and retain it if he chooses to do so. His doing this merely saves him the trouble of putting another question to draw it out. But in this case it is only on a technical construction that the answer could be held not responsive. The witness was fairly notified by the question put that the purpose was to prove by him the condition of the planking as he found it, and he answered at once that the planking was all right. And in so far as this answer can be considered the expression of an opinion, we do not think the cases of *Stange v. Wilson* 17 Mich. 342, *Ryerson v. Abington* 102 Mass. 526, and *Kelley v. Fond du Lac* 31 Wis. 179, which are cited in support of the ruling, are in point. The first two certainly are not, and the third only decides that witnesses who are not experts cannot be allowed to testify to their opinions whether a certain bridge is or is not safe for travel. That was not the question to which Dench was called. One side affirmed, and the other denied, that a certain plank was warped loose, liable to tip up when a horse trod upon it, etc. When Dench, called as a witness on this controversy, said "The planking was all right," no reasonable man could have understood him as meaning that a loose plank, liable to tip up when trodden upon, was safe or right, but the obvious meaning of his answer was that the planking was right in the sense of not being thus warped, loose, etc., and if any one thought the reply uncertain and ambiguous, the true meaning should have been made clear by further

questions and answers, instead of striking this answer out.

The submission of the case to the jury seems in the main to have been careful and accurate, but doubtless by inadvertence the judge apparently put upon the defense a burden which belonged to the plaintiff when he told the jury that "the fright of the team is no defense to this action unless you find it was caused by something else than the defect in the bridge." The important question was whether the defect in the bridge caused the fright; the affirmative fact on that point was to be shown, not the negative. And the affirmative was upon the plaintiff.

Many other errors are assigned and have been examined; but we have discussed those we sustain and find none of the others of sufficient interest to require an extension of the opinion.

A new trial must be ordered.

CAMPBELL and SHERWOOD, JJ. concurred.

ERNEST FEIGE ET AL. v. THE FIRST NATIONAL BANK OF EAST SAGINAW ET AL.

Party wall—Defective construction of building.

A, having put up a brick building, sold to the adjoining owner, B, a *half* interest in a side wall to be used as a party wall in a building which B was putting up. C was also building next beyond B, and the new buildings went up together as one. Their foundation was laid before the sale of the wall was made. After the new buildings were finished, A sued C for injuries resulting to A's building from alleged defects in the construction of C's. The trial judge charged that there could be no recovery if the defect was in this general foundation, nor unless it was in the foundation of a vault that was in C's building. The defense claimed that A's building was in the same condition before C's was erected as afterward. Verdict was for defendant. *Held* (1) that the instruction was too broad, as A and C had no contract relations which would preclude A from suing; and (2)

that as there was some evidence, though slight, that the injury was in part due to a defect in the foundation proper of C's building, the instruction could not be said to be harmless, on the ground that the verdict covered all defects.

Error to Saginaw. (Gage, J.) June 18.—Sept. 29.

CASE. Plaintiffs bring error. Reversed.

Sweet & Flanders for appellants.

Wisner & Draper for appellees.

COOLEY, C. J. This is an action on the special case. The facts are in substance as follows:

In the year 1872, the plaintiffs erected on Cass street in East Saginaw a three-story brick building, which they have since that time occupied as a furniture warehouse.

In 1874 the plaintiffs sold to one Fish the one undivided half part of the north wall of their building, to be used by Fish as a party wall, and Fish did so use it in the construction of a store of twenty feet front, which he erected in 1874–5.

While Fish was putting up his building the First National Bank of Saginaw erected one for its purposes, occupying the whole space between the Fish building and Genesee street. The foundations for both these buildings appear to have been laid before Fish purchased the half of the party wall, and the two went up together, and presented an appearance on Cass street of being one building. Each of the buildings was however under separate supervision in construction. The bank, for its purposes, constructed a very heavy vault, which was connected in foundation with its main building.

The substance of the plaintiffs' complaint is that the foundation of the bank building was greatly defective and insufficient; that it was negligent to construct it as was done; that by reason of the defective foundation the bank building settled greatly, the walls cracked and were thrown out of perpendicular, and the whole building pressed south upon the Fish building, causing that building to press against the building of the plaintiffs, crack its walls and throw them

out of perpendicular, break the glass in the windows and otherwise injure the building. The defendants contended and sought to satisfy the jury by evidence that the building of the plaintiffs was substantially in the same condition before the bank building was constructed that it is now, and consequently could not have been injured by that building in any manner. They also insisted that it fully appeared by the evidence that plaintiffs knew all about the foundation which had been prepared for the Fish and bank buildings before they sold half of the party wall to Fish, and understood its defects, but that by the sale they consented to the Fish and bank buildings being attached to theirs, and consequently were not now in position to be entitled to complain of any injurious results following the erection of those buildings which are traceable to the defective foundation.

On the trial of the case certain rulings of the judge on the admission of evidence were excepted to, but without, as we think, sufficient reason. As the decision upon none of these rulings would have value as a precedent, we pass them without further remark.

In submitting the case to the jury the judge said to them, among other things:

"Now, at the time the Feige Bros. sold to Mr. Fish the half of this party wall, they had seen the foundation of the bank building and of the Fish building. They knew the character of the soil, and they also knew the size of the foundation, and the way in which it was put up. They testified that they had seen it and examined it. Now, they can claim nothing here on account of that foundation, that is, the foundation of the main building (I am not speaking of the vault, but of the regular foundation), because they saw that foundation, and with their eyes open made this contract, and allowed this building to be tied to their building, and therefore they can claim nothing of the foundation in and of itself. Neither can they claim anything if their building is affected by reason of the attachment of these buildings to it,—that is, the attachment simply, because that they contracted might be done when they sold one-half of the party wall; and they can claim nothing if their building is affected by the reason of the increase of height by reason of the Fish

building being higher than the Feige building, for that they permitted to be done. They contracted for that, so that, in order to find for the plaintiff in this cause, you must find that the injury to their building resulted from the defective foundation to the vault. I speak of this so you can keep it in mind."

This instruction assumes that the plaintiffs in selling to Fish, and thereby assenting to his making use of the wall as a party wall, assented also to the bank uniting with Fish in a party wall, and to all the consequences which would naturally follow from the two buildings being constructed together upon the foundation which had already been laid. But this was altogether too broad.

The plaintiffs entered into no contract relations with the bank, and were under no obligations to inquire into foundations which the bank had laid for its purposes. More than this: they had no business to interfere in any manner with the business of the bank, and any interference might have been resented as an impertinence. They might indeed have refused to sell to Fish unless he would agree to decline all connection between his building and that of the bank; but they had a right to assume that Fish would so decline unless the connection was made safe, and that the bank itself would be guilty of no negligence to their prejudice. There is some evidence in the record that the question of the sufficiency of the foundation was raised by them at the time, and that Mr. Judd who represented the bank in the construction, did not agree with the plaintiffs that there was any defect. But the plaintiffs never consented to be bound by Mr. Judd's judgment if it should prove erroneous and prejudicial; the bank took the risk of that, and not the plaintiffs. If the bank, either intentionally or through negligence, saw fit to construct a building defectively, its managers were bound at its peril to make sure that the defects did not result in injury to others.

It is contended in the brief for the defense that this instruction, if erroneous, can be seen from the record to have caused no injury, and therefore the judgment should not be

reversed by reason thereof. The argument, as we understand it, is that the real contest before the jury was whether the building of the plaintiffs was substantially in the same condition before the bank building was put up as it was afterwards, the defendants contending that it was and the plaintiffs denying it. But the defendants further insist that such evidence as the plaintiffs produced tended to show that if plaintiffs' building was injured in consequence of any defect in that of the bank, the injury was attributable to defective foundation of the vault, and not of the building proper; and as the jury were told the defendants were responsible for any injury resulting from defect in the foundation of the vault, a verdict in their favor was in effect a verdict that plaintiffs had suffered no injury that was legally attributable to the defendants.

If there were no evidence in the case which would justify the plaintiffs in claiming before the jury that the defective foundation of the bank building proper caused at least some part of the injury of which they complain, the argument now made for the defense might be accepted as sound. But there was some such evidence, and the plaintiffs had a right to go to the jury upon it. Though it seems to have been somewhat weak, we cannot say it was worthless. And we cannot therefore with that certainty which we ought to feel to justify denying a new trial when a clear error is apparent, say that the error was without injury.

A new trial must be awarded.

CAMPBELL and SHERWOOD, JJ. concurred.

HENRIETTA P. GAGE, ADM'X v. WILLIAM JENKINSON, JESSE C. TRYON AND SETH D. THOMPSON.

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Mortgage—Personal liability of third persons.

1. One who takes a deed of mortgaged land will be personally liable on the foreclosure of the mortgage if his deed expressly binds him to pay it; but a covenant to do so cannot be implied by either deed or mortgage.
2. The statutory jurisdiction to enforce the collateral obligations of third persons upon a mortgage foreclosure is permissive and not obligatory and will not be exercised to their prejudice unless they have made it necessary by their own agreements.
3. Whether, on mortgage foreclosure, a personal liability can be enforced against one who is not a party to the mortgage but has bought the land subject thereto and without making anything more than a parol agreement with the grantor to pay it—Q.

Appeal from Kalamazoo. (Mills, J.) June 18.—Sept. 29.

FORECLOSURE bill. Complainant appeals. Affirmed.

S. W. Oxenford and *Henry F. Severens* for complainant.

Edwin M. Irish for defendants Jenkinson and Thompson.

SHERWOOD, J. On the 26th day of June, 1877, the defendant Jesse C. Tryon was owner of 117 acres of land in the township of Brady, Kalamazoo county. On this land, previous to the commencement of this suit, he gave the following mortgages: November 1, 1871, to F. W. Curtenius, $2500; April 5, 1876, to William Jenkinson, $500; May 27, 1876, to Bradley S. Williams, $472; November 13, 1876, to Scott & Sabin, $400; November 13, 1877, to Charles Gage, $600. The bill in this case is filed to foreclose the last-mentioned mortgage by Mrs. Gage, as administratrix of her husband's estate.

On the 26th day of June, 1877, aforesaid, Tryon and his wife made a quitclaim deed of the land to defendant William

Jenkinson. On that day large amounts of unpaid interest had accumulated on these mortgages, and Tryon was further indebted to Jenkinson in items amounting to about the sum of $700. The mortgage given to Curtenius was subsequently assigned by him to Charles Bell, and is called in the pleadings in this case the Bell mortgage.

The bill was filed on the 30th day of October, 1880, for the purpose of foreclosing the Gage mortgage, and for the further purpose of obtaining a personal decree against the defendant Jenkinson. The bill avers that at the time Jenkinson received said quitclaim deed of the mortgaged premises the purchase price agreed to be paid by him therefor was $6000, which, by the agreement between him and defendant Jesse Tryon, was to be paid and applied as follows: $2991 to the payment of the Bell mortgage; $561 to the payment of the Jenkinson mortgage; $523 to the payment of the Williams mortgage; $642.70 to the payment of the Gage mortgage; $672 to the payment of other indebtedness from Tryon to Jenkinson; and for the payment of the balance of the $6000 said Jenkinson gave said Tryon his promissory note; that the conveyance from Tryon to Jenkinson was for such agreed consideration; and that the amount above stated of the purchase price was left in the hands of Jenkinson by Tryon, as aforesaid, in trust for the payment of the mortgages above mentioned, including the mortgage to the complainant's intestate; and that Jenkinson became a trustee under such agreement to the amount of the Gage mortgage, and liable for the payment thereof. Complainant further avers that Jenkinson has had the rents and profits of the farm ever since he received his conveyance from Tryon, and neglects to discharge his trusts by payment of the Gage mortgage; and that the defendant Thompson is Jenkinson's lessee, and claims to be the owner of the Jenkinson and Williams mortgages. Complainant further avers that Jenkinson transferred his mortgage to Thompson, for the purpose of keeping it in existence as a prior mortgage to that represented in this suit by complainant.

The bill was taken as confessed by defendant Tryon, and Jenkinson and Thompson filed their several answers.

Thompson, in his answer, admits the deed from Tryon to Jenkinson; denies upon information and belief that Jenkinson agreed with Tryon to pay $6000 for the farm, or that he was to pay the same as alleged in the bill of complaint; avers he is the owner of the Jenkinson and Williams mortgages, and has redeemed the premises from the lien of the Bell mortgage, and that they are all valid liens upon the property, the Bell mortgage being a first lien; that the mortgages amounted, at the time he purchased the Williams and Jenkinson claims, to more than the property was worth; that when he received possession of the farm of Jenkinson, he expected to buy in all the claims against the property if he could make the necessary arrangements therefor, and ultimately own the property; that he has no knowledge of the amount due or owing upon the Gage mortgage, but avers that he purchased the claims he has stated in good faith, and that they are prior liens to the Gage mortgage, and insists that any decree for sale made in this suit to satisfy the last-named mortgage must be subject to his aforesaid liens.

Jenkinson, in his answer, admits the Gage mortgage, and that he received from Tryon and wife the quitclaim deed mentioned in the bill, but denies that the purchase price agreed upon to be paid by him was $6000, when the deed was made, or that there was any agreement made by which he was to pay the outstanding mortgages, or any part thereof; and avers that in taking the deed of the land from Tryon he purchased merely the equity of redemption of Tryon in the same, and made no agreement to assume and pay off the incumbrances. And, further answering, Jenkinson avers that at the time he took said deed, Tryon was owing him, besides what was secured by his mortgage, upwards of $400, and was at the time insolvent, and that his object in purchasing the equity of redemption was to realize, so far as possible, the amount of said indebtedness. He further denies that by agreement with Tryon, or in any other way, he ever became liable to pay complainant's mortgage, or any part

thereof, and admits by an agreement in writing he did, after receiving the deed, let defendant Thompson in possession of the farm.

This statement from the pleadings is all we deem necessary for the consideration of the case as presented upon the record. It was heard on pleadings and proofs before Judge Mills, who after a careful examination of the matter entered the usual decree of foreclosure, and held Jenkinson not personally liable. We think his decree was right and ought not to be disturbed. The complainant appeals.

The personal liability of Jenkinson is the only question presented needing discussion. There is no covenant in Jenkinson's deed or in writing anywhere by which he agrees to pay the complainant's mortgage or any of the incumbrances. Our statutes provide that "If the mortgage debt be secured by the obligation or other evidence of debt of any other person besides the mortgagor, the complainant may make such person a party to the bill, and the court may decree payment of the balance of such debt remaining unsatisfied, after a sale of the mortgaged premises, as well against such other person as the mortgagor, and may enforce such decree as in other cases." How. Stat. § 6704. If a grantee accept a deed subject to mortgage incumbrances upon the property conveyed, containing a clause that he shall pay the incumbrances, he will then become liable for the payment thereof, and a personal decree may be rendered against him upon a foreclosure. *Crawford v. Edwards* 33 Mich. 354; *Miller v. Thompson* 34 Mich. 10; *Taylor v. Whitmore* 35 Mich. 97; *Carley v. Fox* 38 Mich. 387; *Hicks v. McGarry* id. 667; *Booth v. Connecticut Mut. L. Ins. Co.* 43 Mich. 299; *Townsend v. Tudor* 41 Mich. 263. No such promise, however, is claimed to have been made by Jenkinson in writing, and no such agreement can be implied in the conveyance. The statute expressly prevents any such implication. The provision upon that subject says: "No covenant shall be implied in any conveyance of real estate, whether such conveyance contain special covenants or not."

How. Stat. § 5655; *Brown v. Phillips* 40 Mich. 267. And it is further provided in this connection that "No mortgage shall be construed as implying a covenant for the payment of the sum thereby intended to be secured; and where there shall be no express covenant for such payment contained in the mortgage, and no bond or other separate instrument to secure such payment shall have been given, the remedies of the mortgagee shall be confined to the lands mentioned in the mortgage." How. Stat. § 5656.

The practice in this class of cases of allowing a personal decree against even the mortgagor himself comes from no original equitable jurisdiction, but springs from quite recent statutory authority; and the enforcement of collateral obligations of third persons in a foreclosure suit is a still more recent innovation, and the jurisdiction given over the latter class of persons is permissive only, and not obligatory, and will not be enforced to their prejudice, unless by their own contract or agreement they have themselves made necessary or imperative such enforcement. *Johnson v. Shepard* 35 Mich. 115; *McCrickett v. Wilson* 50 Mich. 513. There is no pretense in this case that the claimed liability of Jenkinson could be enforced at law. The only contract between the mortgagor and Jenkinson, except that contained in the quitclaim deed, rested in parol, as stated by the complainant in her bill; and counsel for defendant raises the question whether in this case, under such circumstances, Jenkinson, who is not a party to the mortgage, and who has never agreed in writing with any one to pay it, can be subjected to a personal decree for its payment.

While as at present advised my mind inclines strongly to the negative upon this question, it is not necessary to decide that question now. The bill of complaint states a different and broader case, and if fully sustained by the proofs I am not prepared to say that the complainant would not be entitled to the relief prayed for. The complainant sets up a contract made by the mortgagor with Jenkinson, by which it is averred that Jenkinson bought the land for the sum of $6000; that that was the sum the latter promised to pay

therefor, and in so doing agreed with the mortgagor that he would pay all the mortgages, discharge the mortgagor's indebtedness to him, and give his (Jenkinson's) note to mortgagor for the balance; and that in pursuance of said contract he had given his note for the balance, his own debt had become merged, and he had paid, or caused to be paid, one of the mortgages and had taken possession of the mortgaged premises under his deed, and was then in the possession of the receipts, rents and profits thereof. These facts present a case of parol contract, partly performed, about as strong as it can be made without being in writing, and while there can be no question about its legal or equitable effect between the parties thereto, there still remains the question, how far it can be enforced between Jenkinson and this complainant, between whom there is no privity evidenced by any writing whatever.

The question might be one of some difficulty to dispose of if we were called upon to dispose of it in this case, as the authorities and dicta upon the question are not entirely harmonious. See cases cited and *Burke v. Gummey* 49 Penn. St. 518; *Heid v. Vreeland* 30 N. J. Eq. 591; *Wilson v. King* 23 N. J. Eq. 150; *Bowen v. Kurtz* 37 Ia. 239; 1 Jones on Mortgages §§ 740, 750; *Shuler v. Hardin* 25 Ind. 386; *Braman v. Dowse* 12 Cush. 227; *Hoff's Appeal* 24 Penn. St. 200–204; *Thompson v. Thompson* 4 Ohio St. 349; *Gilman v. Williams* 7 Wis. 336; *Mellen v. Whipple* 1 Gray 317.

We have carefully examined the record and the testimony in the case, and without any discussion of it here, will only say further that we do not think it preponderates in favor of the averments contained in complainant's bill, and we all think the decree of the circuit judge should be

Affirmed, and the defendants Jenkinson and Thompson will recover their costs.

Cooley, C. J. and Campbell, J. concurred.

JAMES J. BAIRD v. IRA E. RANDALL.

Agent's authority to remit debt—Consideration—Settlement.

58 175
96 340

1. The owner of a mortgaged farm traded it for another, the purchaser assuming the mortgage. It was understood, however, that if the amount due upon it should vary either way from $3300 the difference should be paid by one party to the other. The vendor advanced fifty dollars to cover a possible excess which the purchaser might have to pay. The parties had a meeting with the mortgagee's agent and the amount due was roughly estimated at $3302.42. The agent afterwards found that this reckoning was wrong and that the amount should have been $3357.38. The difference, if any, between the excess and the fifty dollars was to be returned to the vendor, and he sued the purchaser for all but $2.42 on the ground that the estimate fixed the excess to be paid. *Held,* that in the absence of any showing by plaintiff that the difference between the two sums had been remitted by the mortgagee, or that her agent had authority to remit it, or that there was any consideration for so doing, the action would not lie.

   And the fact that plaintiff had bought in outstanding tax-titles which had inured to the mortgagee's benefit would not be a sufficient consideration to support an obligation on the mortgagee's part to make such an abatement.

2. It is error to instruct the jury as to what the evidence of a witness amounts to; it is their business to determine its effect.

Error to Ingham. (Gridley, J.) June 18.—Sept. 29.

ASSUMPSIT. Defendant brings error. Reversed.

Nichols & Humphrey for appellant. Authority to collect a debt does not imply authority to release any part of it without payment: Story on Agency § 99; *Herring v. Hottendorf* 74 N. C. 588; *Melvin v. Lamar Ins. Co.* 80 Ill. 446; *Reynolds v. Continental Ins. Co.* 36 Mich. 131; or to compromise a mortgage claim: *Atlas Min. Co. v. Johnston* 23 Mich. 36; *Herring v. Hottendorf* 74 N. C. 588; *Chilton v. Willford* 2 Wis. 1; simple contracts must be founded on a valid consideration: 7 Term Reports 350 (note); *Converse v. Blumrich* 14 Mich. 110; *Davis v. Strobridge* 44 Mich. 157; *Halsted v. Francis* 31 Mich. 113; *Jennison v Stone* 33 Mich. 101; an agreement to receive less than a party is entitled to

by his contract unless upon some new consideration, is void: *Fitch v. Sutton* 5 East 230; *Cumber v. Wane* 1 Sm. Lead. Cas. 599; *Simmons v. Clark* 56 Ill. 96; *Crowley v Vitty* 7 Exch. 319; *Dedrick v. Leman* 9 Johns. 333; *Harrison v. Wilcox* 2 Johns. 448; *Seymour v. Minturn* 17 Johns. 169.

Cahill, Ostrander & Baird for appellee.

CHAMPLIN, J. Previous to February, 1883, the plaintiff owned one hundred and twenty acres of land near the city of Lansing, known as the "Dart farm," upon which was a mortgage of $2500, given in 1878 to a Mrs. Dunham of Ypsilanti. The mortgage drew interest at the rate of eight per cent., payable semi-annually, and the interest was in arrear since April 4, 1879, and on February 1, 1883, the amount due on the mortgage was something over $3350.

The defendant, at the date first above mentioned, owned a piece of land near Chesaning, and on the first of February, 1883, the plaintiff and defendant traded farms. In the trade the Dart farm was considered as worth $5500. The exact amount due to Mrs. Dunham was at that time unknown to the parties. In the trade, the defendant conveyed to plaintiff the Chesaning land, assigned some mortgages he held upon other lands, paid some money, and assumed and agreed to pay $3300 of the Dunham mortgage, if the mortgage amounted to that sum at that date; if it should be less than that sum he was to pay plaintiff the difference.

The deed executed by the plaintiff and delivered to defendant, which bore date February 1, 1883, was an ordinary warranty deed, in which he covenanted to warrant and defend the premises against all lawful claims, except the above-mentioned mortgage and except as to the unpaid taxes on the land for the year 1882. It also contained the following agreement:

"This conveyance being made subject to a certain mortgage given by Rollin C. Dart to Eliza B. Dunham, October 8th, 1878, for twenty-five hundred dollars, upon which said mortgage there is due at this date the sum of three thousand and three hundred dollars, and if this last-mentioned amount

shall vary from said amount, the parties hereto agree to make the difference good to the other, which said mortgage the said party of the second part hereby assumes and agrees to pay as a part of the consideration."

It is claimed that one L. A. Barnes of Ypsilanti, was Mrs. Dunham's agent, and had charge of collecting the interest due upon the mortgage. The trade, which was consummated on February 1, 1883, had been preceded by negotiations between plaintiff and defendant, and was made to turn upon the question whether, in case such trade was made, an extension of time could be obtained of three or four years at seven per cent. in which to pay the mortgage. Accordingly on December 26, 1882, the plaintiff addressed to Mr. Barnes the following letter:

"LANSING, December 26, 1882.

L. A. Barnes, Esq.—DEAR SIR: I have an opportunity to dispose of the Dart farm for $6000, and the party would like to make a new mortgage to you for Mrs. Dunham's claim in round numbers of $3300. I will take a second mortgage of a thousand. The party buying wants to use some considerable money in improvements, as there is not much of a house and no barn on the premises at present. For this reason I would prefer to let your claim stand at its present amount. The interest he would pay annually at seven per cent., and make principal due in three or four years. If you will make the loan as above indicated, please notify me by return mail, and I will proceed with the deal. Mrs. Dunham's mortgage will be gilt-edged, as the farm is really worth in its present condition much more than I am selling it for, and of course the improvements would add materially to the present value. Please answer by return mail that I may govern myself accordingly."

To which he replied under date of December 30, 1882, as follows:

"YPSILANTI, December 30, 1882.

James J. Baird, Esq.—DEAR SIR: I am in receipt of your favor of the 26th inst. In reply will say that Mrs. Dunham will take a new mortgage for the amount you suggest on three, four or five years' time at seven per cent. interest. Have been absent from home for the last three days; returned only this evening; hence the delay in answering,

which I trust you will excuse. Expect to be in Lansing soon, and will arrange the matter with you. Please let me hear from you, and oblige."

When the parties closed the trade on February 1, 1883, the plaintiff left in defendant's hands fifty dollars with which to adjust the excess of interest over $3300, which defendant had assumed, with the understanding that whatever way the amount might vary from that sum, the parties would make the difference good to the other, as stipulated in the deed. On the same day defendant addressed to Mr. Barnes the following letter:

"LANSING, MICH., February 1, 1883.

L. A. Barnes, Esq., Ypsilanti, Mich.—DEAR SIR: I have purchased of Mr. Baird, the partner of R. C. Dart, the 120 acres of land near this city, upon which Mrs. Dunham holds a mortgage of $2500 given October 8, 1878, by R. C. Dart. I have your letter of October 30, 1882, in which you state that the interest on said mortgage has been paid up to April 4, 1879, and that the interest due up to November 4, 1882, is $758.67, and that would make the interest at seven per cent. from November 4, 1882.

I have paid fifty dollars per acre for this place, or $6000, and it shall be my purpose to pay the mortgage as soon as possible and first to pay the interest and reduce the mortgage to $2500, provided you will make all future interest seven per cent. I would like to let the mortgage remain and pay it as fast as possible, and I think I can very soon reduce it to $3000. I have held from Mr. Baird a reserve, as I did not know just what Mrs. Dunham's mortgage amounted to, and will you please give the amount of interest due up to February 1, 1883, and tell me if you will make future interest seven per cent. and give me a little time to pay the interest.

I am, yours very respectfully."

Mr. Barnes was in Lansing somewhere between the 20th and 24th of February, and there met the plaintiff, and together they went to the office of defendant, where a rough estimate of the amount due upon the mortgage was made, but the note and mortgage were not present and no pretense is made that it was an accurate statement of the amount due. By the figuring there made, the note and mortgage amounted to $3302.42. The defendant requested Mr. Barnes to enter

into a written contract to the effect that this sum was the amount due upon the note and mortgage on February 1, and also embodying the agreement to extend the time of payment and reduction of interest to seven per cent. He says that he was aware at the time that Mr. Barnes had made a mistake in figuring the interest, and wished to have the agreement as to the amount to be paid, in writing, so that there could be no dispute thereafter, and after he should pay over to plaintiff the balance of the fifty dollars. Mr. Barnes made an engagement to call in the afternoon at defendant's office and enter into a contract, and defendant proceeded to draw one up. But Mr. Barnes concluded to leave on the noon train for home, and so informed the plaintiff, and he in turn informed the defendant, and requested him to forward the contract, which defendant did, and also enclosed his certified check for $2.42 for excess of amount due over $3300. After arriving home Mr. Barnes, on making a computation of the amount due on the note and mortgage, discovered his mistake, and refused to accept the $2.42 as payment in full in excess of $3300, and refused to sign the contract, and so informed defendant at Ypsilanti, when defendant called on him in regard to the matter. The exact amount due upon the note and mortgage for principal and interest February 1, 1883, was $3357.38.

The plaintiff claims that, by what transpired in defendant's office between himself, defendant and Mr. Barnes, the amount due on the note and mortgage was adjusted at $3302.42, and that the defendant was thereby obligated to pay him the balance of the purchase money left in his hands to adjust the amount of the mortgage, amounting to $47.58; that it is immaterial that the true amount exceeded that sum; that Barnes agreed to take that sum as a concession, and on account of plaintiff's having purchased some outstanding tax titles which enured to the benefit of the mortgagee.

The agreement contained in the deed was in the nature of an indemnity to the defendant against his paying any amount in excess of what he had assumed as a part of the consideration, namely, $3300. To carry out that agreement for

indemnity the fifty dollars was placed in his hands. The question, therefore, was, What was the amount Mrs. Dunham was entitled to claim, as of the date of February 1st, 1883? The correspondence above referred to shows that the actual amount due at that time was the material question, and such amount was what the parties had in view when they made the deed. There is not the least testimony which tends to prove that, prior to the meeting of the parties in Mr. Randall's office there was any concession claimed or expected would be made from the actual amount due. Unless what occurred at that time concludes Mrs. Dunham, and prevents her from insisting upon being paid the amount actually due to her upon her note and mortgage, she is entitled to receive the principal and accrued interest to that time. In order to deprive her of the right to the payment of this sum, there must have been some valid agreement entered into by her, by which she has remitted the excess over $3302.12. The burthen of proof was upon the plaintiff to show this fact. He was required to show a definite agreement, mutually understood, based upon a sufficient consideration.

Now, under the evidence in this case, two essential elements were lacking to make out such agreement: (1st) The authority of Barnes as agent to make such agreement; and (2d) the consideration to support it. No evidence whatever was introduced or offered to show the nature or extent of the authority of Barnes to act as agent for Mrs. Dunham. The only testimony of any agency whatever is that he acted, with reference to this transaction, in that capacity. Whether he had any authority from her, or, if so, whether it was general or special, was not shown. All he did and said might have been self-assumed, and without authority from her, so far as this record shows. There was no consideration proved which would support a promise to take less than the amount actually due upon the debt. The fact that the plaintiff, who was at one time the owner of the legal title, and had conveyed by warranty deed to the defendant, had purchased outstanding tax titles without consultation with or request of Mrs. Dunham, the mortgagee, was not a sufficient considera-

tion to support the alleged promise, and no other was claimed or pretended.

The second and fifth requests of defendant's counsel covered these defects in the plaintiff's case, and should have been given. The learned circuit judge, in submitting the case to the jury, seems to have lost sight of the true relation of the parties to the suit as evidenced by the deed, namely, that plaintiff stood in the relation of guarantor to defendant of the amount there should be found due upon the mortgage over $3300; and it is plain upon this record that no new contract has been made between these parties which has changed that relation. The circuit judge in his charge gave the following instructions: "Now, gentlemen, I charge you this in regard to the matter, that it does not concern us here now whether that was the true amount that was due upon that mortgage, provided the defendant has stated here, —that his evidence amounts to that,—that it was so fixed upon by Mr. Barnes, the agent, at that time. In other words, that he cannot be allowed to deny his own statement by proof of facts that are different from what he states them to be; he can't go back on his own testimony in that way, and will be bound by it in spite of whatever might have been the fact in regard to the true computation of this mortgage." It was error for the judge to state to the jury that the evidence of the defendant amounted to a statement that it was so fixed upon by Mr. Barnes, the agent, at that time. It was the province of the jury to determine the effect of the evidence, and whether it amounted to a statement that the amount was fixed upon by Mr. Barnes. It was also erroneous and misleading to instruct the jury in the other words quoted above.

Under the defendant's theory of the case, and upon the evidence given upon the trial, it was competent for defendant to prove, either by his own testimony or that of other witnesses, that a mistake was made in the computation by Mr. Barnes as to the amount due upon the mortgage, and that the real amount due was greater than Barnes computed it, and that the owner insisted on being paid the true

amount. For, unless the mortgagee was bound by the mistake made,—and no reason is shown why she should be,—or, as before stated, she entered into a valid agreement, made by her authority, to take the sum of $3302.42, it was both proper and right for the defendant to show the true computation of the amount due upon the note and mortgage. It is proven, beyond question, that the computation made of the amount due at the time the parties met in Mr. Randall's office was a mistake, and it is not open to serious question upon this record that such computation is not binding or conclusive upon Mrs. Dunham; and it is difficult to see by what rule of right such mistake is made to absolve plaintiff from his agreement to indemnify defendant against the amount he is obliged to pay Mrs. Dunham over the amount assumed by him as between plaintiff and himself.

The judgment must be reversed and a new trial ordered.

The other Justices concurred.

EMMA CLINTON v. ALBERT M. ROOT.

Negligence—Experts—Usage—River travel.

1. Ordinary care and prudence in common emergencies is not a question for experts; and unless there is conflict it may often be taken from the jury as a matter of universal judgment.
2. Passenger traffic on river steamers is not so exclusively a maritime business that sailors alone are qualified to testify as to its methods and duties, but usage may sometimes be shown as bearing thereon.
3. Passengers about to embark upon a boat and with little time to spare are justified in assuming, if they do so in good faith, that they may safely follow the directions of the officers of the boat in getting on, unless there is very obvious danger in doing so. And if it takes an expert to define the duty of the officers, the presumption in the passenger's favor is all the stronger.

Error to Saginaw. (Gage, J.) June 18.—Sept. 29.

CASE. Plaintiff brings error. Reversed.

Holden & Harris for appellant, cited as to liability, *Smith v. Lond. & St. Kath. Dock Co.* L. R. 3 C. B. 326.

W. A. Clark for appellee.

CAMPBELL, J. Plaintiff sued defendant as owner of the steamer Wellington R. Burt for an injury received in boarding the vessel at Zilwaukee. Immediately on the arrival of the steamer at the dock, the majority of those waiting got on board, and among them plaintiff, who is a lady of 48 years old, jumped from the dock to the gangway, and fell and broke her leg. The distance was not far from twenty inches, and the fall seems to have been occasioned by the motion of the boat. The steamer was making her last return trip up the river, and plaintiff who had gone down to Zilwaukee earlier in the day, was on her way home again. There was much and directly conflicting testimony upon the point whether the steamer was moored and her gang-plank put out at all or seasonably, and the same direct conflict on the question whether the clerk of the boat did or did not hurry up the passengers on the dock, and order them aboard, without waiting for the plank. A case has seldom appeared in this Court where there was so direct a conflict between apparently reputable witnesses. The jury, under the charge, found a general verdict for defendant, and also made some special findings. To the question whether it was practicable to put out a gang-plank before the plaintiff leaped from the dock upon the boat, they made no answer.

They found that the boat was made fast and a gang-plank put out as soon as could reasonably be done.

They answered the inquiry whether the boat had ceased to move forward when plaintiff jumped from the dock to the deck, that they were in doubt as to the forward movement.

The testimony was not conflicting on the fact that there was movement in some direction at that time.

The finding that the gang-plank was seasonably put out removes from the case that element of neglect, and leaves to

be considered such questions as arose on admission and rejection of evidence, and upon charges and omissions to charge.

There was no finding of the jury that plaintiff did not act upon the orders or assurances of the officers of the boat in getting on board as she did, and this was the principal question presented as the record stands. Connected with it are the instructions given or refused by the court upon contributory negligence. These points, which are dwelt upon by the brief for plaintiff, are not noticed by counsel for defendant. They are important.

Much testimony was introduced bearing upon the danger of failing to supply or use a gang-plank, and the rulings were not entirely harmonious. Captain De Land, who was shown to be a person of experience, while allowed to answer some questions as to danger at that particular time and place, was prevented from answering other quite as proper questions as to general usage and duty. These were not foreign to the inquiry, for it may depend very much on general usage whether the officers and hands of steamers will be expected to provide particular facilities. He was also allowed, under objection, to answer this question: "If you should regard it as carelessness in not putting out the gang-plank, is it not equally careless her getting aboard without the gang-plank?" To this he gave a qualified answer, but one which may have had considerable weight with the jury under the charge concerning contributory negligence.

Whether it was negligence in the steamer's crew not to put out the plank was held by the court in various rulings to be a question only answerable by experts. The rulings in that direction confined the range of experts within bounds which may have been too narrow. But there can be no doubt that the question was one determinable more or less as one of usage and experience. No such criterion can be applied to the action of ordinary persons under given circumstances. Ordinary care and prudence in common emergencies is a matter to be determined by the opinions of the jury, who are in need of no help from experts to decide it. It is often so plainly a matter of universal judgment that courts may

act on it themselves and take it from the jury,—although not in case of conflict. But to treat it as belonging to the same category with matters of marine usage and duty was misleading and erroneous. In the same connection Elijah Powers, a sailor of experience, and for years familiar with the custom in regard to taking passengers aboard steamers, and who saw what occurred, was not allowed to answer whether "as that boat was, could they be taken on safely?" or another similar question as to what was requisite for safety,—the exclusion being for want of evidence of sufficient knowledge. He certainly had testified to knowledge, and had shown an amount of experience which ought to have given it.

In view of some other instances of exclusion, it seems proper to refer to this subject further. The employment of river steamers in carrying passengers is not so exclusively a maritime business that knowledge of its methods and duties is presumably confined to sailors alone, or to sailors employed on river steamers. Many if not most of the persons employed on board are such as under the maritime law would be classed as landsmen. A knowledge of the incidents of the business is attainable for many purposes by any kind of experience which gives facilities and creates habits of observation. Many of the inquiries in the present case, which the court confined to sailors, and on which the jury were told they must accept the views of sailors, were quite as open to the view of other observers.

But the very fact that no one without some adequate knowledge could be allowed to express an opinion upon the duty of the steamer's men to provide safe means of access, must be equally significant in relieving inexperienced persons from a presumptive knowledge of the danger caused by the omission. The testimony in this case showed that it was a constant practice of persons seeking passage to do just as the plaintiff did, and if it could—as it evidently might—be regarded as dangerous, it was such an obviously frequent danger that it became a question of some importance in the case whether adequate or reasonable precautions were used against it, and how far, with or without invitation from the

officers, passengers could be deemed negligent in getting on board in that way, where no obstacle existed.

Upon this question of contributory negligence, the charge leaned so strongly against plaintiff that it is not at all unlikely it determined the verdict. It seems to have been held that there was evidence of such apparent risk that the invitation to go on board as plaintiff did would not exonerate her from considerable responsibility. After drawing some distinctions between the duty resting on children and grown persons to disregard dangerous invitations and commands, the court used this language: "If a person of ordinary care and prudence, of the age, intelligence and experience of this lady, would have hesitated,—would have seen that there was danger and would have hesitated,—or would have said, 'There is danger, and I will take the risk,' then there was contributory negligence on her part, and she could not recover. It is a question of fact for you to find. If you find that the defendant was seeking to make a proper landing there and did so; that these parties, before the defendant could make a proper landing, got aboard this boat, and this plaintiff went on board and was injured in consequence,—she cannot recover." There were several repetitions of the duty of applying the rule of ordinary care, which taken alone would perhaps be unobjectionable, but when the whole charge is taken together the force of an invitation to get on board, and the duty of plaintiff to refrain from doing so if dangerous, were not so dealt with as to give sufficient weight to the conditions of the case as presented.

Where passengers are at the appointed place for embarking, with no fences or gates to keep them back, they must generally have a right, if they do so in good faith, to assume that no dangerous orders will be given, and that they may safely act on the directions of those whose legal duty it is to protect them from risk, and who are supposed to know what is safe. Some allowance must also be made for such conditions as stand in the way of full deliberation. It is applying too harsh a rule to hold that persons who have apparently but a few moments to decide between following the directions of

the officers and losing their last chance of passage, should be held to be negligent in doing as they are invited to do, unless the danger is very obvious. The instruction complained of, which spoke of defendant's seeking to make a proper landing, did not include in the assumption the important element of knowledge or reason for belief of plaintiff that such attempt would be made. A knowledge of such purpose might make any act of impatience open to criticism, whereas a want of such knowledge, leaving every one where he or she must act on present appearances, would very much modify that responsibility as governed by the facts.

In our opinion the case was not so presented as to save plaintiff's rights from misconstruction.

The judgment must be reversed and a new trial granted.

COOLEY, C. J. and SHERWOOD, J. concurred.

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MARTHA TAYLOR v. EDWARD M. ADAMS.

Effect of pleading—Election—Defense of principal's rights—Advice of counsel—Tortious entry—Ejection of intruder.

1. After pleading and going to trial in an action begun by capias, defendant cannot insist on objections to the sufficiency of the affidavit for the writ.

2. A declaration in case contained two counts, one of which alleged the wrongful expulsion of plaintiff from premises occupied, and the other an assault and battery. *Held*, that as no inconsistency between these counts was pointed out, there was no error in refusing to require an election between them.

3. An agent's right to defend his principal's possession of premises is not affected by what he has said in the latter's absence about the latter's title, so long as he did not speak as agent, and has given no license to occupy the premises.

4. Advice of counsel as to his client's right to occupy premises, cannot give the client any greater right than he has already.

5. Evidence that an agent in defending his principal's possession, drew

a revolver on a policeman who approached, was *held* irrelevant in an action against him by the intruder, as the act did not take place in the latter's presence.

6. Identification of a lot as the one referred to in a lost document, states only a conclusion, if the witness cannot give the description, and is insufficient to show the contents of the paper.

7. Where the substance of a contract cannot be shown, evidence that a party has not forfeited his rights thereunder becomes immaterial, and on motion should be stricken out.

8. The clandestine entry of a claimant upon premises of which another has been given possession by legal process, makes one a tortious intruder whom the lawful possessor may expel by force, if need be. And if the intruder is accidentally injured in the process of expulsion, his own contributory negligence should be considered in fixing responsibility therefor.

9. The reputation of the house a witness rooms in is immaterial to the issue so long as the party in whose interest he is testifying is not responsible for it.

10. An instruction to the jury to disregard mischievous and improper testimony will hardly cure the error of allowing it to remain in the case until the close of the trial; and if so allowed the trial judge should remedy the injustice on motion for new trial.

Error to Kent. (V. H. Smith, J.) June 18.—Sept. 29.

CASE. Defendant brings error. Reversed.

E. M. Adams in person, and *E. F. Uhl* for appellant.

Geo. W. Thompson and *N. A. Earle* for appellee.

SHERWOOD, J. The plaintiff brought her action on the case against the defendant in the Kent circuit to recover damages for alleged personal injuries received at the hands of the defendant, his servants, agents and employees, on the 28th day of December, 1882, in forcibly ejecting her from a dwelling-house in the city of Grand Rapids. The declaration contains two counts. The first alleges the occupation of the dwelling-house by the plaintiff, and her wrongful expulsion by the defendant and others of his procuring; and the second alleges an assault and battery and consequent injuries.

The bill of exceptions contains all the evidence in the case, from which it appears that the house in question was two stories high, and with the lot upon which it was situated was formerly claimed and occupied by the plaintiff and her husband; that on the 27th day of May, 1878, Mary L. Boardman purchased the house and lot upon a sale made by a circuit court commissioner under a mortgage foreclosure in chancery, in a suit wherein the plaintiff and her husband, Charles M. Taylor, were parties defendant with others; that under and by virtue of a writ of assistance in the said suit, the said Taylors were ejected from the premises, and Mary L. Boardman was put in possession of the same by the sheriff of Kent county. On December 10, 1881, Mrs. Laura E. Adams, the mother of the defendant, purchased the premises at a sale made by the circuit court commissioner of Kent county, upon the foreclosure of a mortgage against Mary L. Boardman and others, defendants, among whom were Mrs. Taylor and her husband, and received the circuit court commissioner's deed therefor, and at the same time received possession of the premises from Mrs. Boardman under said deed, and remained in possession, and controlling and renting the same, through her agent, the defendant, down to the time of the assault complained of by plaintiff. Some of the time the premises were not all occupied by Mrs. Adams.

The evidence tends to show that a Mr. Crossman was occupying the premises last and was just moving out, when, without consent or permission from any one, or the knowledge of Mrs. Adams, the plaintiff and her husband forced an entrance into the building after Crossman had locked up the house and given the keys to Mrs. Adams, and having borrowed a few things of the neighbors, they having but recently returned from their residence in California, undertook to live in the house. It was under these circumstances that Mrs. Laura E. Adams went to the house on the day the plaintiff and her husband entered, and ordered them to leave, and on their refusal so to do, the force complained of and the injuries alleged to have been received by plaintiff

were the results of the efforts of the defendant and his helpers, acting as the agents of Mrs. Adams, in expelling the plaintiff from the premises. The defendant claimed the right, in behalf of his mother, and acting as her agent, she being the owner and in the possession of the property when the plaintiff made entry, to use all necessary means and sufficient force to remove the plaintiff therefrom, and that he used no more force than was actually necessary for that purpose. The plaintiff claimed that admitting the rights of Mrs. Adams to be as defendant claims them, still he used an excess of force and thereby made himself liable for the injury complained of. The cause was tried by jury, and a verdict rendered against the defendant for $3500.

The defendant appeals, and has filed seventy assignments of error, thirty-four of which relate to matters arising upon the evidence, twenty-six arising upon the requests to charge, and nine upon the charge as given by the court upon his own motion. Nine assignments were abandoned by counsel upon the argument. Motion was made to quash the writ and dismiss the proceedings on the ground that affidavits for the writ did not show a cause of action against the defendant nor the nature of the plaintiff's claims nor that the plaintiff had a cause of action. This motion was overruled and the rulings excepted to. There was no error in this. The defendant subsequently pleaded and went to trial, and final judgment was rendered. *Pardee v. Smith* 27 Mich. 38; *Manhard v. Schott* 37 Mich. 234; *Miller v. Rosier* 31 Mich. 475; *Baldwin v. Circuit Judge* 48 Mich. 525.

Upon the trial defendant's counsel moved the court to compel the plaintiff to elect upon which of the two counts he would rely. The motion was properly denied by the court. The counts were not inconsistent,—at least, no inconsistency was pointed out,—and the subsequent treatment of the motion by defendant's counsel very strongly indicates an abandonment of it. *Cook v. Perry* 43 Mich. 623.

On the evening before the alleged assault occurred, the defendant had a talk with the husband of plaintiff, in which

something was said about the claim of plaintiff and the amount he (Adams) had offered for it and the amount he was willing to give for it. Mrs. Laura E. Adams was not present, nor was the defendant acting for her at the time, so far as the record shows. We do not think the testimony was material but was calculated to prejudice the rights of the defendant in this case by showing that he admitted claims in the plaintiff which he denied in his defense as agent for his mother, and which must be held good in the latter to justify defendant as against the plaintiff in this action. The defendant's exception was well taken. The defendant's right to defend his mother's possession did not depend upon what he said about it or the title, so long as he gave no permit or license to the plaintiff to occupy the premises.

The objection to the conversation by Adams with witness Taylor about the amount Mrs. Taylor owed Peaslee, was subject to the same objection. Mr. Taylor's statement of what counsel had advised him as to his right or that of the plaintiff to take possession of the property was incompetent, and should not have been admitted. His counsel could give her no additional rights to those she had before, and tended in no way to authorize her to make the entry from which she was expelled by the defendant. The tendency of the testimony was mischievous.

While the defendant and his employees were carrying out the stove, Mrs. Taylor, by her outcry, attracted the attention of a policeman, who came to the premises and made some inquiries in regard to the matter, which the defendant regarded evidently as an interference; and after telling him he was protecting the property of his mother, drew a revolver and gave the officer to understand he must not enter the building. This testimony was objected to as immaterial and irrelevant. The court permitted the testimony to be given. It does not appear that the commotion occurred in the presence of Mrs. Taylor, or within her hearing. We think the testimony should have been excluded. Its tendency was to unduly impress upon the minds of the jury that the act complained of was committed with a degree of violence not at

all attributable to the defendant, and could hardly fail to have that effect, accompanied by the statement of the court in making the ruling that "it tends to characterize and throw light upon the transaction."

The conversation testified to by plaintiff's witness, Oliver N. Taylor, in which, about a month before the injury complained of, defendant told him that he "would give fifty dollars and pay the Peaslee contract for Mr. Taylor's interest," or something to that effect, was clearly immaterial, and should not have been admitted, for reasons hereinbefore given, and for the same reasons the examination of defendant as to the same matter when he was on the stand as a witness, and also as to his conversation with Church about the Peaslee contract, were incompetent and it was error to admit them.

The plaintiff showed by Church and others the loss of the Peaslee contract with Mrs. Taylor, and then undertook to prove the contents of the contract by the witness; and he was allowed, without being able to give the description or number of the lot stated in the contract, to state he knew the lot, and that it was the same one in question in this suit. This testimony was insufficient to show the contents of the written instrument, and the exception was well taken. It gave the witness' conclusion, instead of the substance of what was stated in the instrument.

The testimony relating to this contract being inadmissible, the conveyance from the Auditor General to Peaslee and from Peaslee to the plaintiff in pursuance of the contract, for the purpose of showing that the plaintiff had not forfeited her rights thereunder, became unimportant and was erroneously admitted. This evidence was well calculated to mislead the jury. All the testimony tending to show title to the premises in the plaintiff was of the same character and subject to the same objection so long as it appeared by evidence undisputed that Mrs. Adams was in possession of the property under the commissioner's deed, and placed there by order of the court. The entry of the plaintiff under such circumstances in the manner she did, as shown in this record, was unlawful and gave her the character in the trans-

action, as was well said by the Chief Justice in the case of *People v. Adams* 52 Mich. 105, of a tortious intruder, and in such case she could be expelled by the lawful possessor by the use of force necessary for that purpose. Cooley on Torts, 168, 324; *Com. v. Clark* 2 Met. 23; *Ayres v. Birtch* 35 Mich. 502; *Pond v. People* 8 Mich. 150; *Blades v. Higgs* 10 C. B. (N. S.) 713.

The questions put to witness Engleman by plaintiff's counsel for the purpose of showing the kind and reputation of the house where he had his room had better not have been admitted; the defendant was in no way responsible for that, and the testimony was immaterial.

The defendant's motion to strike out all the testimony relating to the Peaslee contract and its contents as given by witness Church, and the deeds hereinbefore referred to from the Auditor General to Peaslee and from him to the plaintiff, should have been granted. Their irrelevancy was sufficiently apparent at the time this motion was made.

The direction of the court to the jury that they should not consider the matter of the defendant's having and exhibiting the revolver to prevent other persons from entering the building, "as bearing upon the question as to whether excessive force was used or not," did not cure the error in admitting the testimony. This evidence had been allowed to remain in the case till the close of the trial, and it is scarcely possible that this direction of the court at so late a stage of the trial could have very greatly removed the prejudicial effect the objectionable testimony had wrought in the minds of the jury, and it is not proper to subject the rights of parties to such hazard upon the trial of a cause; and this fact should exhort to the utmost caution in the admission of this class of testimony upon the trial. It not unfrequently occurs that the real facts in the case raising the vital questions upon which the determination of the rights of the parties depend are completely obscured before the jury by the introduction of testimony of a sensational character, accompanied by explanatory statements of counsel which have no proper place in the proceedings. The trial court

alone can prevent injustice from being done, when such testimony is resorted to, upon a motion for a new trial. It is not often it is within the province of this Court to apply the remedy.

We have now considered all the objections to the rulings of the court relating to the testimony that we care to discuss. There were other exceptions taken which might properly be sustained, but it is not probable that a recurrence of them will be made necessary upon a new trial. We shall not attempt a review of all the exceptions taken to the charge and refusals to charge; neither do we deem it necessary. The court correctly told the jury in his charge that, upon the undisputed facts in the case, "the plaintiff, when she was in those rooms or in that building * * * she was an intruder upon the possession of Mrs. Adams; that she was a trespasser, had no right there, and hence the defendant had a right to put her out * * *" and that "the defendant had the right to use such reasonable force as was necessary for that purpose; that it was her duty to go out upon request." The plaintiff refused to go out when requested, and told the defendant "she would not be carried out except as a corpse." This of course necessitated the use of force to remove her, and required upon the part of those doing it the exercise of reasonable care and prudence. For accidental injuries occurring to her in the effort to make such removal, and which were occasioned by the plaintiff's persistence in the wrongful course she was pursuing, the defendant could not be made responsible; and in this connection we think the court should have given the defendant's ninth, tenth, twentieth, twenty-first, twenty-fifth, twenty-sixth, twenty-seventh, twenty-eighth, thirtieth, thirty-second, forty-first, and forty-ninth requests to charge. The testimony in the case clearly warranted these charges, and we do not find them or the substance of either sufficiently presented in the charge as given by the court.

The defendant's sixty-second assignment of error is to the following clause of the charge given by the court upon his own motion, viz.: If the defendant "used a

greater degree of force than was reasonably necessary,—if he used force in excess of what was reasonably necessary for the purpose of ejecting her,—then he is liable for the results that necessarily followed such excess, in actual damages to compensate her for the injuries which followed such excess of force." This was erroneous. It leaves out of consideration by the jury any contributory element by the plaintiff which was wrongful, necessarily calculated to induce the very excess complained of, and which, if the jury found existed, would relieve the defendant of all the claimed liability; and this infirmity is found in nearly every portion of the charge excepted to by the defendant's counsel, and we do not deem it necessary to consider the exceptions further. They are all well taken, wherein this element is found wanting.

The defendant's thirty-fifth and thirty-sixth requests state the law correctly upon the subject of damages, and should have been given by the court.

The importance of this case has made a somewhat extended review of the questions presented necessary, and the conclusions we have reached are necessary to protect the rights of the parties as they appear upon this record.

The judgment must be reversed and a new trial granted.

CAMPBELL, J. concurred.

COOLEY, C. J. I concur in the result.

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133	173.	

HENRY L. SELLECK v. THE LAKE SHORE & MICHIGAN SOUTHERN RAILWAY COMPANY.

Railroad injury—Proximate cause.

The illegal obstruction of a highway by a freight train standing across it is not the proximate cause of the injury which a driver, who is waiting to get across the track, may suffer from having his horses frightened by a passing train while he is detained there.

Error to Branch. (Pealer, J.) June 18.—Sept. 29.

CASE. Defendant brings error. Reversed.

Millard & Weaver, O. G. Getzen-Danner and *Ashley Pond* for appellant. As to proximate cause in cases of negligent injury, see *M. & St. P. Ry. v. Kellogg* 94 U. S. 475; *Lewis v. F. & P. M. Ry.* 54 Mich. 55; *Pittsburg &c. Ry. Co. v. Stacey* 47 Am. Rep. 385; *Fowler v. C. & N. W. Ry.* 17 Am. & Eng. Ry. Cas. 537; *L. & N. R. R. Co. v. Guthrie* 11 id. 478; *Jackson v. Nash. Chat. & St. L. Ry.* 13 Lea 491; *Tisdale v. Norton* 8 Met. 388; *Henry v. St. L. K. C. & N. Ry.* 76 Mo. 288: 43 Am. Rep. 762.

Jno. B. Shipman for appellee.

COOLEY, C. J. The declaration in this case contains but a single count. It alleges that on September 11, 1883, the plaintiff was

"engaged in the carrying of passengers from a hotel, in the village of Quincy, located on the south side of the defendant's track, by way of a certain public highway therein, called Main Street, across the railroad track, where it crosses Main street, to the defendant's railroad depot, located on the north side of said track; and thereupon" on said day "the plaintiff attempted to convey two passengers from the hotel aforesaid to the said depot with a wagon drawn by two horses belonging to and driven by him along the route and street mentioned, the said horses being of ordinary gentleness and accustomed to being around cars and trains, but arriving at the place aforesaid, on Main street, where the defendant's said railroad intersects and crosses the same, and across which said public highway is constructed, maintained and operated by the said defendant, the plaintiff was forced to stop, by reason of the said highway being there and then obstructed and rendered impassable by the defendant's cars, to-wit, a freight train, composed of a number of cars, to-wit, twenty-five cars, drawn by an engine, all under the care and management of the defendants. And the defendants did then and there, by their said cars and train, obstruct the said public highway for more than five minutes at one time, to wit, at said time; that is to say, they negligently and unlawfully obstructed it for more than five minutes immediately preceding the time when the plaintiff reached the spot as aforesaid, with their said cars and train, and unlawfully

kept and continued the same obstruction therein for fifteen minutes after he reached the place, and carelessly neglected to cut the train and open a passage along said highway across said track at any time during said period of over twenty minutes, but wrongfully left the cars and train standing on the track across the said highway during all that time, totally blockading and preventing travel thereon during all of said period, well knowing people would need to use the street at said time in going to the depot with and without teams and wagons to meet the west-bound passenger train over said railroad, then nearly due at that station, and also knowing that the blockade of said highway, as aforesaid, made it an unsafe and dangerous place for teams to be caught in, and while the plaintiff was thus prevented by the wrong of the defendant from driving along said highway across the railroad track to the place of safety beyond, and while he was thus waiting for the defendants to open the freight train and let him pass through, and after the defendants, by the means aforesaid, had obstructed the said highway for more than five minutes; and while they continued to keep up and maintain said obstruction and blockade of the street, as aforesaid,—the said passenger train, run by the defendant over said railroad, arrived and departed, and as the engine drawing the same approached and passed the street and spot where the plaintiff was waiting as aforesaid, the defendants, by their servants in charge of the said passenger engine, carelessly and recklessly caused the same to exhaust great quantities of steam and, by negligently and wantonly opening various steam-cocks thereon, and by other means, caused it to make a great noise. These, with the smoke and steam driven towards the plaintiff's horses, the ringing of the engine bell, and the roar and confusion of the moving train, being calculated to frighten ordinarily gentle horses, blocked, as were the plaintiff's, by the freight train on said street. And the plaintiff avers that by the wrongful acts of the defendants aforesaid his said horses and team were frightened and became unmanageable, and, without the fault of the plaintiff, and while he was using all due care and diligence to hold and control them, they turned around and overturned the wagon wherein he and his two passengers were sitting, throwing them out, and throwing the plaintiff with great force and violence upon the ground and against the sidewalk, and then the team ran away, dragging the plaintiff on the ground four rods in his efforts to stop them,"

—with averments of special damage, wherefore the plaintiff sues, etc.

It will be observed that two wrongs are imputed to the defendant by this declaration: the *first* being the obstruction of the public street for more than five minutes by one of its trains contrary to the statute; and the *second*, the carelessly and recklessly causing the passenger engine as it was passing to exhaust great quantities of steam, etc., etc., whereby the plaintiff's team became frightened and unmanageable, etc. As the injury of which the plaintiff complains is alleged to have been caused by this second wrong, the recital of the first was of no legal importance in the case, and can only be understood as made by way of explanation of the horses being where they were when the wrong from which the injury resulted took place. But the explanation is of no importance in the case: the plaintiff had a right to be with his horses where he was, and if the defendant wrongfully caused an injury to him while there, it is responsible without regard to the reason for the plaintiff being there, provided he was himself without fault.

On the trial the plaintiff failed to give any evidence whatever in support of the allegation of wrong to which by his declaration he had attributed the injury. In fact he disproved the allegation by showing that, instead of there being any such careless and reckless conduct, nothing unusual occurred in the management of the passenger engine. The defense thereupon asked an instruction to the jury that they return a verdict for the defendant; but this was denied. On the contrary the jury was instructed as follows:

"If the defendant did not obey the law, and did obstruct plaintiff's way there for more than five minutes at a time as complained of, and if the obstruction for the time over five minutes caused the injury, without any contributory negligence on the part of the plaintiff, then the plaintiff should recover. * * *

If, in consequence of such blockade of the highway as I have before named, the plaintiff was unavoidably detained and prevented from passing with his team along it to the depot, until the passenger train, using the usual sig-

nals and making the ordinary noises of moving trains, arrived and passed west, and by reason of this unavoidable detention, and while waiting to pass over the crossing, the plaintiff's team became by those surroundings frightened and unmanageable, without the fault of the plaintiff, while he was using proper care and skill to hold and control them, and they overset the wagon and run away, injuring the plaintiff and his property, the defendant must be held liable for the damages thereby resulting to him."

These instructions were erroneous. The plaintiff had not by his declaration attributed his injury to the illegal detention, and if he had, it would have been idle, for the particular injury of which he complained, namely, the fright and running away of his horses, could not have flowed from that detention as a proximate cause. The discussion of the question of proximate cause by this Court in *Lewis v. Railway Co.* 54 Mich. 55, is so recent and was so full, that further discussion now could do little more than to go over the same ground, and is therefore quite unnecessary. But the recent cases of *Jackson v. Railway Co.* 13 Lea 491 and *Pittsburg &c. Railway Co. v. Staley*, to appear in 41 Ohio State Reports [page 118] are referred to as cases analogous to the present in their facts, and in both of which a conclusion was reached in harmony with the views here expressed.

A new trial must be ordered.

CAMPBELL J. concurred.

SHERWOOD, J. I concur in the result.

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Daniel Smead v. The Lake Shore & Michigan Southern Railway Co.

Railway cattle-guards—Injury to animal on track.

1 A declaration for an injury caused by the insufficiency of a cattle-guard should state in what particulars it was insufficient; and if it does not do so it is demurrable.

2. In an action for the loss of a colt killed upon a railway track in consequence of the insufficiency of the cattle-guards it was improper to ask the plaintiff and his witnesses whether, in their opinion, the cattle-guard was sufficient to prevent animals from getting on the right of way under circumstances ordinarily arising at those places.

3 Cattle-guards are sufficient if they are in good repair and of a pattern that has been found by experience effective in keeping from the track such animals as they are generally designed to restrain.

Error to Branch. (Pealer, J.) June 18–19.—Sept. 29.

Case. Defendant brings error. Reversed.

Millard & Weaver, O. G. Getzen-Danner and *Ashley Pond* for appellant.

John B. Shipman for appellee.

Sherwood, J. The plaintiff in this case sued for the value of a colt killed by the defendant's engine upon its right of way in April, 1882, at or near a place called Payne's Crossing, in the town of Batavia in Branch county. The action is based upon that part of How. Stat. § 3377, relating to cattle-guards, reading as follows: "Every railroad company * * * shall erect and maintain fences on the sides of their respective roads of, the height and strength of a division fence required by law, with fences and cattle-guards at all highway and street crossings, *sufficient to prevent cattle or other animals from getting on such railroad.* * * * * Until such fences and cattle-guards or ditches shall be duly made, such company * * * shall be liable for all dam-

ages done to cattle or other animals thereon, which may result from the neglect of such company * * * to construct and maintain such fences, cattle-guards, or ditches, as aforesaid; and after such fences, cattle-guards, or ditches shall be duly made and maintained, such company or corporation shall not be liable for any such damages, unless negligently or willfully done." They were required to construct these protections within six months after the road was running.

The case was tried and submitted to the jury entirely under the first count of the declaration. This avers that the defendant, although operating the road for more than six months previous, did not construct and maintain a cattle-guard at the highway crossing where the colt was killed sufficient to prevent horses from getting on the railroad, and by reason of this neglect of duty the plaintiff's horse was enabled to and did get from the highway, over this poor cattle-guard, upon the railroad right of way, where it was killed by one of the defendant's trains. No point was made upon the sufficiency of the declaration.

The only question seriously controverted upon the trial was as to the sufficiency of the cattle-guard. The colt, in entering upon the defendant's right of way, jumped the cattle-guard at the highway crossing, and when the train came along the animal, in its fright and effort to escape, again attempted to jump the cattle-guard, and was caught, run over and killed. The guard was almost new, in good repair and complete in all its parts. The claim made by the plaintiff was that the cattle-guard was insufficient in its design and construction to meet the requirements of the statute above quoted. The cause was submitted to the jury under the charge given by the court, and a verdict was rendered against the defendant. The defendant brings error.

The facts in the case seem to have been substantially conceded, except as to the sufficiency of the cattle-guard. We quite agree with Judge Pealer, who tried the cause at the circuit, that "what kind of a guard should be used is quite a difficult question," to comply with the statute, and that "a fair construction of the law does not require the company to

construct a guard at its crossings that should keep animals from getting over it under a great degree of excitement" or in exceptional cases, or under extraordinary circumstances; but it requires the company "to have such a guard as would turn back such beasts as are generally restrained, under such ordinary circumstances as may occur at such places, or may be reasonably expected to occur there." Of course the kind of guard which will accomplish this object can only be ascertained by observation and experience, and when the best and most approved is used, designed and constructed, as the result of the use of such means, and kept in proper place and good repair by the company, it has discharged its whole duty in the premises, and if a loss then occurs to the owner of an unruly or disorderly animal running in the highway, in its crossing or attempting to cross the guard, the loss must be borne by the owner, and cannot be attributed to any fault of the company.

The difficulty of determining the sufficiency of the cattle-guard is made apparent in the examination of the plaintiff's declaration in this case. He utterly fails therein, in either count, to point out any specific defect in which the insufficiency consists, but contents himself with relying upon the allegation of general insufficiency. Certainly the violation of or neglect to perform some specific and well-defined duty must be shown before any liability is incurred, and good pleading requires that this should appear in the declaration; but no demurrer was interposed in this case, and this subject cannot be further considered, except to say that the testimony to prove the cause stated, with a single exception, was properly received.

The following question was put to the plaintiff and several of his witnesses, viz.: "In your opinion was the cattle-guard sufficient to prevent animals from getting on the right of way under circumstances ordinarily arising at those places?" This question, and the one following it of a like nature, was permitted to be answered by the plaintiff and his witnesses, against the objection of defendant's counsel. This, we think, was error. The question called for answers giving merely

the opinions of the witnesses, and established no facts. Really, the facts stated by some of these witnesses, when given, tended strongly to contradict the opinion. It is quite elementary that a witness can only give his opinion in exceptional cases, and then only when his knowledge is such as to qualify him, to some extent, as an expert.

I think the rule is well stated in Best on Evidence, where he says: "This rule is necessary to prevent the other rules of evidence being practically nullified. If the opinions thus offered are founded on no evidence, or on illegal evidence, they ought not to be listened to; if founded on legal evidence, that evidence ought to be laid before the jury." 2 Best on Evidence 511, 517 and notes; *Joyce v. Insurance Co.* 45 Me. 168; *Ames v. Snider* 69 Ill. 376; *Whitmore v. Bowman* 4 G. Greene (Ia.) 148; *Veerhusen v. Chicago & N. W. Ry. Co.* 53 Wis. 689. The testimony was incompetent.

The evidence tended to show that the guard in question was the kind best approved now in use; that it is, and has been for many years, in use by the defendant on all its roads; and that it is also used by nearly all the principal railroads in the country; and, after making this proof, the defendant requested the court to charge the jury upon this subject as follows: "If this cattle-guard was sufficient to reasonably serve the purposes of turning back such beasts as cattle-guards are generally designed to restrain, then the defendant is not liable for not maintaining a better one, and your verdict must be for the defendant. The defendant is not bound to guard against unruly horses or other beasts. *Davidson v. Mich. Cent. R. R. Co.* 49 Mich. 428. Railroads are only held to the duty of being prudent railroad companies, and to the diligence embraced in good railroad management. The degree of care required in any business must be proportionate to its nature and risks. But the law does not require the business to be conducted upon any unusual basis, though the business be one of great risks, and requiring great care and caution. Railways fulfill their duty if they conduct their road in the manner generally found and believed safe by prudent railway companies. *Mich. Cent. R. R. Co. v. Cole-*

man 28 Mich. 448; *Grand Rapids & Ind. R. Co. v. Judson* 34 Mich. 507; *Mitchell v. Chicago & G. T. R. Co.* 51 Mich. 239. The burden of proof is on the plaintiff to prove every fact necessary to entitle him to recover. He must show by preponderance of testimony that this cattle-guard was not sufficient for the purposes for which it was intended and constructed. He must show that it was not sufficient to turn back and restrain such cattle, horses and other beasts or animals as such structures are designed to restrain. If this cattle-guard was in good repair and condition, and was of the same general construction and efficiency as cattle-guards in general use on railroads, and if such cattle-guards have, by experience, been found sufficient to turn back and restrain cattle, horses and other animals from getting on the railroad, then this cattle-guard must be deemed to be sufficient under the law, and your verdict must be for the defendant."

We think these requests were all proper and should have been given in this case. We do not think, under the testimony, the case should have been taken from the jury, but under proper rulings and instructions was one for the jury. For the error herein pointed out the judgment must be

Reversed and a new trial ordered.

COOLEY, C. J. and CAMPBELL, J. concurred.

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WILLIAM B. LEDYARD v. LEVI L. PHILLIPS, MARY L. WARNER ET AL.

Offset of Judgments.

A bill to compel the offset of judgments was dismissed, where one was a joint and the other a sole judgment, and that recovered by defendant had been lawfully assigned to a third person for a valuable consideration before there was any final judgment against which it could be set off.

Appeal from Kent. (Montgomery, J.) June 19.—Sept. 29.

BILL to compel set-off. Defendants appeal. Reversed.

Smiley & Earle for complainant. Where one of the parties to counter-claims or judgments is insolvent, and the circumstances are such that a set-off could not be had at law, equity will compel a set-off of one claim against another, or one judgment against another: *Simson v. Hart* 14 Johns. 62, 74; *Blake v. Langdon* 19 Vt. 485; *Lindsay v. Jackson* 2 Paige Ch. 581; *Pond v. Smith* 4 Conn. 297; Storey's Eq. Jur. § 1437; *Smith v. Felton* 43 N. Y. 419; *Brewer v. Norcross* 17 N. J. Eq. 219; *Phelps v. Reeder* 39 Ill. 173; *Himrod v. Baugh* 85 Ill. 435; High on Inj. (2d ed.) § 239; 7 Wait's A. & D. 478; *Gay v. Gay* 10 Paige Ch. 369; mutual judgments may be set off, either on motion or upon a bill filed, independent of the statute of set-off, in virtue of the incidental control of the court over its suitors and officers, and of the original jurisdiction of the Court of Chancery prior to the statute of set-offs: *Duncan v. Broomstock* 13 Am. Dec. 729; in the exercise of this power, a judgment against A and B may be set off against a judgment in favor of A alone: *Wright v. Cobleigh* 23 N. H. 32; *Concord v. Pillsbury* 33 N. H. 310.

Edward Taggart for appellant Warner. Equity will not allow a set-off where the law will not; and in no case is this rule modified farther than to allow such a set-off where there are special equities: *Green v. Darling* 5 Mas. 201; *Gordon v. Lewis* 2 Sumn. 628; *Duncan v. Lyon* 3 Johns. Ch. 351; *Dale v. Cooke* 4 Johns. Ch. 11; *Lockwood v. Beckwith* 6 Mich. 175; see *Hale v. Holmes* 8 Mich. 37; *McGraw v. Pettibone* 10 Mich. 530; *Hendricks v. Toole* 29 Mich. 340; *Wells v. Elsam* 40 Mich. 220; as a general rule equity will not set off judgments, as against a bona fide assignee: *Davis v. Milburn* 3 Ia. 163; *Ramsey's Appeal* 2 Watts 229; *Graves v. Woodbury* 4 Hill 559; *Dunkin v. Calbraith* 1 P. A. Browne 47; *Hendrickson v. Hinckley* 17 How. 443; *Sellers v. Bryan* 2 Dev. Eq. 358; *Cotton v. Evans* 1 Dev. & B. (Eq.) 306.

CAMPBELL, J. Complainant filed his bill to compel the set-off of so much as should be necessary of a judgment in his favor against John W. and Levi L. Phillips, against a judgment obtained against him by Levi L. Phillips, but assigned to defendant Warner.

The complainant's judgment was obtained on a joint and several note made by John W. and Levi L. Phillips for

$6492 due September 1, 1873. Upon this, suit was brought October 15, 1875, and defendants pleaded the general issue with set-off. In March, 1876, the suit was referred to S. L. Withey, who, May 15, 1877, reported in favor of defendants for $697.23. Exceptions were taken in the circuit court, which were not disposed of until July 27, 1881, when judgment of confirmation was rendered. This judgment was removed by writ of error to this Court where the judgment was reversed and judgment rendered January 5, 1882, for $1206 and costs. This difference was made up by allowing Ledyard the value of crops which were on land bid off by him on foreclosure, and charged to him by the referee, but held by this Court to have gone to him as purchaser. *Ledyard v. Phillips* 47 Mich. 305.

Levi L. Phillips sued Ledyard in August, 1880, for work and labor in putting in a wheat crop in 1874, and on the 27th day of January, 1882, obtained judgment for $845.56 and costs, which he at once assigned to defendant Warner. On March 6, 1882, complainant filed this bill to enforce the set-off between the two judgments. The grounds relied on in the bill are that the joint judgment was for a private debt of Levi; that the transaction out of which Levi's claim arose was in the nature of a mutual credit,—the employment being had on the understanding that the claims should be dependent on the same mutual dealings, the insolvency of Levi, and the assignment of the latter judgment to defendant Warner as a colorable attempt to evade the set-off.

The court below decreed a set-off as prayed, and included costs as well as damages.

We discover nothing to indicate that Levi's work was done with any reference to the claim set up against him by complainant. On the contrary, there is much to indicate that no counter-claim was then supposed to exist. There had been a foreclosure of a real estate mortgage on which a surplus of not far from $10,000 was decreed to belong to John W. Phillips as against Ledyard, by decision of this Court in April, 1875 (*Ledyard v. Phillips* 32 Mich. 13),—the sale having been made in 1874, previous to the services in question, and

the sale being the same one on which the other controversy arose. It is very manifest that at this time there was no such understanding as the bill sets up, and there is some reason to think that Levi was a sufferer from the disposition of the surplus money to such an extent as to prevent the judgment of January 5, 1882, from being in any proper sense his sole debt as among the parties. The only ground which is at all plausible is the alleged insolvency of Levi. But as it is not at all shown satisfactorily that John is insolvent, although so alleged, and no attempt has been made to collect the judgment by execution, we doubt whether that ground of complaint is made out. But it is not very important because we find nothing to impugn the assignment to the defendant Warner.

On the 26th of November, 1881, for an actual and valuable consideration received from her in the price of land conveyed by her to him for $1800, Levi L. Phillips assigned to her all his claims against complainant then in suit, and any judgment he might obtain thereon. At that time he had already obtained judgment in the old referred suit, which stood apparently good, and which was subsequently reversed on a contested question of law. At that time there was nothing which could stand in the way of his doing as he pleased with his other claim, which was put in judgment January 27, 1882. The assignment made after this judgment was no more than he was legally bound to complete, if necessary to fulfill the sale. There is no foundation in the record for any suspicion of its sufficiency. The transfer of the land is made out, and the only argument used against the assignment is based on domestic relations which are not shown to be wrong, and which could not in themselves deprive the assignee of the price due her for her lands. There is no force in the argument that the assignment could not discharge the vested equity to a set-off. No such equity was made out which would appear on the face of the judgments if made out at all. No presumption arises of any connection between a joint judgment and a sole judgment.

And the assignment really dates back to the preceding November, when there was no judgment to set off.

We think complainant made no case for relief. The decree must be reversed and bill dismissed with costs to appellants in both courts against complainant.

COOLEY, C. J. and SHERWOOD, J. concurred.

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ALONZO ROLFE v. THOMAS DUDLEY, EGBERT J. DAVIS AND ALBERT W. BRADFORD.

Justice's courts—Attachment—Substituted service—Trover for goods taken under void judgment—Partnership liability, in tort.

1. Where the circuit judge who signs a bill of exceptions certifies that it contains the substance of all the evidence, the verdict will be presumed to be warranted by the evidence if it stated that any was introduced tending to prove the material issues.
2. Substituted service of a writ of attachment by leaving a copy with defendant's wife at his last place of residence will not give a justice jurisdiction over his person; and a personal judgment on such service is void.
3. Trover will lie for property taken under a void judgment, not only against the constable who seized it, but against the judgment creditors if they took part in the proceedings after judgment. So *held*, where the creditors were the members of a firm, and one of them received the property, and refused to give it up while the other declined to do anything about it, but referred the owner to his partner.
4. Whatever one partner does in the collection of a firm debt is presumptively done with the other's consent.

Error to Wayne. (Chambers, J.) June 19.—Sept. 29.

TROVER. Defendants bring error. Affirmed.

Shaw & Mathews for appellants.

Geo. H. Prentis for appellee.

CHAMPLIN, J. The plaintiff brought trover to recover damages for the alleged conversion of a three-springed

phaeton. The defendants pleaded the general issue, with notice of justification under a valid writ of attachment issued by a justice of the peace.

The circuit judge certifies in the bill of exceptions that the bill contains the substance of all the evidence and proceedings in the cause had on the trial. The evidence is not set forth, but it is stated that evidence was introduced tending to prove certain facts stated in the bill of exceptions. In such cases it will be presumed that the verdict of the jury is warranted by the evidence, where any was introduced tending to prove the material issues in the case.

The plaintiff, to maintain the issue on his part, introduced evidence tending to show that in April, 1882, while he was temporarily absent from his home in the city of Detroit, the defendant Albert W. Bradford took from plaintiff's place of business in said city a three-spring top buggy or phaeton, which the plaintiff was the owner of; that early in May, when he returned home, he demanded the buggy from defendant Bradford, who refused to give it up; that Bradford at this time, after refusing to give it up, told plaintiff he had taken the buggy for the defendants Dudley and Davis, who were partners under the firm name of Dudley & Davis, and that he, Bradford, was acting under their instructions, and that plaintiff would have to see them about the matter; that plaintiff called on defendant Davis after this, and demanded the buggy from him, and Davis said he would have nothing to do with it; that plaintiff must see his partner Dudley, in relation to it; that plaintiff then called upon defendant Dudley, and demanded the buggy, and Dudley refused to give it up; that the buggy had not been returned to him, the plaintiff, and that it was worth at the time of taking, $250.

The defendants then introduced the files and record in a suit commenced by attachment before a justice of the peace by defendants Dudley and Davis, as copartners, to recover a debt due to them from the plaintiff. The affidavit for the writ was sworn to by Davis, and the writ was delivered to the defendant Bradford, who was a constable, to serve. The writ was issued April 10th, 1882, and was returnable April

17th, 1882, at nine o'clock in the forenoon. Bradford levied the attachment upon the property in dispute on the 10th of April, and made an inventory thereof. His return of service, endorsed on the writ, is as follows:

"*State of Michigan, County of Wayne, ss.*: By virtue of the within attachment, I, Albert W. Bradford, constable, did, on the 10th day of April, A. D. 1882, seize, within my county, the goods and chattels of the within named defendant, which are described in an inventory, of which a copy, certified by me, is herewith returned, and on the same day I left a copy of the annexed writ of attachment, and of said inventory, duly certified by me, with F. P. Jackson, in whose possession I found the said goods and chattels; and I further return that on the 11th day of April, A. D. 1882, at the city of Detroit, in said county, because the defendant could not be found in the county of Wayne, I left a copy of the annexed writ of attachment, and of said inventory, duly certified by me, with one Mrs. Rolfe, wife of the defendant, at the last place of residence of said defendant, in said county of Wayne. ALBERT W. BRADFORD, Constable.
Dated, April 12th, 1882."

No personal service was had, and the defendant did not appear, but the plaintiffs proceeded to judgment, issued execution, and sold the property; for what price does not appear, but the execution was returned fully satisfied. The defendants further gave evidence tending to show that the buggy in controversy was never in the possession of the defendants Dudley and Davis, or either of them, nor was a demand for the buggy ever made by the plaintiff of defendants Dudley and Davis; that plaintiff was indebted to the firm of Dudley, Davis & Company, composed of defendants Dudley and Davis, for goods sold and delivered, and that defendant Egbert J. Davis instituted the proceedings to recover the debt.

Plaintiff then introduced evidence tending to show that at the time of the attachment he was engaged in the business of buying and selling carriages, harnesses and horses in the city of Detroit, and that the buggy attached was a part of his stock at that time.

The foregoing is substantially the case made by the respec-

tive parties. The service of the writ of attachment in the manner and time set forth in the return of the constable gave the justice no jurisdiction over the person of the defendant. The further proceedings and the judgment rendered in that case were void. *Adams v. Abram* 38 Mich. 302, 304; *Isabelle v. Iron Cliffs Co.* 57 Mich. , and cases there cited. The judgment being void afforded no justification to defendants for proceeding thereunder.

It is claimed by counsel for defendants that, as the property never came to the actual possession of defendants, and as the error was that of the constable, they were guilty of no intentional wrong, and they should not be held liable in this action. This would be true had they taken no steps in the case after the defective return of the officer, and had assumed or asserted no control over the property after that time. But they proceeded in the case to judgment, issued execution and sold the property, thus satisfying their claim. When the plaintiff demanded the property of Bradford he refused to give it up, asserting that he had taken it for Dudley & Davis, and was acting under their instructions, and referred him to them. Plaintiff then demanded the buggy of Davis who refused to have anything to do with it, and told him to see his partner Dudley in relation to it, and plaintiff then demanded the property of him and he refused to give it up. These facts are sufficient to connect the defendants with the detention of the buggy and render them responsible for its unlawful conversion. The refusal of Dudley to deliver up the property when demanded was sufficient to bind his partner Davis. It was not necessary that both partners should refuse to deliver the vehicle on demand by plaintiff. What was done by either in the collection of the partnership debt was presumptively with the sanction of the other. *Harvey v. McAdams* 32 Mich. 472.

This disposes of the case and renders a discussion of the other points raised unnecessary.

The judgment is affirmed.

The other Justices concurred.

OCTOBER TERM 1885.

CHRISTOPHER POST v. VILLAGE OF SPARTA.

Saloonkeeper's bond.

Mandamus will not issue to compel the approval of a liquor dealer's bond by the council of a village organized under the General Incorporation Law, which empowers such villages to suppress saloons. Act 52 of 1883.

Motion for order to show cause. Submitted October 6. Denied October 7.

Relator, a resident of the township of Plainfield, in Kent county, wishing to go into the saloon business in the village of Sparta, presented a bond in accordance with the requirements of the Liquor Law (Act 259 of 1881) to the common council of that village. As the council had never fixed the penal sum for such bonds, it was drawn in the sum of $6000, which is the maximum amount required by the State law. No objection was made to the sureties, who had duly justified on oath, but the council, without referring the bond to any committee, rejected it for no other apparent reason than that the village had an ordinance which absolutely prohibited liquor dealing within its bounds. Relator asks a writ of mandamus to compel the council to approve his bond.

Frank G. Holmes for relator.

THE COURT denied the writ on the ground that the village of Sparta was organized under the General Incorporation Law, which was so amended in 1883 (Act 52) as to give the villages organized thereunder the right to suppress saloons.

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ATTORNEY GENERAL v. THE BOARD OF COUNCILMEN OF THE CITY OF DETROIT.

Constitutional law—Perpetuity of institutions—Elective franchise—Tests for holding office—Delegation of powers.

1. The fundamental and necessary characteristics of the various classes of municipal bodies which administer local government in Michigan, cannot be changed by legislation from what they were as fixed by usage and recognition when the Constitution was adopted.
2. The elective franchise is substantially the same in all parts of the State and cannot be essentially changed in any locality by legislation to regulate the mode of exercising it.
3. Matters of individual conscience, including opinions on political subjects, cannot affect a citizen in any of his legal and political rights.
4. The ballot is a constitutional method of voting and cannot be changed; and its perpetuation is meant to secure the right to vote without having the voter's opinion of men or measures inquired into.
5. Act 320 of 1885 in providing for the appointment of election inspectors in Detroit by a board appointed by the mayor and council, and consisting of two persons from each of the two leading political parties, is unconstitutional: (1) as making particular political opinions a condition to holding office; (2) for sub-delegating the popular power of choosing officers; (3) for interfering with the municipal right to local self-government.
6. The phrase "office or public trust" in the constitutional prohibition against tests includes every important function of government, and covers boards of registration commissioners. And the term "test" does not apply to those special qualifications that are required for particular offices.
7. All officers and functionaries exercising powers of government and control over political action must derive their powers and office either from the people directly or from the agents or representatives of the people.

Mandamus. Submitted Oct. 6. Denied Oct. 14.

Edwin F. Conely and *Isaac Marston* for relator.

Fred A. Baker and *Ashley Pond* for respondents.

CAMPBELL, J. The Attorney General applies for a mandamus to compel the respondents to take action upon certain nominations made by the mayor of Detroit of four persons, two being Republicans and two being Democrats, to act as a "Board of Commissioners of Registration and Election" for the city of Detroit. Respondents refused to consider the nominations because they regarded the statute which provides for such board as unconstitutional and invalid. To an order to show cause they interpose that ground of defense No other question is of much importance in the case.

The necessity of an immediate decision, in order to allow time for the action of the city authorities in season for the coming election, made it impossible for the Court to do more than announce its determination, on rendering judgment in favor of respondents, as any oral statement in brief form of the grounds of their action would have been liable to some misapprehension. It was therefore thought best that the members of the Court should express their views more formally in writing.

The statute in question purports to amend chapter 2 and some sections of chapter 3 of the charter of Detroit, as revised in 1883. Chapter 2, which refers to registration of voters, is entirely superseded by the present act, as is also so much of chapter 3 as provided for the choice of inspectors of election. The new statute undertakes to provide a Board of Commissioners to appoint ward registers and inspectors who are to perform the duties formerly imposed on the boards made up of aldermen and their appointees and of persons elected by the voters. The board thus provided for is required to be composed of four members holding office for four years, the first board being appointed for one, two, three and four years respectively, so that one vacancy shall be filled each year. They are all to be resident electors of the city, and "two members thereof to be from each of the two leading political parties in the said city." They are required two weeks before the time fixed by law for the meeting of boards for the registration of voters, to appoint two qualified electors of each voting district, one "from each of

two leading political parties in said city" to act as registrars and form a district board of registration. The various district boards sitting together are to constitute a city board of registration. The Board of Commissioners are to fill any district vacancies by persons of the same political party to which the absentee belongs.

The commissioners are also required to appoint for each voting district two inspectors, one from each of the two political parties "represented in the common council of said city," the electors choosing a third. Vacancies in any board of inspectors are to be filled by viva voce vote of the electors, but each vacancy must be filled by a person of the same political party as the absentee. The commissioners also appoint the various clerks of election, but have no immediate part in the work of registration by action or supervision.

The statute makes a number of new provisions upon the subject of registration and election, which were more or less discussed on the argument, but which would only be important if the law were not held to be entirely invalid, as we deem it to be. These several provisions will not, therefore, be dwelt upon.

The invalidity of the statute was chiefly based on the argument, upon the illegality of creating a board with such powers as those conferred by the statute, and required to be composed of equal numbers of two political parties appointed as such members and ineligible without such party connection. Relator insists that the Legislature under its power to pass laws "to preserve the purity of elections and guard against abuses of the elective franchise" has discretionary power over the methods, and that even if the partisan qualification is improper the court may treat it as not essential and sustain the commission by allowing the selection of its members without any such test. Neither of these grounds is tenable in our view of the Constitution.

In order to appreciate the bearing of the considerations presented on the case, it will be necessary to make some reference to the general elective system of the Constitution itself.

It is needless to explain that under that instrument the whole scheme of government, in every department, depends upon the action of the qualified voters in their election districts. All male citizens of lawful age, and some whose United States citizenship is incomplete, are entitled after a certain term of residence to vote in the township, or ward, in which they reside. Every vote, for any purpose whatever, is required to be cast in such township or ward. The only exception is in case of soldiers in the field during war. All legislation imposing restraints or conditions upon voting must conform to the other clauses and provisions of the Constitution. No part of that instrument can be allowed to over-ride or destroy any other part. It is also well settled that our State polity recognizes and perpetuates local government through various classes of municipal bodies whose essential character must be respected, as fixed by usage and recognition when the Constitution was adopted. And any legislation, for any purpose, which disregards any of the fundamental and essential requisites of such bodies, has always been regarded as invalid and unconstitutional. There is nothing in the Constitution which permits the Legislature, under the desire to purify elections, to impose any conditions which will destroy or seriously impede the enjoyment of the elective franchise. And as the right of voting is the same everywhere, it is obvious that the conditions regulating the manner of exercising it must be the same in substance everywhere. The machinery of government differs in its details in cities, villages and townships, and of course it is unavoidable that there must be some differences in methods and officers, to administer the election laws. But it cannot be lawful to create substantial or serious differences in the fundamental rights of citizens in different localities, in the exercise of their voting franchises.

It is also a most important principle under our constitutional system, that no one shall be affected in any of his legal and political rights by reason of his opinions on political subjects or other matters of individual conscience. The political right to freedom of belief and expression is asserted in the most distinct way, and applies to every privilege which the

Constitution confers. No one has ever supposed that any new condition could be added to those which the Constitution has imposed on the right of suffrage, beyond such as are necessary to guard against double voting, or to prevent its exercise by those who are not legal voters. The only legitimate object of registration laws is to secure a correct list of actually qualified voters. Any attempt to inquire into the sentiments of voters is not only an abuse, but one which it is the chief purpose of the ballot system to prevent. The ballot is a constitutional method which cannot be changed, and its perpetuation means the security to vote without any inquisition into the voter's opinion of men or measures. And it would be entirely meaningless if the voter's choice of candidates for any office must be made from any particular party or number of parties. But the Constitution has made this more specific (although this was hardly necessary), by providing, after giving the form of an official oath, that "no other oath, declaration or test shall be required as a qualification for any office or public trust."

It is manifest that every important function of government comes under one or the other of these heads of office or public trust. The board of registration commissioners consists, under this statute, of persons holding permanent offices. The district registrars, clerks and inspectors perform functions connected with the most vital and important action of citizens in their capacity as choosers of the officers of government. The constitutional rule covers them all, literally as well as impliedly.

It was urged on the argument that if the term *test* can be held applicable to inquiries into party affiliation, it is equally applicable to those other qualifications often required for public service, such as education, scientific acquirements in surveyors and other specialists, legal knowledge in law officers, and the like. But this is not so. Not only is it evident from the other provisions in this clause that all of the exemptions referred to are such as would be applicable in all sorts of offices, but the use of the word *test* is especially significant because its recognized legal meaning in our constitutions is

derived from the English Test Acts, all of which related to matters of opinion, and most of them to religious opinion. Such has been the general understanding of the framers of constitutions. If this were not so, and if the power of the Legislature in imposing conditions of office is at the same time only restrained by express clauses applying in terms to officers and to no one else, it would not be difficult for any dominant party controlling the Legislature to perpetuate its power until overthrown by revolution. But such discriminations are as repugnant to the rights of voters in selecting as to the rights of those chosen in assuming office, and this clause is but an additional assertion of a principle found in other parts of the Constitution, expressed or clearly implied.

In the case of *People v. Hurlbut* 24 Mich. 44, it was not disputed by any of the judges who referred to the matter, that it would not be lawful to confine the choice of officers to particular parties, although two of the judges thought that the provision in that particular case was capable of being eliminated from the statute. And it is claimed in the present case that the present law is declared and intended to be non-partisan, and that the board may be chosen without reference to this restriction of party membership.

It is altogether likely that the framers of the law were of opinion that the evils of partisan action and the temptation to carry it to abusive extremes would be lessened by requiring that one party should not monopolize the offices but that two should share them. No one can doubt the advantage of impartiality in public action. But parties, however powerful and unavoidable they may be, and however inseparable from popular government, are not and cannot be recognized as having any legal authority as such. The law cannot regulate or fix their numbers, or compel or encourage adherence to them. Many good citizens form no permanent party ties, and when elections are close the effort of each party is to detach votes from the friends of the other. Where there are two parties larger than any others, the success of either is very often gained by coalition with a third one. In local matters party allegiance is not uncommonly laid aside for the

time being, so that it cannot be said that any party is represented in the election. However well meant such a statute as that before us may be, it distinctly makes party adhesion a condition of office, and not only so, but it puts all but the two favored parties beyond the possibility of representation, if the law is obeyed.

It is equally clear that this party representation is the essential purpose of the law, and that the other changes are merely subsidiary. There are some changes in detail, but the main purpose cannot be mistaken. The partisan qualifications are made emphatic in regard to all the offices. It is impossible for any candid person to read the act and believe that the real legislative design can be carried out by leaving the mayor and councilmen at liberty to choose commissioners from a single party, or for the commissioners to appoint registrars and inspectors without distinction of party at their pleasure. And it would need no great sagacity to see that if such unlimited power were vested in a body made up as this body might then be constituted, all of the old evils would remain, and would be made worse by the absence of any responsibility to the voters of the precincts.

In my judgment the creation of a board with such powers as are given to this board is quite as serious an infringement of the Constitution as the partisan clauses, and much more dangerous. This board is made by the statute the repository of some of the most important powers of government. It has the entire control, directly or indirectly, of the elections on which all the departments of government depend. It has the appointment of officers who can deprive any man of his vote at an election, if they see fit to do so, without any adequate means of redress to save it. While it is unavoidable that a voter's rights at an election must, in case of dispute, be disposed of summarily, it is all the more necessary that the tribunal which decides on so sacred a right should be made up in harmony with representative and popular institutions.

While boards are not uncommonly created for the more convenient managements of the business interests of municipalities, it is a principle universally settled in our

system that all officers and functionaries exercising powers of government and control over political action must derive their powers and office either from the people directly, or from the agents or representatives of the people. The officers of towns and cities have always been so created. The discretion of a political body or functionary cannot be delegated and sub-delegated indefinitely. Here the choice of ward officers is made, not by the people of the ward, nor by any one chosen by the people of the ward, nor by the chosen officers of the city, but by persons who are themselves appointees of a part of the city government. No doubt there are many ministerial powers which can be deputized. But a governing body cannot deputize others to perform its governing functions, and the Legislature cannot authorize it to do so without destroying the character of the corporation which is required to be preserved. It has always been held in this State that the municipalities which can be created by our Legislature must be such in substantial character as they have been heretofore known. Up to this time, and ever since elections were first held in Michigan, they have been not only localized in some municipal division, but regarded as municipal action and supervised and managed by municipal officers either directly elected or else appointed by those who have been elected. Such a board as this, which is in no sense a mere agency of the city, is foreign to our system. If it can be created in a city, it may be just as well created in a county, or for the State. When the election ceases to be a municipal procedure, the whole foundation of municipal government drops out. And a municipality which is not managed by its own officers is not such a one as our Constitution recognizes.

As the defects which have led to a refusal of a mandamus in this case invalidate the whole law, there is no occasion to consider anything else. In my opinion either of them is fatal.

CHAMPLIN and SHERWOOD, JJ. concurred.

MORSE, C. J., concurring. The ostensible primary object of the law under consideration was to preserve the purity of

elections and throw additional safeguards around the ballot-box. Such a law should be sustained, unless in plain violation of the letter or spirit of the Constitution. Every good citizen, regardless of political belief or party action, ought to and does desire that the right of suffrage shall be amply protected against hindrance or obstruction to the legal voter, as well as against the fraudulent exercise of the elective franchise. The security and permanency of good government also depend upon it. We can take judicial knowledge, I think, that political corruption exists, and that there has been, and is liable to be, a dishonest depositing and an unfair counting of ballots. There is no doubt but legislation is needed to protect and purify the exercise of this, one of the highest privileges of the citizen.

The constitutionality of this act, which is in the form of an amendment to the charter of the city of Detroit, was attacked upon the argument in this Court upon four grounds, namely:

First. That it is in conflict with the provision of the Constitution that "No law shall embrace more than one object, which shall be expressed in its title."

Second. That it violates another provision of the Constitution, to wit: "No law shall be revised, altered, or amended, by reference to its title only; but the act revised, and the section or sections of the act altered or amended, shall be re-enacted and published at length."

Third. The form of registration prescribed is not in harmony with the constitutional qualifications of electors in this State.

Fourth. The Act is wholly void because of the political tests or qualifications of the registration and inspection officers.

I am not satisfied that the first two objections are tenable.

As to the third objection, while I believe the form prescribed not applicable to our election laws, and one that would do more harm than good, creating confusion instead of certainty, and having a tendency to hamper and perhaps to prevent the exercise of the elective privilege by the legal

voter in certain cases, and therefore unconstitutional; yet, under the rule uniformly applied to statutes, it would not defeat the operation of the remainder of the law, as I regard the form of registration rather as an incident to than as the main principle of the Act.

The fourth objection to the law, it seems to me, is fatal. The Act provides in substance that the board of councilmen of the city, upon the nomination of the mayor, shall appoint a Board of Commissioners of Registration and Election in and for the city of Detroit, who shall consist of four resident electors, and whose term of office shall be four years. This Board of Commissioners have placed wholly in their hands the appointment of the district boards of registration in every voting precinct in the city. They have also the absolute power of appointment of two of the three election inspectors in every voting district, leaving the electors the poor privilege of choosing the other upon the opening of the polls. Besides defining the powers and duties of said boards of commissioners, registration and election inspectors, the law prescribes the following qualifications of these officers as follows: *First.* "Said board" (of commissioners) "shall be strictly non-partisan in character, two members thereof to be from each of the two leading political parties in the said city." *Second.* "One of said registrars" (district board of registration) "to be from each of two leading political parties in said city." *Third.* "One inspector" (of elections) "so appointed to be from each of the two political parties represented in the common council of said city." The law also provides that if any vacancy shall occur in the district registrars or election inspectors such vacancy shall be filled from the same political party to which the absentee belongs.

Section 1, article vii of our Constitution prescribes the qualifications of electors. It contains no provision for a registration law; and such a law can only be sustained and upheld under section 6 of article vii of that instrument, which authorizes the Legislature to pass laws "to preserve the purity of elections, and guard against abuses of the elective franchise." The Legislature is utterly powerless to pass

any act to hinder or abridge, in the exercise of the electoral right, any person who is an elector under the Constitution, except the manifest intent and operation of the law be to protect the legal voters from fraud and abuse of the elective franchise. If a registration law therefore is constitutional, it must be so drawn as by its terms to proscribe no man because of his political belief; and the officers whose duty it is to operate the machinery of registration and election, who sit in judgment upon the right of citizens to vote, cannot by law be restricted to any one or two political parties.

We must take judicial knowledge of the current undisputed history of our State and country, and act upon the assumption and the fact that there are to-day, at least in the State of Michigan and in the city of Detroit, four political parties, to wit, Republican, Democratic, National or Greenback, and Union or Prohibition. To confine the registration and election boards to men composed wholly of any one, two or three of these parties would be a plain violation of the spirit of our Constitution, and have a tendency to hamper and abridge the elective rights of those belonging to the political party or parties who by law would not and could not have any representation upon such boards. But such a law is also in direct conflict with the plain letter of the Constitution. Section 1, article xviii, of that instrument, after prescribing the form of the official oath of members of the Legislature and of all officers, executive and judicial, concludes as follows: "And no other oath, declaration, or test shall be required as a qualification for any office or public trust."

In my opinion there can be no doubt but this law subjects the officers of registration and election in Detroit to a political test. If the two leading parties in that city be Democratic and Republican, then any citizen who cannot by reason of his political conscience ally himself with one or the other of these parties is debarred by law of the right of holding one of these offices. If the National and Prohibition parties should be the two leading ones, then the Republican or Democrat would be ostracised. There can be in a true

republican government no political or religious test in holding office, the political and religious liberty of the citizen, being at the foundation of republican institutions. If this law had provided in express terms that these various boards should be equally divided between Democrats and Republicans, its repugnance to the Constitution would be plainly apparent to all. As it is, it accomplishes by indirect language the same result.

The opinion of Chief Justice Campbell in *People v. Hurlbut* 24 Mich. 90–92, correctly applies the principle that no person can be prevented from holding office because of his political opinions.

Suppose the Legislature should enact a law that the school officers of any city or village in this State should be selected equally from the members of the two leading churches therein, making a religious test, would any one argue for a moment that such an act was constitutional? And certainly the right of the citizen to his political opinions is and should be as zealously guarded as his right to his religious belief.

It is urged that the political proscription in this law is less than actually takes place without it; that those having the appointing power of registrars and inspectors under the old law do in Detroit, as a matter of fact, appoint all these officers from one party instead of two, thus precluding still more citizens from these places. In answer it can be said that this is an abuse of power not sanctioned by the law, but permitted, if at all, by its silence, while this Act before us puts the seal and stamp of approval upon the very abuse it seeks to cure, and makes it a requisite for these officers to be partisans of a certain name or designation, thus making this evil of partisan appointment a permanent feature of our State polity. For if the Legislature has power to require that these offices shall be filled by members of two parties only, it is competent to pass a law that they shall be holden only by the members of the leading party; and a partisan majority in the Legislature might fix the political belief of every municipal officer in the State, taking from the people of the locality the right to have a government of a different

political color than the Legislature. The remedy is worse than the disease. It is not only political oppression, but a deprivation of a local self-government.

Suppose that in one or more election districts in the city of Detroit the Nationals and Prohibitionists combined were numerically stronger than the united Republicans and Democrats, though a minority in the whole city. Then, in these days of party coalition, it might be possible for the Democrats and Republicans controlling the boards of registration and election in the city, and in these wards and districts, to combine against the other two parties in such districts. In such a case there would be naturally the same incentive to and opportunity for frauds and abuses as if all the registrars and inspectors belonged to one party, and it is therefore doubtful if the present law would in all cases have the effect desired.

Suppose, further, the two leading parties in Detroit to be, as they actually are, Democratic and Republican. The plurality of these dominant parties over the third party might be so small and trifling in the entire city that in two-thirds or even three-quarters of the wards in the city the third party might have a plurality of votes over either, and yet have no representation except one inspector upon any of these boards, and therefore liable to be subject to the same evils that we now deplore.

Again, the inspectors must be of the same political shade as the two leading parties in the common council; and it would not be an unusual thing to have the leading parties in the city not the same as the leading parties in the common council.

The argument might be elaborated further, but it is useless. In any way we turn this law, and apply it to the common every-day occurrences in political life and action at our elections, the more clearly does it appear that this act can have no other effect than a disfranchisement of a large body of the people from holding these offices, simply because they are politically for the time being in the minority in the whole city. And it should be remembered that all are liable

to bear its ostracism. The changes and fluctuations in votes constantly going on often places the majority at the last election in the minority in the next, and they who wield the club of power under this law to-day may feel themselves its weight to-morrow.

I fully agree in the views so ably expressed by Justice Campbell in the leading opinion filed in this cause. The nearer the officers are to the people over whom they have control, the more easily and readily are reached the evils that result from political corruption, and the more speedy and certain the cure. The form of our State government presupposes that the people of each locality, each municipal district or political unit, are intelligent and virtuous enough to be fully capable of self-government, and the idea that the farther removed the election officers are from the people the less we encourage fraud and the more nearly we attain virtue at the ballot-box, is not in harmony with the theory and spirit of our institutions. It matters not what legislation has heretofore been adopted in the same road with this law; it is our duty to deal with the encroachment brought before us and to remove it.

The writ of mandamus must be denied.

JOHN DAVIS v. GEORGE T. LADUE.

Contract—Extra Services.

Assumpsit lies for extra services in running a drive of logs where the original contract only bound the plaintiff to run them within a reasonable time and with reference to existing conditions, and the extra services were such as became necessary and were agreed upon in consequence of the failure of the stream in which they were run.

Error to Shiawassee. (Newton, J.) Oct. 7.—Oct. 14.

ASSUMPSIT. Defendant brings error. Affirmed.

Hugh McCurdy and *A. McDonell* for appellant.

G. R. Lyon for appellee.

SHERWOOD, J. On the 15th day of October, 1883, the defendant owned a certain tract of timber land situate in the county of Otsego, supposed to contain, at the time, two million feet of lumber. On that day the plaintiff made a contract with defendant, whereby he agreed, during the ensuing winter, to deliver upon the bank of Black River the pine upon said lands, cut into merchantable logs, at $4.50 per thousand feet, and in case the defendant did not sell the logs on the bank the plaintiff further agreed to mark the logs at both ends and put them afloat in the river and run them to Cheboygan for the sum of two dollars per thousand. No particular time was mentioned within which this should be done, but it seems to have been conceded by the parties that the season of 1884 would constitute a reasonable time within which it should be done under the contract.

The plaintiff broke the logs into the river in good season, and commenced to run them down the river and into Black Lake. The river was a very small stream where the logs were banked, and after running them down to a point known as "Chandler's Dam," the water got so low that the plaintiff ceased his efforts to go further with them, or, in the lumberman's language, "hung up the drive," to await a rise in the river from rainfall, and immediately informed the defendant of the situation of the logs and what he had done. At this time, which was the last of May, the water in the river was very low, and the logs could only be run by the use of dams to float them, which was very expensive. Upon being informed of the situation the defendant had a treaty with the plaintiff in regard to continuing the drive, and at the request of the former he agreed to continue the drive and cross the dam with the logs, and go as much further as defendant desired, if the defendant would pay him the extra expense therefor. One White had a drive ahead of defendant in the stream, and after the defendant had made an arrangement with White to have plaintiff run both drives,

each to share the expense, defendant informed the plaintiff he would pay the extra expense of running his logs, and ordered the plaintiff to move on down the stream.

The plaintiff complied with the request, and by raising dams secured floatage for the time being for the logs, and ran them over the Chandler dam down the stream, into and across Black Lake, until low water on the rapids below was reached, and there the drive was again "hung up." At this point the defendant came to the plaintiff and wished to take his logs and himself run them the remainder of the route to Cheboygan, and an arrangement was entered into between them whereby the plaintiff was to pay the defendant three hundred dollars, and the plaintiff was to be released from further running the logs. A settlement was then had between them as to the extra expense the running of the logs to that point amounted to, and it was ascertained that the defendant's part was $367. White's portion was also agreed upon and by him paid. The $367 the defendant refused to pay, claiming that the plaintiff had done no more than he was obliged to under the original contract; and that by reason thereof there was no consideration for the contract to pay for the extra labor in taking the drive over the Chandler dam and other low water before the logs reached the rapids below the lake.

To recover for the extra labor, the sum of $367, and the other moneys due upon the original contract, the plaintiff brought this suit in the Shiawassee circuit. The cause was tried before a jury, and a recovery was had against the defendant for the sum of $1502, in which was included the item of $367 for the extra services. The defendant brings error, and we have before us a bill of exceptions containing all the evidence touching the item of extra services and expense thereof.

The appellant desires to submit but one question in this case for the consideration of the Court; that is, was the plaintiff entitled to recover for the extra services the $367? We think, under the testimony contained in the record, and the charge given by the court and the finding of the jury, the

plaintiff was entitled to recover for the extra service, and that the judgment rendered in the case is right. The verdict of the jury is general, and upon all the material questions upon which testimony was given, whether conflicting or not, and is conclusive. It is against the defendant, and unless some error is contained in the charge, it disposes finally of the case. Judge Newton charged the jury as follows:

"The true intent of the contract in question requires the plaintiff to run the logs during the season of 1884; and it was the duty of the plaintiff to use reasonable diligence in performing this work of running the logs while it was practicable to run them. If the jury find that in May, 1884, the water became so low that the logs would no longer float, and the plaintiff hung up the drive, and if you find it was reasonable for him to do so and not in violation of his contract, and the defendant after going up and looking at the river and the water and seeing for himself the stage of the river, and told the plaintiff if he would get back his men and run the logs at once he would pay him the cost, over and above the contract, then the plaintiff is entitled to recover the amount of such cost, if you find the time for running such logs had not expired, and that the defendant had a contract for the delivery of the logs within that time, and that the delay was not caused by the willful neglect of plaintiff, but was forced on him by necessity, arising from the low condition of the water. If the contract had provided a definite day or time when the logs should be delivered at all hazards by the plaintiff, I would not hesitate to tell you that promise was void, and the plaintiff could not recover. But the contract does not mention any particular day for the completion of the work. The plaintiff was bound to put them into the stream with due and reasonable diligence in the season, and to use reasonable and due diligence, having reference to the capacity of the river for floatage, during the season; then with sufficient force to run them with dispatch to the place of delivery. If you find from the evidence he was doing this with reasonable diligence, and within the life-time of his contract, and that the water became so low that it was impossible to run the logs in the customary manner of such rivers, and that the floatage of the logs was not detained by any negligence or want of diligence on his part; and if you further find that the defendant being informed of the danger of not getting the logs down in time to fill his contract

for delivery to Mr. Turner at Cheboygan in the usual and customary manner of running logs on that stream, and that the defendant then requested him to make extra exertions to get them down in time to fill his (defendant's) contract with Mr. Turner, and that he would pay the expense over that which would ordinarily be incurred—then such promise would not be void, but would be valid; and if the work so accomplished by the extra labor, at the request of the defendant for the purpose of filling his contract within the lifetime of the contract, of the plaintiff in this suit, the expense so incurred in doing so by the plaintiff, the plaintiff would be entitled to recover for such extra cost in doing the work. But if you find that the plaintiff was not diligent but negligent of his duty to the defendant, and might have run down the logs before the time they were tied up for want of water, and abandoned the running of the logs, or delayed the running of them, for the purpose of getting a better bargain from the defendant, or entirely abandoning his contract, and the promise was made to him under such circumstances, then the promise would be void, and the plaintiff could not recover for that item. A contract, gentlemen, for running logs on a particular stream must be construed and considered by court and jury with reference to the stream and the condition of the water-way provided for their delivery, the opening of the spring, the quantity and duration of the water; and the diligence required of the plaintiff in performing his contract must be according to the facilities it affords for completing the work in a reasonable time during the season for running logs."

This charge we think unexceptionable. It was the extra work in driving the logs at the low stage of water that defendant promised pay for, and we cannot say the jury found for any other. By extra services the jury must have understood such as would have been unnecessary with an ordinary stage of water, and undoubtedly excluded any other in the computation in making up their verdict.

The judgment must be affirmed.

The other Justices concurred.

DAVID WALLACE v. THE DETROIT CITY RAILWAY CO.

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Street railways—Cleaning snow from track.

1. Where in an action for negligent injury both sides have without objection introduced such testimony as fully explains all facts bearing on the manner and cause of the injury, an amendment of the declaration should be allowed as a matter of course, if objected to for variance, so long as it is plain that no one could have been surprised by the testimony.

2. A declaration in an action against a street railway company for an injury resulting from its neglect to properly clean the snow from its tracks, in consequence of which a horse harnessed to a double bob-sled was thrown down, described the ridges of snow as "along and very near to said street railway track, and between the double tracks thereof," and stated that as the sleigh struck the ridge between the tracks the horse stepped on the steep and slippery bank piled "along and near said" track. *Held*, that this distinguished between the two places; and as a like distinction was kept up in farther recitals, there was no variance arising out of the question whether it was one ridge or the other that caused the injury.

3. Any disposition of the snow cleared from a street railway track must be made with due regard to the rights of travel on the highway; and it cannot be charged as matter of law that the fact that the general level of the road was left above the level of the railway track would not make the disposition of the snow unlawful.

Error to the Superior Court of Detroit. (Chipman, J.) October 8.—October 14.

CASE. Defendant brings error. Affirmed.

Brennan & Donnelly for appellant.

James H. Brewster for appellee.

CAMPBELL, J. In this case plaintiff recovered against defendant for injuries alleged to have resulted from negligence in not properly removing snow in the street, whereby plaintiff's horse was thrown down, and damage occurred to him. The principal questions not supposed to be covered

by the decision in *Bowen v. Detroit City Ry. Co.* 54 Mich. 496, relate to the form of the declaration, and to refusal to charge as requested.

The testimony tended to show that the fall of plaintiff's horse, which was attached to a sleigh running on two sets of bobs, was caused by a sudden jolting upon a ridge between the rails and the existence of a slippery bank on which he was moving outside of the rails, so that it might have been open to some question whether the ridge between the rails was the only cause of his being thrown down.

Upon the trial the testimony proceeded on both sides without objection so as to fully explain all the facts bearing upon the manner and cause of the injury. Had objection been made for variance, it is clear that no one could have been taken by surprise by the testimony, and an amendment would have been allowed as a matter of course. But we do not think the declaration is open to the criticism made. It very plainly describes the snow banks as "along and very near to said street railway track, and between the double tracks thereof," and it also states that as the sleigh struck the ridge between the tracks, the horse slipped on the steep and slippery bank, piled, etc., "along and near said street railway track," etc. This distinguishes between the two places,—one where the sleigh struck, and the other which the horse had reached and on which he slipped and fell, and a similar distinction is kept up in the further recitals. We think there was no variance.

The other main objection is that the court did not give the following charge when requested:

"If the defendant, in cleaning from its tracks the snow, threw it to the sides with scrapers, and, after putting it there, promptly leveled the same off, then the fact that such a disposition of the snow raised the general level of the carriage or sleigh track above the level of the street railway would not make the act of the company in so disposing of the snow unlawful, improper or unreasonable."

We do not think the court could have so charged as a question of law. It is quite possible for such a disposition

of the snow, outside of the depression in which the track would thus be placed, to make it absolutely unsafe to cross the track or to travel in security beside it. As it was decided in *Bowen's Case*, we think that any disposition made of the snow must be made with due reference to the rights of travel upon the highway, and that the request which the court refused left this qualification out of view.

Upon the remainder of the case we have been unable to discover that the rulings upon the trial were not in full accordance with our former decision, or that there was any failure to do what was proper in dealing with the law and facts, or in any of the holdings. We do not think it necessary to rediscuss these questions.

The judgment must be affirmed with costs.

The other Justices concurred.

ROBERT GIBBONS, SURVIVOR v. JESSE H. FARWELL.

Trover—Plaintiff's title.

Creditors to whom goods have been consigned in payment, but who have neither asked for nor accepted such consignment, have no title to such goods and cannot maintain trover against a third person for their conversion.

Error to the Superior Court of Detroit. (Chipman J.) October 9.—October 14.

TROVER. Defendant brings error. Reversed.

Moore & Canfield for appellant. In trover, plaintiff cannot recover without proving that the property belonged to him: Cooley on Torts, 442, 446; 2 Greenl. Ev. § 552; *Ribble v. Lawrence* 51 Mich. 569; 3 Phil. Ev. (C. & H. notes) 534; as to whether the shipper or the consignee should maintain it against the carrier, see Ang. on Carriers, §§ 495, 498; Hutchinson on Carriers, §§ 434–5; 2 Redf. Railways § 203; Desty's Shipping § 264; *Coombs v. B. & E. R. R.* 3 H. & N.

510; *Coates v. Chaplin* 2 Ad. & El. (N. S.) 483: 2 Gale & Dav. 552; *O'Neill v. N. Y. C. &c. R. R.* 60 N. Y. 138; 2 Greenl. Ev. § 212; Edw. Bailments 563–4 (2d. ed.) §§ 665–7; *Dunlop v. Lambert* 6 Cl. & Fin. 600; *Grimes v. Van Vechten* 20 Mich. 410; the forwarding of goods does not by itself amount to a payment by the consignor, if not so agreed: Benjamin on Sales, 193 n.; *Clark v. Tucker* 2 Sandf. 157; *Brabin v. Hyde* 32 N. Y. 519; *Mattice v. Allen* 3 Keys 492; *Gilman v. Hill* 36 N. H. 319; *Bissell v. Balcom* 40 Barb. 98; 2 Schouler on Pers. Prop. 510; *Walker v. Nussey* 16 M. & W. 302; *Artcher v. Zeh* 5 Hill 200; *Grimes v. Van Vechten* 20 Mich. 410; *Rogers v. Phillips* 40 N. Y. 519; *Frostburg & Co. v. N. E. Glass Co.* 9 Cush. 115; *Meredith v. Meigh* 2 El. & Bl. 363; in trover there must be a taking with the intention of exercising over the chattel an ownership inconsistent with the real owner's right of possession: *Burroughes v. Bayne* 5 H. & N. 301; Cooley on Torts 450; a bailee's failure to deliver to the owner or notify him does not amount to a conversion: *Maginn v. Dinsmore* 70 N. Y. 410; Angell on Carriers, §§ 431, 433; *Scovill v. Griffith* 12 N. Y. 509; *Simmons v. Lillystone* 8 Exch. 441; *Hawkins v. Hoffman* 6 Hill 586; Bigelow on Torts, 199; *Beardslee v. Richardson* 11 Wend. 25.

Atkinson & Atkinson and *Alfred Russell* for appellee. Conversion consists of "any tortious act that deprives an owner of his goods wholly, or but for a time:" Cooley's Blackstone 1 50, citing *Keyworth v. Hill* 3 B. & A. 685; or, "any illegal use of the property:" Tiff. Justice, 616; or "using goods contrary to the design of the bailment:" *Isaack v. Clark* 2 Bulst. 309; *Fisher v. Kyle* 27 Mich. 454; delivery to the wrong person is conversion: Angell on Carriers 290, 292; *Devereux v. Barclay* 2 B. & Ald. 702; *Bowdon v. Vaughan* 10 East 416; *Bullard v. Young* 3 Stew. (Ala.) 46; *Seyeds v. Hay* 4 Term 260; *Ind. & St. Louis v. Herndon* 81 Ill. 143; *Ill. Central v. Parks* 54 Ill. 294; *Esmay v. Fanning* 5 How. 228; *Coykendall v. Eaton* 55 Barb. 188; *Bissell v. Starr* 32 Mich. 298; *Edwards v. Frank* 40 Mich. 616; *Hicks v. Lyle* 46 Mich. 488; possession will be sufficient evidence of right as against all who have neither right nor rightful possession: see 1 Smith's Lead. Cas. 473 et seq.; *Duncan v. Spear* 11 Wend. 54; *Harker v. Dement* 9 Gill 7; *Jefferies v. Great West. R. W. Co.* 5 El. & Bl. 802; *Craig v. Miller* 12 Ired. 375; consignee has legal title: *Perkins v. Dacon* 13 Mich. 81.

MORSE, C. J. This is an action of trover. The property in question in the suit upon the trial was 7000 hop-poles. The facts are undisputed. The plaintiff in the court below established substantially the following case: That he was the surviving partner of the firm of Johnston & Gibbons of Detroit; that said firm had advanced money to one John McKay of Cheboygan, who was getting out hop-poles and cedar posts at Strong's island, to assist him in his operations. In the summer of 1880, in the month of August, McKay shipped 7000 or more hop-poles on the schooner Southampton, owned by defendant, and directed the captain of the boat, defendant's agent, to deliver them to Johnston & Gibbons at Detroit. McKay testified that when he put the poles on the boat they were his property, and he sent them to Johnston & Gibbons toward payment of the money advanced by them to him, and that he wrote to them about it before he sent the poles; that the whole cargo was made out to Johnston & Gibbons, but that he did not give a bill of lading to them because he did not reach them; that the poles were worth ten cents apiece in Detroit. It also appeared that on the way down the poles were seized by the sheriff of St. Clair county and taken from the boat. Afterwards a United States marshal took possession of them and reloaded them upon the boat, and under his direction they were carried to Detroit and unloaded upon a dock in the presence of McKay; that they were never delivered to Johnston & Gibbons, nor were they notified to receive them; that before commencing suit Johnston & Gibbons made no demand for them, and took no steps to get them. Gibbons testifies that he made no move to obtain the poles, because the attorney of the defendant asked him to keep quiet until the determination of another suit, and said to him: "Then you will have no trouble settling with Farwell." That this other suit was in replevin, embracing this same property, and that defendant Farwell and McKay were resisting the claim of one John L. Smith, who was plaintiff therein. After this showing plaintiff rested his case, as did also the defendant. Plaintiff

had judgment for $810.21, the verdict being directed by the judge of the Superior Court of Detroit.

Error was assigned and urged in this Court on two grounds:

First. That the plaintiff did not show property in the hop-poles; that at the best Johnston & Gibbons were only consignees, and not entitled to sue in this action.

Second. That if plaintiff had sufficient ownership or interest to maintain his action, there was no evidence of conversion.

We think the first objection to the verdict a good one. There is no evidence that Johnston & Gibbons had ever asked or directed McKay to send them any hop-poles in payment of his indebtedness to them, or in any manner accepted them. Neither does McKay swear that they had accepted, or agreed to accept, these or any other hop-poles in payment. All that he says about it is confined to a single question and answer: "*Question.* Had you any arrangement with them to send them hop-poles? *Answer.* I had. I wrote them about them before I sent them." What arrangement he had, or what he wrote them, does not appear, nor did they answer his letter, according to the testimony. Gibbons is a witness upon the trial, but says not a word about his firm ever owning the hop-poles, or making any arrangement that they should be sent, or that the firm would receive them. There was no contract, express or implied, shown that passed the property, when loaded upon the boat or in transit, from McKay to Johnston & Gibbons. When delivered at Detroit the firm of plaintiff might accept them upon their debt or not, as they saw fit. Until such acceptance the hop-poles were the property of McKay. This being our view of the case, it is unnecessary to discuss the question of conversion.

The judgment of the Superior Court must be

Reversed with costs, and a new trial granted.

The other Justices concurred.

JOHN H. BISSELL v. EDGAR O. DURFEE, JUDGE OF PROBATE FOR WAYNE COUNTY.

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Probate and official bonds.

1. Executors' bonds are not such official bonds as will fall within the title of Act 179 of 1885, "to provide that all sureties upon official bonds shall make justification under oath, of their pecuniary responsibility." Nor are any probate bonds.
2. The constitutional provision which confines statutes to the purview of their titles is for the purpose of preventing the Legislature as well as the people from being misled as to their contents.
3. Bonds referred to in the statutes of Michigan as "official" are, *it seems*, bonds of public officers only.

Mandamus. Submitted Oct. 13. Granted Oct. 14.

James C. Smith, Jr. and *John H. Bissell*, in person for relator, claimed that Act 179 of 1885, purported by its title to relate only to official bonds, and could not therefore cover those of an executor: see *Underwood v. McDuffee* 15 Mich. 366; *Shurbun v. Hooper* 40 Mich. 505; *Throop v. Langdon* id. 682; *Spencer v. Perry* 18 Mich. 399.

Edwin F. Conely for respondent.

CAMPBELL, J. Relator applies for a mandamus to compel the probate judge to accept an executor's bond which the judge states he would feel bound to accept as sufficient were it not for statute No. 179 (page 244 of the Laws of 1885), which it is claimed imposes new conditions upon such instruments. That statute is entitled "An act to provide that all sureties upon official bonds shall make justification under oath of their pecuniary responsibility."

The body of this statute is made broad enough by its terms to apply to every kind of bonds which are required to be approved by any court or officer, and would include appeal and license bonds and multitudes of others which have

nothing to do with any office or agency, public or private. It requires sureties to swear, under penalties of liability for perjury, that they are "worth in unincumbered property not exempt from execution under the laws of this State, the penal sum thereof, after payment of all just debts, claims and liabilities." The statute further imposes criminal responsibility by making it a misdemeanor to accept or approve any bond not so justified, and imposing on the persons so accepting or approving it, a personal liability for all damages resulting to any one from such approval.

It is claimed by relator that under the Constitution this statute cannot be made to apply to anything not covered by its title, and that the title does not cover any but bonds of public officers.

There is no doubt, under the Constitution, that the only bonds covered are official bonds. Had the body of the statute been confined to persons filling those ambiguous positions which depend on the appointment of the public or some of the public functionaries, it is possible that such enumeration might be regarded as a legislative definition of what was meant by the term "official." But we need not determine how far this could be done. As the object of confining acts to the purview of their titles is to prevent the Legislature as well as the people from being misled as to their contents, it is manifest that a definition might be so far from the natural meaning of the title as to be quite as deceptive as any other variance. In the present case there are no such definitions given, and as already pointed out, the body of the act contains no reference to any particular class or classes of bonds, but covers every bond contemplated by law for any purpose.

The question, then, is narrowed to the inquiry whether a probate bond is an official bond within the ordinary and recognized meaning of that term, as applied to such instruments.

It may perhaps be found that for want of a more convenient phrase, the term "official" is sometimes applied to persons holding fiduciary positions, to distinguish their transactions in such relations from their purely private business. But the statutes which provide for official bonds, as such, are

very clearly confined to the bonds of public officers. Chapter 284 of Howell's Statutes, which is chapter 120 of the Revised Statutes of 1846, was entitled "Suits against sheriffs and other officers on their official bonds," in that revision, and is by Judge Howell changed to "Suits against sheriffs and others on their official bonds." But this change is not, —even if made by the Legislature, which it was not,—of any significance, because the chapter refers in its body to none but public bonds. While not authoritative, some weight should be given to the unbroken practice which has prevailed since the State was organized, of making in the indexes of the laws a separate heading of "Official Bonds," under which none but the bonds of public officers and agents have ever been classed, while all kinds of probate bonds have invariably been put under another heading. The Revision of 1846 has a separate chapter (No. 75) entitled "Of probate bonds and the prosecution of them," which is found in its amended form in Howell's Revision (chapter 227), in which all kinds of probate bonds are dealt with together, and made subject not only to the same methods of prosecution, but also to discharges and renewals under the judge's discretion. We have found no legislative recognition, even casual, of any such bonds as official.

We cannot conceive that under such a title as that of the statute of 1885 it could be fairly supposed that such revolutionary changes would be introduced as would follow from the construction that would reach probate bonds. The ample discretionary power over them now given by law was found necessary to secure competent and faithful parties to execute their trusts. If under this title all such bonds are included, it would also include all other court appointees, and might repeal by implication a great multitude of provisions which probably never occurred to the Legislature. The constitutional requirement confining the operation of laws by their titles should be honestly carried out. In our opinion it would be a great perversion to extend it to such bonds as are involved here.

It is only proper to say that in the present case the respon-

dent has made no effort to do more than ascertain his own duty, and is to be commended for taking as early an opportunity as possible to have the matter fairly presented.

The mandamus must be awarded as prayed, without costs.

The other Justices concurred.

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s25NW 329
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Township of Springwells v. Wayne County Treasurer. Hamtramck Township v. Same.

Municipal annexation—Collection of liquor tax.

1. The right of a municipality to a liquor tax collected therein becomes vested at the date at which the law requires the tax to be paid; and if not then paid the subsequent annexation of the territory to that of some other municipality before its payment, does not transfer to the latter the right to the money.

2. Detaching territory from a township does not affect its ownership of anything but the land, unless the law provides for the transfer of other rights; if it does not, debts and other incorporeal rights still belong to the township.

Mandamus. Submitted Oct. 13. Granted Oct. 14.

Certain portions of the townships of Hamtramck and Springwells were annexed to the city of Detroit by Act 398 of 1885, approved May 26th and taking immediate effect. At that date there were sundry liquor dealers in the annexed districts whose liquor taxes were then due, but respondent denies that they had yet been paid. Such taxes are required by How. Stat. § 1283, to be paid to the treasurer of the county; and by § 1288 that officer is to pay the amounts so received to the treasurer of the "township, village or city" from which they were collected. When the taxes due from the annexed districts before annexation were actually paid in, these districts were already annexed, and belonged to the city; and when the township treasurers demanded their proportion of the moneys collected, the county treasurer refused to pay it to them on the ground

that it belonged to the city. The townships then sued out the writ of mandamus to compel the county treasurer to pay as demanded.

Edwin F. Conely for relators.

Henry M. Duffield for respondent.

PER CURIAM. Under the statutes the tax from every liquor dealer then in business is payable in advance to the county treasurer on the first Monday in May, and must by that treasurer be paid over to the local treasurer. The only question before us is whether this money belongs to the township in which it ought to have been paid in May, or whether the subsequent annexation of a part of the township, bringing the dealer within the city of Detroit, entitled that city to all liquor taxes not then collected, although previously due to the townships. In our opinion the right became vested in the townships to have this money on the first Monday of May, and it was then a fund which was their property. Detaching part of a township does not affect the ownership of anything but lands. All debts or rights incorporeal continue to be owned by the township, unless provision is made by law to the contrary. The provision that the taxes are to be paid over to the townships from which they were collected does not refer to the locality of the dealer when paid, so much as to the place where he dealt when the tax became due. His liability is not destroyed by subsequent change of place or jurisdiction. His obligation, when once fixed, remains in force in favor of the original payee.

The mandamus must issue in each case, as prayed.

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s25NW 175
p131 s204

STEPHEN H. CLINK v. FRED. J. RUSSELL, CIRCUIT JUDGE FOR MUSKEGON COUNTY.

Special bail—Time—Notaries.

1. If the twenty days within which a person arrested on a capias is entitled to file special bail, expire on Sunday, he has the whole of the following day in which to file it.
2. A recognizance of special bail acknowledged before a notary public is void; notaries have no power to take such acknowledgments.
3. A motion to strike from the files is the proper procedure for getting rid of a document that is a nullity.
4. A default for failing to file special bail may be disregarded if prematurely entered: and if an attempt in good faith to file such bail has been made, but the bail turns out to be a nullity, defendant should be allowed a farther reasonable opportunity to file it and to perfect it if excepted to.

Mandamus. Submitted Oct. 20. Denied Oct. 27.

Stephen H. Clink, in person, for relator.

Francis W. Cook for respondent.

BY THE COURT. The relator was arrested on a capias ad respondendum on or about the 5th day of May, 1885, at the suit of F. W. Cook, and gave bail to the sheriff of Muskegon county. The writ was returnable on the 18th day of May. The twenty days after the return-day of the writ expired on Sunday, the 7th day of June. The relator, assuming that he had the whole of Monday, the 8th, in which to put in special bail, filed on that day a paper in the statutory form of a recognizance, taken and acknowledged before a notary public of Muskegon county.

The plaintiff in the suit, assuming that where the twentieth day of the writ expires on Sunday the defendant was required to put in his recognizance of bail as early as the Saturday preceding, proceeded on Monday to enter the defendant's

default for want of appearance, and took an assignment of the bail-bond to the sheriff, and upon the same day commenced suit thereon; and afterwards moved the court to strike the paper writing, purporting to be a recognizance of special bail filed by the relator, from the files, for the following reasons: (1) Because it was not executed and filed within twenty days after the return-day of the writ. (2) Before it was filed, plaintiff had taken an assignment of the bond to the sheriff and commenced suit thereon. (3) It was not taken and acknowledged before any officer or person authorized by the laws of this State or the rules of this Court to take acknowledgments of recognizance of special bail. (4) It was void, and filed without authority. The court granted the motion, and the paper was stricken from the files.

The relator applies to this Court for a mandamus to compel the circuit judge to reverse his action and restore the paper to the files, for the reasons (1st) that it was filed in the time prescribed by the rules and practice of the court; and (2d) if so, the motion to strike from the files was not the proper remedy, but the plaintiff should have excepted to the sufficiency of the bail.

The first question presented is whether, under the rules and practice of the court, the defendant had the following Monday to put in bail, where the twenty days after the return-day of the writ expires on Sunday. The statute does not, in express terms, limit the time in which the special bail is to be put in, to twenty days after the return-day of the writ. It prescribes that the defendant shall be entitled to be discharged from arrest on executing a bond to the sheriff or officer making the same, conditioned that the defendant will appear in the action by putting in special bail within twenty days after the return-day specified in the writ, and perfecting such bail according to the rules and practice of the court. We are not aware that this precise question has been passed upon by the courts of the state of New York, from which our statute, in this respect, was adopted; and it is the first time it has been presented to this Court. Looking at the object which is sought to be accomplished by the statute and prac-

tice in suits instituted by capias, we think the strict construction which would be required if the statute, in terms, required the act to be done in twenty days, should not be applied. The rules of practice provide that when the time within which the act to be done expires on Sunday, the party shall have the succeeding day to perform the act. We think this rule applies to the case before us. Were there any doubt upon the question, such construction should be given as would prevent a forfeiture. This is the settled rule in analogous cases.

It follows that the defendant in the suit was entitled to the whole of Monday, the 8th day of June, in which to put in special bail before his default could be taken; and that the assignment of the bail-bond given to the sheriff was premature, and the action commenced thereon before the time for putting in special bail had expired, cannot be maintained.

The paper writing filed by the relator on the 8th day of June with the clerk is not a recognizance, and was rightly stricken from the files by the circuit judge. "To make a good recognizance or obligation of record, the form prescribed must be pursued, therefore they may not be acknowledged before any others besides the persons appointed by the statutes, and the substantial forms of the statute are to be observed." *Bacon's Case* 2 Dyer 220; *Hall v. Winckfeild* Hob. 195; Toml. Law Dict. tit. "Recognizance." This is apparent also from the signification of the word; it being an obligation of record entered into before a court or officer *duly authorized* for that purpose. The statute requires that a recognizance of special bail may be taken before any justice of the Supreme Court, or any circuit judge, circuit court commissioner, or clerk of any court of record. Notaries public are not authorized to take such recognizance. A paper writing in the form prescribed for special bail taken before a notary public is of no binding force whatever. It is not merely an irregularity: it is a nullity; and the proper remedy on the part of the plaintiff is a motion to strike from the files.

As there has been no default properly entered in this case,

the relator, being the defendant in the suit, may still appear to the action by putting in special bail and perfecting the same if excepted to. The default, being prematurely entered, may be disregarded. The relator should, if he desires, be permitted to contest the plaintiff's cause of action upon the merits, and no undue haste to prevent him from so doing will, we are justified in presuming, be sanctioned by the circuit court in which the action is pending. If the relator does not proceed with reasonable promptness to appear in the cause, he will lose the right accorded to him under the rules and practice of the court. We have sufficiently indicated what is the correct practice to pursue under the circumstances of this case, and under the showing made

The mandamus will be denied without costs.

GEO. W. BEARD AND DAVIS COON v. GARRET DEGOIT, CLERK OF BURDELL TOWNSHIP, OSCEOLA COUNTY.

Highway Commissioners—Letting contract.

Highway commissioners have no authority to contract with persons who have not themselves bid for work that under the statutes can only be let on sealed proposals.

Motion for order to show cause. Submitted and denied October 27.

The highway commissioner of Burdell township gave notice that he would receive sealed proposals for the building of a bridge, and several bids were sent in ranging from $387 to $1000. The lowest bidder was not present when the bids were opened, and the commissioner, in announcing that he should award the job to him, added that if he did not give the necessary security he should accept the next higher bid. The lowest bidder, whose name was Elza Coon, refused to give security, and the next higher bidder agreed with rela-

tors that if the commissioner approved they might take the job off his hands. The commissioner consented and contracted with relators, who gave satisfactory bond and did the work under the eye of different members of the township board, who frequently visited the place where it was going on and made no objections. When the bridge was finished, the commissioner accepted it and drew an order on the township treasurer in payment, but the clerk, although he reported the amount of the contract price to the supervisor as money to be raised by tax, and the board of supervisors authorized the amount to be spread on the tax-roll, refused to countersign the commissioner's order on the ground that the contract was void in not being executed by a regular bidder. Relators seek to compel the clerk by mandamus to countersign the order.

C. M. Beardsley and *H. A. Chaney* for relators relied on How. Stat. §§ 1379, 1380, 1414, 1415.

THE COURT refused the order asked for. The highway commissioner has no authority to let jobs for which the statutes require sealed proposals, to persons who did not make such proposals, and at a time subsequent to the opening of the bids. *Hannah v. Fife* 27 Mich. 172; *Mackenzie v. Baraga Township* 39 Mich. 554.

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112 323
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a122 618
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146 482

JOHN JEFFERY ET AL. v. ELIZABETH HURSH ET AL.

[See 42 Mich. 563; 45 Mich. 59; 49 Mich. 31.]

Deed and defeasance as mortgage—Power of attorney to sell—Bond to reconvey—Taxing costs.

1. The character of a deed as security is not destroyed by the fact that no defeasance was given until after the delivery of the deed, provided the transactions were substantially contemporaneous and were manifestly meant to amount to a mortgage.

2. The recital in a bond of defeasance that the obligor will reconvey such interest as he has *now* acquired, establishes the contemporaneous character of the deed and defeasance and cannot be contradicted by parol.

3. A bond of defeasance, being under seal, is an instrument of as high order as the deed which it accompanies.

4. A bond to reconvey is valid as a defeasance even though it covers lands belonging to a third person and included with the grantor's land by virtue of a power of attorney to him to sell them. It would be good at law as to the grantor's land, and in equity as to the third person's, the last not being mortgageable under a power of sale.

5. A power of attorney to sell will not support a mortgage; and if the deed is really intended as security they are conveyed without authority and the grantee cannot maintain ejectment for them.

6. A deed absolute taken in connection with a bond or separate defeasance or agreement, executed at the same time, to reconvey on payment of a stated sum, constitutes a mortgage if the instruments are of the same date or are executed and delivered at the same time and as one transaction. When this is the case it is a conclusion of law that they constitute a legal mortgage.

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7. Costs are not of right at common law, but only by statute. And the statute does not cover proceedings that were complete in themselves before its adoption.

8. Costs, that by order of court or under some statute have been paid during the progress of the case, cannot be recovered back nor taxed on the final disposition of the case.

9. The party who on appeal recovers final judgment in ejectment is entitled not only to his costs of the appeal but to such costs as are taxable of all previous trials, whether decided for or against him.

10. Where an appellate court orders a new trial in ejectment the costs are in its discretion; but all that are not disposed of by its special order will abide the final result and will be taxable then.

11. An order for reversal and new trial with costs of both courts means the costs of that hearing in the appellate court and of the particular trial below wherein the judgment was reversed. It can not, against objection, cover all previous trials below if there have been several.

12. An affidavit for the taxation of witness fees as costs must state the residences of the witnesses as well as their names, the number of miles they have traveled and the number of days they have necessarily been in attendance.

13. In taxing witness fees it is not to be assumed, without some showing, that unsworn witnesses were not properly summoned, if the affida-

vit to the bill of costs states that they were deemed necessary and were called in good faith.

14. Witness fees and sheriff's fees for subpœnaing witnesses cannot be taxed as costs unless the affidavit for taxation shows that the sums claimed have been disbursed by the party claiming taxation or that the service has been performed for him.

15. Continuance fees are not taxable as costs without some showing that the case was continued on motion of the losing party or that it was not reached during the term.

16. Defects in a bill of costs must be supplied, if at all, while the matter is before the taxing officer; no amendment can ordinarily be allowed on appeal from his action. The proper course would be to withdraw the bill and make a new application, or to ask for a postponement and supply the defects by the adjourned day.

Error to Bay. (Green, J.) Oct. 7–8.—Oct. 28.

EJECTMENT. Defendants bring error. Reversed.

Brown & Leaton, Fancher & Dodds Bros., A. McDonell, and *John Atkinson* for appellants. A conveyance absolute on its face with an instrument of even date to reconvey on repayment of the consideration with interest is prima facie a mortgage: Jones on Mortgages, § 244; *Taylor v. Weld* 5 Mass. 109; *Bailey v. Bayley* 5 Gray 505; *Murphy v. Calley* 1 Allen 107; *Lane v. Sheurs* 1 Wend. 433; *Enos v. Sutherland* 11 Mich. 539; *Roach v. Cosine* 9 Wend. 227.

Spaulding & Cranson and *Hatch & Cooley* for appellees.

CHAMPLIN, J. Plaintiffs, as heirs-at-law of John Jeffery, deceased, brought ejectment to recover possession of the west half of the northeast quarter of section 22, township 14 north, range 4 east, in Isabella county. They claim title in fee. On the 10th day of March, 1856, John M. Hursh, now deceased, acquired the title in fee-simple to the land in question by patent from the United States, and some time afterwards gave a mortgage thereon to one Ganson, and another to John Jeffery. At this time the defendant Elizabeth Hursh, was the wife of John Hursh, the mortgagor, and joined with him in the execution of the mortgages. Afterwards, and on the 29th day of March, 1871, John M. Hursh by warranty deed, conveyed the land to Wesley Win-

ters, and he on the same day conveyed by deed the land to the defendant Elizabeth Hursh. April 9th 1872, Elizabeth Hursh executed a power of attorney to her husband, John M. Hursh, by which she empowered him "to sell and convey all lands that I am possessed of in the counties of Clare and Isabella, to receive payments for the same at any price or prices that to my said attorney may seem meet and just, and to execute and deliver such deed or deeds of conveyance in my name as may be necessary to convey the title to such land in fee." On the 23d day of November, 1872, John M. Hursh executed a warranty deed of the land in question together with about five hundred and sixty acres of lands belonging to himself, to John Jeffery, the plaintiff's ancestor. In this deed he purported to act for himself personally and as the attorney in fact of Elizabeth Hursh. It contains a covenant that the premises are free from all incumbrances, and also of warranty against all lawful claims.

The defendants claim that this instrument was not intended as an absolute deed, but that it was either a mortgage or a conditional sale; and in either case is void as to the land of Elizabeth Hursh, for the reason that the power of attorney from her to John M. Hursh did not authorize him to make either a mortgage or conditional sale of her land. The evidence adduced in support of defendant's claim consisted (1st) of a bond bearing the same date as the deed, executed by Jeffery to John M. Hursh, conditioned that he, Jeffery, on the receipt of $3514.46, being the same amount as the consideration named in the deed, with interest thereon at the rate of ten per cent. from that date, to be paid on or before one year to him by said Hursh, would make, execute and deliver to the said John M. Hursh, his heirs or assigns, or to whomsoever might be named by said Hursh, "a good and sufficient deed of conveyance of such interest as I now have acquired of said Hursh, of the following described lands situated in Isabella county and State of Michigan." [Here follows a description of the land in question, and a large number of other descriptions, containing over five hundred acres in all, and being the same lands described in the deed and no others.]

(2d.) Of the testimony of witnesses as to what occurred at the time the papers were executed, and the admission of Jeffery; and (3d) of the fact that Mrs. Hursh had always remained in the possession of the land in question, claiming it as her own and paying the taxes thereon, and that Jeffery never interfered with the possession of defendant Hursh, and never sought in any way to acquire possession thereof.

John M. Hursh and John Jeffery had both died before this suit was commenced. The only living witness who has testified to what occurred at the time the papers were executed is William E. Winton. He was the attorney of John Jeffery in his life-time, and after his decease he was the attorney of Mrs. Jeffery, who was appointed administratrix of the estate of John Jeffery, and who was also guardian of the plaintiffs in this suit. He had assisted in one of the trials of this case at the circuit and addressed the jury on behalf of the plaintiffs. He was judge of probate of Gratiot county, in which the estate of John Jeffery was administered, and was exercising that office at the time the papers in controversy were drawn. John Jeffery died about a year and a half after the deed and bond were executed. After Mrs. Jeffery was appointed administratrix, Mr. Winton, acting as the judge of probate and her legal adviser, at a time when the occurrence was comparatively recent, advised Mrs. Jeffery that the deed in question was not in fact an absolute deed, but a mortgage, and under his advice she treated it as a mortgage, and sold and assigned it as such to one Scriven who brought a suit to foreclose it as a mortgage. She also treated it as a mortgage security in her account of the estate before the probate court of which Winton was judge. After an interval of twelve years from the execution of the deed and mortgage in his presence, he testifies as to what occurred on that occasion as follows:

"On the 23d day of November, 1872, Mr. Jeffery, in company with John M. Hursh, came into the probate office, where I was alone. After the introduction of Mr. Hursh, Mr. Jeffery said that Mr. Hursh had come to sell his wife's farm, with a power of attorney, and wanted me to examine the power of attorney and see if it was sufficient to

vest him with such power. I examined it, and told Mr. Jeffery that I thought it was sufficient. Then Mr. Jeffery went on and made a computation of the amount that was due him on the mortgage, and perhaps some other papers. My mind is not clear enough now to remember how many papers he had, but he had a mortgage, and I can recollect some notes; but whether there were any more notes than were secured by the mortgage I cannot state positively, and the amount of a mortgage that some proceedings had been taken to foreclose that was a lien on this same land,—this land in controversy. Having ascertained the amount that was due Mr. Jeffery, and also on the other mortgage, Mr. Hursh mentioned a certain amount of money over and above. Mr. Jeffery says to Mr. Hursh: 'That eighty is not worth that amount.' The amount he wanted, together with this, amounted to over three thousand dollars. If my recollection serves me right, he said it was not worth that money.

Question. Who did?

Answer. Mr. Jeffery. Mr. Hursh says, 'I have some other land that I will put in, together with the eighty in controversy, that will satisfy you for the amount of money I want.' Mr. Jeffery says: 'These are Indian lands about which there is considerable question nowadays about their title. I don't consider them of much value.' Mr. Hursh says, 'I will put in enough so I think you will feel satisfied;' and he put in the amount that the deed describes.

Q. Did Mr. Hursh make any remark about the title in that connection?

A. He said there was some question about it; but he thought perhaps some of them might be good. After he put in the amount of land he spoke of, it seemed to meet the minds of both parties. I then drew the deed, describing the lands as set forth in the deed.

Q. [Handing the witness the instrument from Hursh and wife to Jeffery.] Is that the deed you drew at that time?

A. That deed is in my handwriting. I think that is the identical deed. I drew the deed and counted out the money. Mr. Jeffery laid down the money to see if it was correct. I counted out the money for Mr. Hursh, after delivering the deed, and Mr. Hursh executed it in the manner in which it shows here for itself. I would not from memory know who was the other witness unless I saw it on here. He was a man that was about the court house; he was probably called in to do it, for I don't remember of his being there, but he signed that.

Q. What was the amount of the claims Jeffery had against Mr. Hursh, as near as you can recollect?

A. It is a matter of recollection. I have the impression that the amount of the claim run up somewheres perhaps to $1800; might go over and might fall short. That included both mortgages."

The witness further testified that the amount of money named in the consideration of the deed was the exact amount of the Ganson mortgage, the mortgage due Jeffery, and the money he got over and above those mortgages at the time. He also testified as follows:

Question. After you had drawn the deed, and up to the time of the drawing of the deed, was there anything said about a contract or bond back?

Answer. No, sir.

Q. Was there anything said about it till after the execution and delivery of the deed?

A. No, sir.

Q. Was there anything said about it until after the payment of the money by Jeffery to him?

A. No, sir.

Q. State just what next occurred after the money was paid and the deed delivered.

A. I think after the deed was drawn and the money was delivered, I says, "I suppose this is ready for delivering," and shoved the deed to Mr. Jeffery and the money to Mr. Hursh, which he took, and Mr. Jeffery the deed. Then I turned around about my own business, while they visited in regard to Mr. Hursh's early settlement in Isabella county, and the hard times, and on they talked about that for a certain time, but how long I can't tell, maybe five minutes and maybe half an hour; just what time was consumed I can't recollect, but during that visit Mr. Jeffery says: "Mr. Hursh, if you will pay me that amount of money within one year (the amount of the consideration), with ten per cent. interest, I will deed this land to you." I says then, "If you want to do that I will put that in writing." Mr. Hursh made no reply. Mr. Jeffery says: "Very well, I will do that." I at once, with no further suggestion, drew that writing, whatever it is.

The witness testifies that he then, without further directions, drew up the bond from Jeffery to Hursh, and Jeffery

signed it, and after it was signed he, witness, either handed it to Hursh or to Jeffery and he to Hursh, who took it and carried it away. On further examination by defendants' counsel, the following testimony was elicited:

Question. Was there anything said about possession at the time?

Answer. I don't think there was.

Q. When did you come to understand it as a mortgage?

A. I understood it at the time.

Q. Did you get any further information on the subject by the time you drew the mortgage?

A. No, sir.

Q. You continue to be the attorney for Mr. Jeffery and his estate?

A. Yes, sir.

Q. When you drew the assignment to Scriven, you drew it as an assignment of a mortgage?

A. Yes, sir.

Q. You had no additional information?

A. No, sir.

Q. You drew it of your own knowledge of the first transaction?

A. Yes, sir.

On cross-examination he testified that he was induced to think the transaction was a mortgage, because he knew there was a paper given back; and without looking it up to see what the force of defeasance was, it occurred to him that a paper given back in that shape was a defeasance. That about four years afterwards the thought crossed his mind that the paper given back did not amount to a defeasance, and upon examination of the law, he became satisfied that it did not.

From this testimony it is claimed, on the part of the plaintiff, that the bond executed by Jeffery to Hursh cannot operate as a defeasance, for two reasons: (1st) Because the giving of the bond was subsequent and independent of the execution of the deed; and (2d) Because, so far as the lands in dispute are concerned, the bond claimed to be a defeasance was given, not to the grantor of the deed, but to John M. Hursh, a third person.

The first ground is untenable. The deed and bond were cotemporaneous, and constituted one entire transaction; and as such must be construed together as one instrument. An interval of five minutes or half an hour is not of itself sufficient to make them independent transactions. It is a question of intent whether the deed in question was in fact a mortgage, and such intent is to be gathered from the instruments executed and from the facts and circumstances attending and surrounding the transaction, as well as from all other testimony bearing upon the question. As already remarked, these instruments bear the same date and embrace the same subject-matter. The land assumed to be conveyed absolutely by deed is contained in the bond agreeing to convey to Hursh. Taken together they contain strong intrinsic evidence of being cotemporaneous and parts of the same transaction, and exclude the idea that they are two independent and separate transactions. The language of the bond is that upon receipt of $3514.46, to be paid by Hursh, he, Jeffery, will make, execute, and deliver to Hursh a "good and sufficient deed of conveyance of such interest *as I now have acquired* of said Hursh of the following described lands," etc. The proper meaning of the word "now," as used in the above sentence which I have italicized, is "at the present time;" and both instruments bearing the same date, the language used stamps them as one transaction, and parol evidence would not be admissible to vary or contradict the writing.

There is no evidence in the case that contradicts the fact expressed in the bond that the two instruments are simultaneous. According to Winton's testimony one immediately followed the other in proper order. The bond was of as high order as the deed. It was under seal and executed in the presence of the same witnesses who witnessed the execution of the deed. Mr. Winton states that he does not know what talk or arrangement had been made by Jeffery and Hursh before they came to his office. Evidently the terms of their agreement had been arranged before going to Winton to have the papers drawn, as scarcely any negotiation was

had in his hearing. It appears that Hursh had staid the night previous at Mr. Jeffery's house, which lends probability to the conclusion that their bargain was arranged there. If not, how does it appear that Jeffery knew all about the nature of the title to the additional lands which Hursh proposed to satisfy him with for the amount of money wanted? Nothing was said by Hursh in Winton's presence about his other lands, or the nature of his title thereto, and yet when he proposed to put in other lands, Mr. Jeffery said at once, "These are Indian lands," etc.

The second ground is equally untenable. With the exception of the eighty acres belonging to Mrs. Hursh, the lands conveyed by the deed belonged to John M. Hursh, and these, as before stated, amounted to over five hundred acres. If the deed was intended as a security, there can be no doubt that as to these lands, the bond to reconvey given at the same time would constitute a defeasance, and the instruments together would constitute a mortgage of the lands belonging to Hursh. The grantor of these lands would be the party to whom the reconveyance was to be made, and within all the decisions, the bond, so far as it embraced the lands conveyed by Mr. Hursh, would be a defeasance. Can it be that, by embracing in the same deed land belonging to Mrs. Hursh and taking the bond to reconvey all of the land to him, the instrument is deprived of its character as a defeasance. I think not. It would still be a defeasance at law as to the lands of Mr. Hursh, and also in equity as to the land of Mrs. Hursh. 1 Jones on Mortgages § 241, and cases cited in note 3. Nor does this view militate against the opinion expressed by this Court in 42 Mich. 563. The record upon which that decision was rendered did not disclose the fact that any of the land embraced in the deed belonged to John M. Hursh. So far as appeared, the lands conveyed were the lands of Mrs. Hursh, and the bond, as disclosed by that record, bound Jeffery to convey to Mr. Hursh. It was claimed that under such facts the bond operated as a defeasance; but this Court held that under such circumstances the bond, running to the husband and attorney-in-fact of the grantor, was not a defeas-

ance, and that parol evidence was necessary to stamp the arrangement as a mortgage transaction.

Here the case made by the proofs is quite different, and leads to a different conclusion. The undisputed testimony shows that Hursh did not intend to make an absolute sale, either of his own or his wife's land. His offer was to convey to Jeffery his wife's land to pay the mortgage debts of himself to Ganson and to Jeffery, and to obtain from Jeffery a definite sum of money besides. Aside from the deed, there is no evidence whatever that it was intended to be an absolute sale. The testimony of Winton as to what transpired in his presence does not tend to prove that an absolute sale was intended, but that it was conveyed as a security for the indebtedness of Hursh, and for money borrowed at that time. He states that Hursh mentioned a certain amount of money, over and above the mortgages, that he wanted, and that Mr. Jeffery says, "That eighty is not worth that amount;" and Mr. Hursh said, "Mr. Jeffery, I have some other land that I will put in, together with the eighty in controversy, that will satisfy you for the amount of money I want." Mr. Jeffery says: "These are Indian lands, about which there is considerable question nowadays about their title. I don't consider them of much value." Mr. Hursh says, "I will put in enough so I think you will feel satisfied;" and the witness says he put in the amount that the deed describes. This is not the language which would be used upon a purchase and sale of over five hundred acres of land. It is inconsistent with such a transaction, but is consistent with a mortgage security in which the mortgagor puts in security until the lender feels satisfied. The question is put at rest when, at the same time, the lender executes an agreement to reconvey the premises upon repayment of the exact amount loaned.

But the evidence that the transaction was a mortgage does not rest here. Joel Drake testified that, a short time before Mr. Jeffery died, in a conversation with witness he told him that he had fixed up his matters with John M. Hursh; that he had taken a deed as security for the amount Hursh owed him; that witness remarked that was a queer way to take a

deed and intend it as a mortgage; that Mr. Jeffery said he thought it was all right; that his attorney Mr. Winton had done the business for him, and he thought it would be all right. In addition to this, Mrs. Hursh remained in possession of the land, and John M. Hursh paid the taxes thereon for the years 1872 and 1873, and defendants' counsel offered, and should have been allowed, to prove that he paid the taxes for 1874 and 1875. It must be remembered also that Mr. Winton, at the time the papers were drawn, deriving his impressions from what occurred at the time, understood the transaction to be a mortgage. That the deed was at first recorded in the book of deeds is of no particular significance. There is no evidence that Mr. Jeffery gave any instruction to the register to record it in the book of deeds, and it was the duty of the register to so record it, unless instructed to the contrary. The fact being established that the deed in question was a mortgage, it follows that Mrs. Hursh's lands were conveyed without authority. The power of attorney only conferred upon Mr. Hursh authority to sell, and it did not authorize him to mortgage her land. The facts proved constituted a complete defense against plaintiffs' action.

It is now settled, as well as any principle of law can be, that an absolute deed, with a bond or separate defeasance or agreement executed at the same time, to reconvey the estate upon payment of a certain sum of money, constitute a mortgage, if the instruments are of the same date, or are executed and delivered at the same time, and as one transaction; and when this is the case, it is a conclusion of law that they constitute a legal mortgage. *Wilson v. Shoenberger* 31 Penn. St. 295; *Reitenbaugh v. Ludwick* id. 131.

It was the duty of the court so to declare the law in this case, and he should have directed a verdict for the defendant in accordance with their first request to charge. As this disposes of the case upon its merits, the other errors alleged need not be noticed. It appears plain to us that a new trial will be of no avail to the plaintiff, yet the statute confers upon him the right of a retrial if he desires one, and we therefore

Reverse the judgment, and order a new trial. The defendants are entitled to a judgment here for the costs of both courts.

The other Justices concurred.

Motion for re-taxation of costs. Submitted February 2, 1886. Granted February 19.

Spaulding & Cranson for the motion.

Dodds Brothers against.

CHAMPLIN, J. Motion for re-taxation of costs. Suit in ejectment was brought in the circuit court for the county of Isabella, which resulted at a trial had at the May term, 1879, in a verdict and judgment for defendant. Plaintiff brought error, and the judgment was reversed by this Court with costs, and a new trial granted. The case was tried again at the May term, 1880, when the defendant again recovered, and upon writ of error to this Court was again reversed and a new trial ordered. Again the cause was tried at the May term of the Isabella circuit court, and judgment rendered in favor of plaintiff, which judgment was reversed by this Court. In October, 1883, a change of venue was taken to the circuit court for the county of Bay, where a trial was had and judgment rendered in favor of the plaintiff, which was again reversed by this Court. On a new trial the plaintiff again had judgment, which was brought to this Court and reversed at the October term, 1885, with costs of both courts and a new trial granted. The defendant has presented and had taxed a bill of costs, which includes the taxable costs of each of the trials in the court below, as well as the costs of this Court for the October term at which she prevailed. It is objected to on the ground that the defendant is not entitled to the costs of those trials which resulted in judgments in her favor and which were reversed by this Court.

The right to recover costs is conferred by the statute and

did not exist at common law. It is to the statute therefore that we must look for the authority to recover costs in any given case. The statute provides that the defendant in actions of ejectment shall recover his costs upon a judgment rendered in his favor, if after appearance of the defendant such plaintiff be nonsuited, discontinue his suit, be *non pros'd* or judgment pass against him on verdict, demurrer or otherwise. How. Stat. §§ 8964, 8967. Also, if upon writ of error the judgment be reversed the plaintiff in error shall recover costs, unless in such judgment a new trial be ordered, in which case the costs on reversal shall be in the discretion of the court; and if a judgment [be] reversed in part and affirmed in part, costs shall be awarded to either party in the discretion of the court; and if then upon such writ the judgment be affirmed, the defendant in error shall recover costs. How. Stat. §§ 8978, 8979. The proper construction to be given to these statutes is that the party who finally prevails in the suit and recovers final judgment, is entitled to recover his costs; and in case there has been more than one trial, the party who finally prevails is entitled to recover his taxable costs of each trial. Costs, however, which are paid under an order of the court during the progress of a cause, or in compliance with any statutory requirement, cannot be recovered back or taxed on the final disposition of the cause. When cases are brought to this Court by writ of error, the plaintiff in error, in case final judgment is entered here, is entitled to tax his costs in this Court of the court below, including therein all the costs which he is entitled to recover. If the judgment entered here is not final, if liberty be given to amend, or a new trial be granted, or if in any other form the original action is still to go on, the costs on reversal are in the discretion of this Court, and all costs not disposed of by the special order or direction of this Court must abide the event of the suit, and be taxable to the party recovering final judgment.

In this case a new trial was ordered on reversal, and the plaintiff in error was awarded the costs of both courts. This order included the costs of this Court and of the trial in the

court below whose judgment was reversed. The costs of the former trials must abide the event of the suit. It follows that the costs of the former trials cannot be taxed in this Court in this action, if objection be made by the plaintiff.

Another objection is made to the taxation of mileage of the witnesses because there is no proof of the place of residence of each witness. The statute allows fees to witnesses in civil actions, for traveling, at the rate of ten cents a mile in coming to the place of attendance, to be estimated from the residence of such witness if within this State, or from the boundary line of the State which such witness passed in coming, if his residence be out of the State. How. Stat. § 9016. Another section of the statute provides that "When there shall be charges in a bill of costs for the attendance of any witness, * * * such charges for witnesses shall not be taxed without an affidavit stating the distance they respectively traveled and the days they actually attended. How. Stat. § 9002. The bill of costs in this case contained a statement of the name of each witness, the number of days and the miles traveled, but did not state the residence of the witness; and the affidavit stated "that the witnesses above named were in good faith made to attend, and were deemed material and necessary, and they respectively traveled the number of miles, and actually attended the number of days specified."

That portion of section 9002 above cited is the same as the Revised Statutes of New York (2 Rev. Stat. 653, § 7), which was construed by Mr. Justice Bronson in the case of *Ehle v. Bingham* 4 Hill 595. He says: "An affidavit of travel and attendance of witnesses is defective unless it state the name and place of residence of each witness, the distance traveled by him, and the number of days he actually attended. For the purpose of satisfying this requirement, and detecting any false swearing, the affidavit should state the name and place of residence of each witness, the distance he had to travel to reach court, and the number of days that he actually attended as a witness in the particular cause. No other rule will effectually guard against overcharges." Our practice is

essentially the same as that which prevailed in the state of New York before the adoption of the Code in that state, and the authors upon that practice as it then existed are regarded as authority in our courts in matters where the practice is the same. Burrill and Graham lay down the same requisites in the affidavit to tax the costs and fees of witnesses as stated by Mr. Justice Bronson. We think that taking both sections of the statute together relating to the fees of witnesses, and taxing costs for their attendance, the affidavit should show the residence of each witness as well as the other requisites. We are aware that the practice in this State has not been uniform in this respect, and therefore we shall not strike out these items for witness fees on the objection made, but permit another affidavit to be filed showing the residence of each witness.

Elizabeth Hursh, the defendant, is included in the list of defendant's witnesses for the trial at the May term, 1879, and a charge is made of seven days' attendance and eighteen miles' travel, amounting to $8.80. The statute provides that when "the bill of costs shall contain an item or items for the attendance and travel of the party himself as a witness, such item or items shall be taxed upon affidavit that the party was in attendance upon the court for the time charged for the purpose of being sworn as a witness, and not to assist in the management of the cause, and the travel was for the purpose of giving his evidence." The affidavit upon which the above item was taxed states: "And that the defendant, Elizabeth Hursh, attended as a witness and for that purpose only, and not to assist in the management of the cause." She was not sworn, and the affidavit does not state that "the travel was for the purpose of giving her evidence," which the statute requires; but the trial was had in 1879, and the statute permitting parties to tax the cost of attending the trial as witnesses was not enacted until 1881. This item must be rejected.

Another witness was not sworn at the trial which occurred in May, 1879, and two others were not sworn at the September term, 1884. The affidavit states that they were in good

faith made to attend, and that they were deemed material and necessary. The bill of costs does not disclose such a large number of witnesses as leads us to infer that witnesses were unnecessarily accumulated, and in the absence of any counter-showing, we cannot say they were not deemed necessary, and caused to attend in good faith. *Gilbert v. Kennedy* 22 Mich. 19.

A witness had been subpœnaed and his fees paid by plaintiff. He was in attendance in pursuance of such subpœna, and was called as a witness, and sworn on behalf of defendant. The bill contains an item of three days' attendance and seventy miles' travel for this witness, amounting to $10. This item was improperly taxed, and is rejected. There was no showing that he was subpœnaed and his fees paid by defendant.

Objection is made to the following item: "Sheriff Packard's fees for serving subpœnas in Isabella county, $7; deputy-sheriff Whitney's fees for serving subpœnas on witnesses in Gratiot county, $10;"—included in the bill of costs for the March term, 1874; and "Sheriff Packard's fees for serving subpœnas on witnesses, $9.75," included in the bill for September term, 1884. These items were not claimed as disbursements, and there was nothing before the taxing officer showing that the services had been performed. The sheriff had made no return. Before such fees can be taxed there must be some evidence that the services were rendered. These items must be disallowed.

Among the items taxed was one amounting to $152.50, purporting to be for costs on continuance for the March term, 1884. The affidavit of O. L. Spaulding shows that there was no stipulation for continuance, and the certificate of the clerk of Bay county shows that there is no journal entry continuing the cause at the March term. Without some showing that the cause was properly upon the calendar of the court for trial at that term, there is no foundation laid for taxing the costs of a continuance. Before such costs can be taxed it must be made to appear that the cause stood for trial at that term, and was either continued on application

of the plaintiff or was not reached before final adjournment.

We have now passed upon all the objections made to the taxation of the bills of costs presented to and taxed by the clerk. As before stated, only the costs in this Court upon the reversal at the October term, 1885, and the costs of the last trial in the court below, can be taxed in this Court, unless by consent. The matter will be referred back to the clerk of this Court, with leave for defendants to amend their affidavit or file new ones showing the residence of their witnesses, and to supply such other defects in proof of the items which it is proper for the clerk of this Court to tax, and new notice of taxation and copies of affidavits must be served upon the attorneys for the plaintiffs. This action permitting defects to be supplied, however, is not to be taken as a precedent in practice. Ordinarily, when objections are made and defects pointed out, such as is done in this case, it is the duty of the party applying to tax the bill, if he wishes to remedy the defects, either to apply for a postponement and supply the defects by the adjourned day, or withdraw his bill and make a new application; and if he fails or neglects to do so, it will be too late after taxation to do so, and the items will stand rejected. But as the practice hitherto has been somewhat uncertain, we deem it just to make an exception in this case.

The other Justices concurred.

SUSAN RHOADES, ADM'X v. CHICAGO & GRAND TRUNK RAILWAY CO.

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61 593
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69 112
58 263
81 623
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86 505
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90 598
90 620

Railway injury at crossing—Contributory negligence.

1. Positive testimony as to the giving of statutory railway signals near a highway crossing cannot, as matter of law, control negative testimony on the same subject. If such proofs conflict their weight is for the jury.

2. An error in taking a case of railway injury from the jury upon a particular question, may be rendered nugatory by such evidence of contributory negligence as would render that course necessary.

3. A man approached a railway crossing at an acute angle in a buggy drawn at an easy trot by a horse and a mule. A regular fast train, coming at the same time, and in full sight for a considerable distance if he had turned his head, whistled sharply close by the crossing and frightened his team so that it became unruly, and ran upon the track, and the man was killed. The man, who knew the neigborhood, was apparently ill, and drove absent-mindedly, without noticing the train until he was close to the crossing, though several witnesses saw the danger he was running into. *Held*, that he was guilty of contributory negligence, and that an action for his death could not be maintained against the railway company.

4. It is negligent to approach a railway crossing with a team so closely as to involve apparent danger, either of direct collision or of the team's being so frightened by the passage of the train as to become unmanageable and likely to get upon the track in spite of the attempt to check it.

Error to Cass. (A. J. Smith, J.) Oct. 13.—Oct. 28.

CASE. Plaintiff brings error. Affirmed.

Edward Bacon for appellant, cited *Young v. D. G. H. & M. Ry.* 23 N. W. Rep. 71; *Manchester &c. Ry. Co. v. Fullarton* 14 C. B. (N. S.) 53; *Ransom v. St. Paul &c. Ry. Co.* 62 Wis. 178; *Harty v. Railroad Co.* 42 N. Y. 468; *Wakefield v. R. R. Co.* 37 Vt. 330; *Penn. Ry. Co. v. Barnett* 59 Penn. St. 259; *Penn. Ry. Co. v. Ogier* 35 Penn. St. 71; *Kennedy v. Mayor* 73 N. Y. 365; *Pollock v. Eastern R. Co.* 124 Mass. 158; *Chicago &c. R. R. Co. v. Dunn* 52 Ill. 451; *Toledo, Wabash & Western R. R. Co. v. Harmon* 47 Ill. 298; 1 Thomp. Neg. 351, 420; *Borst v. L. S. & M. S. R. R. Co.* 4 Hun 347; *Geveke v. G. R. & Ind. R. R.* 57 Mich.

H. Geer and *E. W. Meddaugh* for appellee, cited as to contributory negligence, *Penn. R. R. Co. v. Beale* 73 Penn. St. 504; *Cent. Ry. v. Feller* 84 Penn. St. 226; *Flemming v. W. P. R. R.* 49 Cal. 253; *Artz v. C. R. I. & P. Ry. Co.* 34 Ia. 154; *Benton v. C. R. R.* 42 Ia. 192; *Turner v. Hannibal &c. R. R. Co.* 74 Mo. 602; *Penn. Ry. Co. v. Righter* 42 N. J. L. 180; *Moore v. Ry. Co.* 24 N. J. L. 284; *D. L. & W. Ry. Co. v. Toffey* 38 N. J. L. 525; *Bellefontaine Ry. Co. v. Hunter* 33 Ind. 335; *Terre Haute &c. R. R. Co. v. Clark*

73 Ind. 168; *Gorton v. Erie R. R.* 45 N. Y. 660; *Salter v. U. & B. R. R. Co.* 75 N. Y. 273; *Trow v. Vt. Cent. R. R. Co.* 24 Vt. 487; *Butterfield v. W. R. R. Cor.* 10 Allen 532; *Wheelock v. B. & A. R. R. Co.* 105 Mass. 206; *Fletcher v. A. & P. R. R. Co.* 64 Mo. 484; *Powell v. Missouri Pacific R. R. Co.* 76 Mo. 80; *Schofield v. C. M. & St. P. R. R. Co.* 114 U. S. 615; *Tucker v Duncan* 9 Fed. Rep. 867; *Holland v. C. M. & St. P. R. R. Co.* 18 Fed. Rep. 243; *Railroad Co. v. Jones* 95 U. S. 439; *Lewis v. B. & O. Co.* 38 Md. 588; *State v. P. W. & B. R. R. Co.* 47 Md. 76; *L. S. & M. S. R. R. Co. v. Miller* 25 Mich. 290; *Williams v. M. C. R. R.* 2 Mich. 259; *M. C. R. R. v. Campau* 35 Mich. 468; *LeBaron v. Joslin* 41 Mich. 313; *Davis v. Detroit &c. R. R. Co.* 20 Mich. 105; *Kelly v. Hendrie* 26 Mich. 255; *D. & M. Ry. Co. v. Van Steinburg* 17 Mich. 99; *Haas v. G. R. &c. R. R. Co.* 47 Mich. 401; *Davies v. Mann* 10 M. & W. 546; *Bridge v. Grand &c. R. R. Co.* 3 M. & W. 244; *Tuff v. Warman* 5 C. B. (N. S.) 573; *Radley v. London &c. R. R.* L. R. 1 App. Cases 754.

Campbell, J. This action was brought to recover damages for the death of plaintiff's intestate, who was killed by an express train of defendant in the afternoon of December 11, 1882, at a cross-road not far from Edwardsburg. The deceased had been at Edwardsburg with a buggy drawn by a horse and a mule, and was returning on a north and south road which crossed the railway at a somewhat acute angle, when a train which had passed Edwardsburg and was going southerly towards the crossing, struck his team on the crossing and killed him and one of his animals. It was claimed by plaintiff that the train did not give the proper signals so as to inform him of its coming, and that when he was near the crossing, and the cars were rushing up behind him, a series of sudden sharp whistles frightened his team and made them unmanageable, so that they ran upon the track in spite of his efforts to hold them.

The defense relied on lack of fault or neglect in the defendant's servants, and on the negligence of the deceased.

There was contradictory testimony concerning the statutory signals, some persons swearing that they were given and some that they were not. Most of the latter was of

course negative testimony to the effect that the witnesses did not hear the signals. One witness swore that he saw the bell and that it was not moving. The fact that sudden and repeated loud whistles were given and frightened the animals was shown by testimony which was positive.

We cannot hold, as we were asked to hold, that where positive proof is met by negative proof, the former must govern. The testimony, if it conflicts, must go to the jury unless under possible peculiar circumstances which do not usually arise. We have no doubt that upon the question of defendant's negligence these were facts for the jury, whatever we may ourselves think of the weight of testimony, and if that were the only issue, we should feel bound to hold that the court below erred in taking the case from the jury and ordering a verdict for the defendant.

But upon the question of contributory negligence there is such positive testimony given by the plaintiff's own witnesses as to leave no room for dispute.

It appeared from the testimony that the train in question was not a stray or irregular one, but a fast train that might fairly be expected at the time when it came. It further appeared that the view of any such train was substantially unobstructed for a long distance along the road on which deceased was traveling, so that by turning his head at any time during its approach he must have seen it. He was moving along at an easy trot, and could at any time, until he neared the crossing, have stopped. He was not a stranger, but was familiar with the road and the surroundings. The testimony for plaintiff shows that he kept on at the same gait until he reached very near the crossing, where his animals were frightened as the train came on behind them, and rushed upon the railway. There is no testimony that he paid the least attention to the train, or looked round at any time to observe whether it was coming. On the other hand it is shown quite clearly that he could not have done so.

The authorities are so uniform that a person must use reasonable caution in approaching a railway at all times, and especially when a rapid train is due or approaching, that it is

hardly necessary to cite them. It is negligent to approach a crossing with animals so nearly as to involve apparent danger to life. A train going at the rate of forty miles an hour will not only destroy anything which it hits, but common experience shows that it creates considerable danger by its sudden passing, of startling and bewildering both persons and animals approaching very closely. In the present case the deceased did not actually drive his team upon the railway, but he drove it so near that he brought it into imminent danger of going on the track in case of anything happening to frighten them. The testimony concerning the proximity of the train when the last whistles were sounded shows that the buggy must have come very close to the crossing, as even at their highest speed they could not have reached the track before the train passed, unless he had already driven perilously near. There is a brief space of time just before the collision, when plaintiff's witnesses did not apparently see him. But their testimony covers enough time to leave no room for doubt that the cause of the mischief was in part, if not chiefly, his voluntary advance into danger. The account they gave of his action and appearance during his ride from Edwardsburg seems to indicate that from illness or some other cause he was absent-minded and probably oblivious of the surroundings, which appear to have drawn the attention of quite a number of persons near by. He was seen the instant before the fatal accident trying to hold in his team, but they were then just reaching the track, when the mule, which was on the near side, was struck just behind the shoulder, and with the driver was instantly killed.

Upon a careful review of the testimony we are unable to see that the circuit judge could have given any different ruling than he did give, and

The judgment must be affirmed.

MORSE, C. J. and CHAMPLIN, J. concurred. SHERWOOD, J. concurred in the result.

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73	231
58	268
91	492
58	268
134	2366
58	268
140	492

URIAH CHUBB, GUARDIAN v. WILLIAM BRADLEY.

Guardian's responsibility for funds of ward.

1. In defense to an action purporting to be brought by a guardian, it may be shown that the guardianship has ceased; and if the plea does not set up such a defense an amendment which would permit such a showing should be allowed.

2. The proceeds of real estate belonging to a ward may be used by the guardian within proper bounds to enable the ward to be suitably brought up and educated; and such money may be turned over to the ward's adopted parents to aid them in its support, if necessary.

3. A guardian who has paid over the proceeds of the ward's estate to a suitable person to aid such person in supporting the ward cannot maintain an action at law against him to recover back the amount so paid after it has been reasonably expended for that purpose. Whether, in case of fraud or an unreasonable disproportion between the support and the funds, such an action could lie—Q.

4. A guardian's liability for the funds of his ward can seldom be passed on by a jury.

Error to Muskegon. (Russell, J.) Oct. 14.—Oct. 29.

CASE. Defendant brings error. Reversed.

Maher & Felker for appellant. The guardian of a minor may make such contracts in respect to his ward and her estate as he sees fit, and will be personally bound thereby whether they are properly chargable against the estate or not: *Mason v. Caldwell* 10 Ill. 196; *United States v. Bender* 5 Cr. C. Ct. 620; *Thacher v. Dinsmore* 5 Mass. 300; *Forster v. Fuller* 6 Mass. 58; *Gibson v. Irby* 17 Tex. 173; *Stevenson v. Bruce* 10 Ind. 397; *Fressenden v. Jones* 7 Jones (N. C.) L. 14; *Poole v. Wilkinson* 42 Ga. 539; *Lewis v. Edwards* 44 Ind. 333; *Phelps v. Worcester* 11 N. H. 51; the same rule applies to the engagements made by the personal representatives of deceased persons: *McGoren v. Avery* 37 Mich. 120; *Ferrin v. Myrick* 41 N. Y. 315; *Austin v. Munro* 47 N. Y. 360; 1 Ch. Pl. 204–5; *Powell v. Graham* 7 Taunt. 584; *Jennings v. Newman* 4 Term 347; *Brigden v. Parkes*

2 B. & P. 424; *Trewinian v. Howell* Cro. Eliz. 91; *Hawkes v. Saunders* 1 Cowp. 289.

Keating & Dickerman for appellee. Actions have been allowed in the name of a guardian for injury to property of his ward in actual possession, or to which he has the right of possession (Tyler on Infancy 263); for non-payment of rent (*Pond v. Curtiss* 7 Wend. 45); for trespass on his ward's lands (*Truss v. Old* 6 Rand. 556; *Bacon v. Taylor* Kirby 368); for intermeddling with the rents and profits of real estate belonging to an infant ward (*Beecher v. Crouse* 19 Wend. 306); for injury to any property of the ward in actual possession (*Fuqua v. Hunt* 1 Ala. 197); or where he has the right of possession (*Sutherland v. Goff* 5 Port. 508; *Field v. Lucus* 21 Ga. 447); or on a note payable to himself, as guardian, though given for a debt due to the ward (*Jolliffe v. Higgins* 6 Munf. 3; *Baker v. Ormsby* 4 Scam. 325; *Thacher v. Dinsmore* 5 Mass. 299); or on his express contract touching the ward's estate (*Thomas v. Bennett* 56 Barb. 197); a guardian is to be sued in person upon notes executed by him in his official capacity: 1 Pars. N. & B. 89, 90; *Thacher v. Dinsmore* 5 Mass. 299; and may foreclose a mortgage in his name as guardian that has been so assigned to him, or assign the same: *Livingston v. Jones* Har. Ch. 165; *Field v. Schieffelin* 7 Johns. Ch. 150; *Kinney v. Harrett* 46 Mich. 87; in a suit brought by A. B., agent, the allegation of agency will be regarded as surplusage: *Buffum v. Chadwick* 8 Mass. 103; *Bond v. Betts* Breese (Ill.) 158; *Clark v. Lowe* 15 Mass. 476; superfluous allegations in a declaration may be rejected and treated as if they had not been there: *Hoyt v. Seeley* 18 Conn. 353; the term "guardian" added to the name of the complainant in foreclosure, is merely descriptive: *Vary v. Chatterton* 50 Mich. 541; in a suit against A. B., executor, etc., where a personal liability of A. B. is proved, the word "executor" may be striken out as surplusage: *Geddis v. Irvine* 5 Penn. St. 508; where a plaintiff is entitled to recover in his own right, if he describes himself as administrator, it will be treated as surplusage: *Commonwealth v. Haffey* 6 Penn. St. 348; where one sues describing himself as executor, if the justice of the case requires, it will be treated as surplusage: *Grew v. Burditt* 9 Pick. 265; *Talmage v. Chapel* 16 Mass. 71.

CAMPBELL, J. Plaintiff was in 1866 made guardian of three young children of Jonathan Bonner, deceased, Emma,

the youngest, having been born April 25, 1865. Their only estate was a pension of a small amount and certain land afterwards sold for $2000. Their mother remarried after her husband's death and died in 1867, when Emma was two years old, and her brother Charles was six. Upon the mother's death these two children had to be looked after, and were placed in defendant's charge, Emma in 1868, and her brother in 1870. The guardian and their uncle desired to have defendant and his wife, who were childless, adopt them. Defendant hesitated about it on account of his small means at that time, as not able to support them. It was then agreed, as the testimony shows, that defendant should have their property to help him support them. Accordingly the pension money was paid and the land was also subsequently sold, and the proceeds, with the pension money, left in his hands. He brought up the children, and the testimony indicates that Emma was treated very generously, and furnished with such an education, and such clothing and ornaments, musical instruments, the use of horse and carriage and other things as put her on an equality with other young ladies, and were, in part at least, such as defendant could not well have afforded out of his own means. In 1882 Emma, being about 17 years old, was married to Fred. N. Edie, to whom defendant had some objection from his having been employed in a business he did not approve. Thereupon she attempted to have her husband appointed her guardian, and letters seem to have been issued to him, but apparently Chubb was not discharged. She cited Chubb to render his accounts, which he did, and showed the money paid over to defendant. An order seems to have been made charging him with the amount so paid over, but, as in our opinion it could have no bearing on this controversy, we need not regard it. Chubb then, as guardian, brought this suit (or it was brought in his name) to recover back the money as still belonging to the estate, and paid over and kept without consideration, although there had been a formal discharge given for it. The court below held the pension money properly retained by defendant, but gave judgment for the proceeds of the lands.

Some questions arose early in the trial as to how far testimony could be introduced to show that the guardianship had been changed,—it being objected that no such defense was pleaded. The court below shut it out. If we rightly understand the record, no lawful change of guardians was actually made. But if it had been, we have no doubt it was proper to show it. The action was on behalf of the guardian as representing the estate, for money had and received, and anything which showed an absence of indebtedness to plaintiff should be a good defense. We see no occasion for a plea, but had it become necessary it would have been unjust not to permit any necessary amendment.

As we view the record, the only real question is whether Bradley should repay any or all of the money received by him as the proceeds of the land. The court below held that having adopted the children, defendant was compelled to support them himself unless there was an agreement made prior to the adoption and as a consideration for it, and that any money not paid under such a prior arrangement could be recovered back. The charge also seems to confine the amount that could be so agreed upon to the pension money and the rent of the farm, excluding the proceeds of its sale.

There is no rule of law, in our judgment, which can sustain these holdings. If it is thought reasonable and proper, in order to give a child more advantages than the income of the estate will furnish, there is no inflexible rule which will prevent resorting to the use of the principal, and it may be true economy and duty to do so. Our statutes provide that the body of a trust fund may in proper cases, be so applied, and in *Gott v. Culp* 45 Mich. 265, this same doctrine was applied to the ward's estate in the hands of the guardian. If children have property separate from that of parents, natural or adopted, although it may fairly be expected that the parents shall bring them up if they can, at their own expense, in conformity with their means, yet it would be entirely unreasonable to refuse to give them better facilities than the parents themselves could afford, if parents and guardians should think it advisable for them, within reasonable

limits. As between guardians and those to whom they pay money for that purpose, we do not think an action at law will lie to recover moneys so appropriated, and no authority appears to support it. None of the authorities cited support the claim that a guardian can repudiate his contracts with third persons, and get back money actually paid over for lawful purposes. As these children were situated there can be no doubt it was desirable to have them, in such tender years, placed in family relations with kind and suitable persons, and the appropriation of funds for that purpose cannot, if honestly made, be recalled by the guardian. We are not called on to consider cases of fraud, or cases where there is no reasonable relation between the funds and the support, or how far, even there, an action at law would lie. In the present case there was no testimony tending to indicate that the arrangements between the guardian and the defendant were improper or excessive, and so far as the facts appear both were justified in their conduct. And at any rate there was nothing shown which would justify this action, and the questions as to the guardian's own liability, if they arose here, which they did not, can seldom be left to a jury.

We have not considered the minor points on the reception of testimony, as they could not be material in any proper view of the case.

The judgment must be reversed and a new trial granted, although we can hardly conceive that this formal order, which is customary on exceptions, can be of any use to plaintiff.

The other Justices concurred.

CATHARINE VAN DRIELE v. ARY VAN DRIELE.

Divorce—Solicitor's fee.

No solicitor's fee beyond what had been previously allowed was included in the costs awarded complainant in divorce, upon reversing a decree dismissing her bill on demurrer, and directing it to be answered.

Appeal from the Superior Court of Grand Rapids. (Parrish, J.) October 14.—October 28.

DIVORCE bill. Complainant appeals. Reversed.

Stuart & Sweet for complainant.

Blair, Kingsley & Kleinhans for defendant.

MORSE, C. J. Complainant filed her bill in the circuit court for the county of Kent in chancery, praying for a divorce from the defendant on two grounds: extreme cruelty and want of proper maintenance. Defendant interposed a demurrer for the reason that the case stated in complainant's bill did not entitle her to relief, and that the acts set forth therein did not in law constitute extreme cruelty. The court below sustained the demurrer and dismissed the bill.

We shall not discuss the various allegations in the bill, as no good purpose will be served by so doing. Some of them are vague, shadowy and unsatisfactory, but upon the whole face of the bill enough appears, in our opinion, to require answer and explanation by defendant. The decree of the circuit court for the county of Kent in chancery is reversed, and defendant must answer. The complainant will be allowed her costs in this Court, but no solicitor's fee, the allowance heretofore made being deemed under the circumstances sufficient.

The other Justices concurred.

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GEORGE D. BULEN v. JOHN H. GRANGER.

Assigned receipt—Cross-examination—Conduct of counsel.

1. In an action upon an assigned obligation, the assignee, if called as a witness for the plaintiff, may properly be cross examined as to any material fact affecting the execution of the paper.
2. Defendant should be allowed to cross-examine plaintiff's witness where by so doing he can obtain testimony which he would otherwise be obliged to make the witness his own to obtain.
3. Counsel must not state in the jury's presence what took place, or what rulings were made on a former trial.
4. Defendant denying liability on an obligation on the ground that the consideration had failed, has the burden of showing such failure.
5. In an action upon an obligation given by a man to his divorced wife, the consideration for which was that she should pay certain debts of his, it is proper for him to show in defense that she had paid them, if at all, with the surplus of moneys furnished her by him for domestic expenses. And after she had testified that she paid them with money obtained from an insurance company, it was proper to cross-examine her as to whether she did not borrow such money on property given her by her husband, the purpose being to show that the money was not borrowed, but was taken out of her husband's store.

Error to Wayne. (Jennison, J.) Oct. 14.—Oct. 28.

ASSUMPSIT. Defendant brings error. Reversed.

Henry M. Cheever for appellant.

Levi T. Griffin (*Griffin & Warner*) for appellee.

SHERWOOD, J. The plaintiff in this case brought suit in assumpsit against the defendant upon an instrument which he gave to Millie M. Granger, his former wife, and which is as follows:

DETROIT, May 16, 1882. Received of Mrs. Millie M. Granger $475, to be paid when store number 20, Monroe avenue, is sold, or money borrowed on the same. [Signed] J. H. GRANGER.

On the back of the instrument is indorsed the following:

For value received, I hereby sell, assign, and transfer to George D. Bulen the within instrument, and all rights of action thereunder, and right to recover the money therein mentioned, but at his own costs and expenses, but after crediting the said Granger with two notes of one hundred dollars each, given by my brother, Albert Hillinger, and given to me by the said Granger. MILLIE M. GRANGER.
Detroit, July 11, '82.

The damage claimed by plaintiff was $279. The plea was the general issue, with notice given of want of consideration. The cause was first tried before a justice in Detroit, and judgment given for the plaintiff. The defendant appealed to the circuit, where the cause was tried before Judge Jennison by jury, and the plaintiff recovered a verdict for the amount claimed. This judgment was reversed on appeal to this Court. 56 Mich. . The cause has since been again tried at the circuit with the same result as before, and the case again comes before us on error. The store was sold some time between the 20th and 30th of May, 1882, and this suit was commenced in September following.

There seems to be no question as to plaintiff's right to bring the action for whatever may be due or owing upon the instrument assigned to him. The paper declared upon contains a statement of the consideration for which it was made, and this rendered it necessary for the defendant to make proof of the facts necessary to defeat the plaintiff's prima facie case. In making his preliminary proofs, the plaintiff's counsel placed upon the stand as a witness the plaintiff's assignor, Mrs. Millie Nicolai (formerly Mrs. Granger), and examined her as to the execution of the receipt to her by the defendant, and her execution of the assignment thereof to the plaintiff, and after she had testified to their execution, defendant's counsel, before the papers had been offered in evidence, proceeded to cross-examine the witness, claiming that the paper testified to was not the original receipt. The cross-examination, except that which related directly to the signing of the instrument, was ob-

jected to; part of it as not proper cross-examination, and part of it as immaterial, and the several objections were sustained by the court, and the ruling excepted to. We think this cross-examination should all have been permitted, and the ruling out of that portion which was objected to on the ground of immateriality alone was error. The testimony was material to the issue as made by the pleadings.

The instrument to which the testimony related was the foundation of the plaintiff's case. It was specially declared upon in his declaration. His case depended upon its validity, and the defendant should have been permitted to show upon the cross-examination every material fact relative to the execution of the paper. Especially should this have been done after the plaintiff introduced the instrument in evidence. Such examination at that time, however, was refused by the court, which was still more erroneous. *De Witt v. Prescott* 51 Mich. 300. The defendant should have been permitted to obtain from the plaintiff's witness the facts he sought to elicit if she knew them, without being obliged to recall her and thus vouch for her credit by making her his own witness. *Detroit & Milwaukee Railroad Co. v. Van Steinburg* 17 Mich. 108; *Thompson v. Richards* 14 Mich. 183; *Chandler v. Allison* 10 Mich 476; *O'Donnell v. Segar* 25 Mich. 370; *New York Iron Mine v. Negaunee Bank* 39 Mich. 660.

Counsel should not have been allowed to state what occurred upon the former trial or what rulings were then made. It was improper in the presence of the jury.

The defendant claimed that the receipt sued upon was given by him to Mrs. Granger for moneys she was to pay on outstanding debts against him thereafter, and that she never paid such indebtedness and therefore the receipt was without consideration and a recovery should not be allowed against him. The burden was upon him to show these facts. The defendant at the time kept a drug-store, but had sold it, and the debts she was to pay were those incurred in carrying on the store business. The defendant was sworn, and after testifying that when he married Mrs. Granger, they had no

property, but subsequently he, upon the death of his father, received a large amount from his estate, was then asked the question: "State whether, during the years 1880, 1881 and 1882 you paid your wife a large amount of money over and above what was necessary to carry on the house or to buy things, provisions—provisions for the table—as rents, or for investments, say to the amount of $3700." (Objected to as immaterial and objection sustained.) The witness should have been allowed to make his answer. The defendant's wife claimed to have paid the debts of defendant, to the amount of the receipt, from her own money. It tended to show that she made use of the defendant's money instead of her own (if she paid them) in so doing; at least, such was a legitimate inference which the jury might have drawn, and the defendant should have been allowed the benefit of it.

Mrs. Nicolai was recalled by plaintiff on rebuttal, and testified that she paid the debts of defendant to the amount of the receipt and over, from moneys obtained of the Marine Fire Insurance Company. She was then asked by defendant's counsel if she did not borrow it on property which Mr. Granger gave her. This was objected to as immaterial. Counsel for defendant then stated that he wished to show that the money was taken out of the store; that she did not pay the bills with money that she borrowed. The question was proper cross-examination, and it was erroneous not to allow the witness to answer.

All the testimony appears in the bill of exceptions, which discloses several other irregularities occurring upon the trial that could hardly have failed to have a prejudicial effect upon the rights of the defendant before the jury, and which should have been avoided.

We had hoped to have been able to close this litigation here; but this we could not do and preserve the legal rights of the parties as presented upon the record. The judgment must therefore be

Reversed and a new trial granted.

The other Justices concurred.

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Lena Simon v. The Home Insurance Company of New York.

Fire insurance—Want of sworn plea—Cross-examination.

1. The averment in a declaration on an insurance policy, that it was made and issued to plaintiff as described, is admitted if not denied by affidavit filed with the plea. Circ. Court Rule 79. And in such case questions arising out of an alleged mistake in the name of the insured or relating to the ownership of the policy or the mode of its procurement are not open to consideration.
2. Where in an action on a fire insurance policy the plaintiff has testified as to the condition of her dress and her children's in escaping from the fire, cross-examination on this point is immaterial unless fraud is charged or the fire was wrongful. Nor can it be made a basis of impeachment.
3. Repetitions of questions in different language are properly excluded on cross-examinations after full answers have been given.

Error to Wayne. (Speed, J.) Oct. 15.—Oct. 28.

Assumpsit. Defendant brings error. Affirmed.

Blodget & Patchin and *Cheever & Underwood* for appellant.

Geo. S. Hosmer (*Dickinson, Thurber & Hosmer*) for appellee.

Campbell, J. Plaintiff, a married woman, sued for insurance on a stock of goods and household articles burned March 26, 1884. The policy was issued May 28, 1883, for $1000. It was issued to L. Simon on an application signed L. Simon, and in some of its provisions uses the word *his* and not the word *her*. The plea was the general issue with special notices of defense, which were—*first*, that the policy was not made to plaintiff but to some other L. Simon; *second*, that plaintiff did not own the property; *third*, that the property was not burned, but removed; *fourth*, that inflammable arti-

cles, forbidden by the policy, were kept; and *fifth*, that the insurance was obtained not by a woman, but by a man who claimed to be L. Simon, and to own the property.

No affidavit was filed with the plea. The declaration, in accordance with the rules, set out in brief form that the policy was made and issued to plaintiff, as described. This, according to Rule 79, was admitted by the failure to deny it under oath. We do not very well see how there was any ground for a claim of fraud, when the premium was not left on credit, and where what are called warranties are practically no more than conditions and not grounds for an action upon them. But if any such possible wrong can be imagined to arise out of a mistake of names, it is not open to consideration here.

The question of ownership of property was gone into, and as all the testimony showed plaintiff owned it, there was no room for dispute about the attaching of the policy to it. The question whether the property had been removed was also fairly considered, and the jury found that fourteen hundred dollars worth of goods and furniture were destroyed.

So much of the exceptions as relate to rulings on the ownership of the policy and the manner of its procurement must be regarded as out of the case.

In relating the circumstances of the fire plaintiff mentioned her going with her children to a neighboring hotel, and their condition of dress. Objection is made that two questions were shut out on cross-examination as immaterial, relating to whether she and her children were not fully dressed. It appears, however, that she had just before, on cross-examination, answered fully as to the same facts, and it was not error to shut out its repetition, merely because in different words. But it was entirely immaterial on the issues. If there had been any plea that the fire was fraudulent and not accidental, the details would be very important, and it would be proper to allow a very searching examination. But when by the plea the honesty of the party is not assailed on that point, and the fire is admitted not to have been wrongful, it could make no difference, as to any issue in the case,

whether they escaped at leisure or in haste. And for this reason such answers could not be attacked by way of impeachment, and it was not error to so hold.

The remarks of the judge in his charge, appear to have been intended and proper to prevent the jury from being misled by false issues, and so far as we can perceive, were in no way calculated to infringe on their duties. We see nothing to indicate error in the conduct of the trial or in the charges and rulings, and

The judgment must be affirmed.

The other Justices concurred.

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Isaac N. Jenness v. Gertrude Smith.

Injunction against ejectment—Partnership interests and tenancy-in common —Appeals—Accounting and quieting title—Security for injunction bill.

1. A guardian obtained leave to sell lands in which his ward inherited an interest but the sale was not approved as required by How. Stat. § 6727. The title to the lands was on its face a tenancy-in-common belonging in equity to firms in one of which the guardian, the ward's ancestor, and the grantee were partners, and in the other the first two; and one of the transfers was made in pursuit of a partnership settlement with the grantee. The ward, on becoming of age, brought ejectment for the lands, and the grantee sought to enjoin the action and claims that the guardian's deeds should be made valid. *Held,* that the bill, which was dismissed without prejudice, was properly dismissed; void guardian's deeds could not be confirmed as such, and though the lands were partnership lands and therefore liable to be used for partnership purposes, still, as they were held by tenancy-in-common, relief could only be worked out in equity unless the deeds were good. And the bill was hardly capable of amendment. The interests belonging to each firm and the condition of each should appear, so as to denote the liability of the different lands, and this can only be reached by some sort of accounting. The bill would probably not be multifarious in joining these titles.

2. An appeal in chancery will not lie that involves nothing but costs on demurrer upon the dismissal of a bill without prejudice.

3. A bill for relief against an heir holding in trust a partnership interest in lands should show the partnership character of the interest.

4. On a bill for an accounting involving the interests of a deceased partner the latter must be represented in court.

5. On a bill to quiet titles held in severalty the owners, if not represented, will not be bound by an adverse decree.

6. A bill to quiet title cannot be filed by any person not interested in the title; and a suit by or against one who is only indirectly interested cannot bind other owners, who cannot be represented in his name.

7. Security must be filed with a bill to enjoin proceedings at law. How. Stat. § 6092.

Appeal from Lapeer. (Stickney, J.) Oct. 15.—Oct. 28.

INJUNCTION bill to restrain suit in ejectment. Complainant appeals. Affirmed.

Geer & Williams for complainant. No one need be made a party to a bill in equity whose interests cannot be affected by the decree: 1 Moulton's Ch. Pl. 98; 1 Dan. Ch. Pl. 284; Powers' Puterbaugh's Pl. & Pr. 37; *Hillman v. Hillman* 14 How. Pr. 459; *Newbould v. Warrin* 14 Abb. Pr. 85; *Stockwell v. Wager* 30 How. Pr. 271; a partner's heirs hold partnership assets in trust for the firm: *Merritt v. Dickey* 38 Mich. 44; *Moran v. Palmer* 13 Mich. 367; *Shanks v. Klein* 104 U. S. 22; *Dyer v. Clark* 5 Met. 562; *Andrews v. Brown* 21 Ala. 437; *Dupuy v. Leavenworth* 17 Cal. 262; *Delmonico v. Guillaume* 2 Sanf. Ch. 406; *Buchan v. Sumner* 2 Barb. Ch. 197; *Gray v. Palmer* 9 Cal. 616; *Connor v. Allen* Har. Ch. 371; *Thayer v. Lane* Walk. Ch. 200.

Farrand & Jenks and *J. B. Moore* for defendant. Chancery has no inherent jurisdiction to order the sale of the real estate of infants, the power being derived entirely from the statutes: *Rogers v. Dill* 6 Hill 415; *Onderdonk v. Mott* 34 Barb. 106; *Williamson v. Berry* 8 How. 495; Schouler's Dom. Rel. 480; *Whitman v. Fisher* 74 Ill. 154; the power of surviving partners over the partnership real estate extends to holding the title, in equity, as trustees for the purposes of the partnership, to use what is necessary, after the exhaustion of the personal assets, to pay the debts of the firm, and no more; and the title of the remainder goes to the heirs of the deceased partner in the same proportion as his interest

was in the partnership: Pars. Partnership 372; *Shearer v. Shearer* 98 Mass. 107; *Mauck v. Mauck* 54 Ill. 281; *Way v. Stebbins* 47 Mich. 298; *Merritt v. Dickey* 38 Mich. 41; *Buchan v. Sumner* 2 Barb. Ch. 165; *Martin v. Morris* 62 Wis. 419; the transfer by one surviving partner to the other, of the remaining property, would be void: *Dwight v. Blackmar* 2 Mich. 330; *Nelson v. Hayner* 66 Ill. 487; Pars. Partnership 442.

CAMPBELL, J. The general purpose of the bill filed in this case is to compel Gertrude Smith to abandon certain ejectment suits for an undivided interest claimed by her as heir-at-law of Henry Fish, deceased, who was her father, and to give up her claim to these lands and some others.

The basis of the complainant's equities is in substance that some of the lands in question were owned by the firm of A. & H. Fish, composed of Allen and Henry Fish, and some of them were owned by I. N. Jenness & Co., composed of complainant and the two brothers Fish. The bill however does not point out what lands belonged to one firm and what to the other. It appears that the title on its face was a tenancy-in-common, which was claimed to belong in equity to the respective firms.

The bill indicates, rather than avers,—for many of the statements are very vague and general,—that the firm of I. N. Jenness & Co. was largely indebted, partly to complainant and partly to others. It is not averred, but it appears, that complainant was bound in any event to bear one-third of this debt. It is also indicated that A. & H. Fish were indebted as a firm to I. N. Jenness & Co., but it does not appear what was the state of the accounts between A. & H. Fish, nor that there were not assets of that firm which would reduce or abrogate the necessity, as between Allen Fish and defendant, of resorting to the lands to pay the debts of that firm.

Neither does it appear with any certainty how the accounts of the individual partners of I. N. Jenness & Co. stood with that firm. It does appear that there were personal assets of the latter firm, but what was done with them, or how much

they were, does not appear. It does not appear that any account was ever settled, or if any how, of either of the two partnerships, except by the transfer of lands to be mentioned.

With this preliminary foundation to explain all the equities supposed to exist for resorting to defendant's land as partnership assets, the bill then shows that Allen Fish, as defendant's guardian, applied in 1876 to the circuit court for the county of St. Clair, in chancery, under the statute providing for sales of infants' lands, setting out various reasons, partly relating to the partnership matters, partly to executory land contracts outstanding, and partly to incumbrances, and seeking permission to sell defendant's interest. At that time she was about seventeen years old, lacking four years of her majority. Under that petition leave was granted to the guardian to make sales, and to report them for confirmation. It is not averred that orders were made to carry out any particular contracts or trusts. The power was a general one to sell. Under this statute no conveyance could be made, or sale completed, until reported to the court, and sanctioned in each case. How. Stat. § 6727. No sales were ever reported.

Under this order, but without any right, Allen Fish, as guardian, conveyed lands valued at $15,800 to Eliza A. Jenness, complainant, and himself in his own right, joining also. Some of this land appears to have been conveyed away by Eliza A. Jenness, and some not. The consideration was the crediting of the consideration money on I. N. Jenness & Co.'s debt to complainant. How much of this land belonged to one firm and how much to the other does not appear.

Other lands were conveyed to a number of different grantees by the same grantors for an aggregate amount of over $7000. No explanation is given of what became of this money. All these deeds were made in 1877.

January 3, 1878, it is averred that Allen Fish and complainant came to an accounting of the affairs of I. N. Jenness & Co., including the balance due from A. & H. Fish. It is claimed that A. & H. Fish owed Jenness & Co. about $43,000; that Jenness & Co. owed complainant about $29,000, and other creditors about $21,000; and that the Jenness

& Co. lands were mortgaged for about $23,000, and the A. & H. Fish lands for about $12,000.

On that day Allen Fish, for himself and as guardian, conveyed to complainant all the remaining lands of both firms, subject to the mortgages, in consideration that complainant would pay all debts and assume the mortgages. This he claims to have done.

After defendant came of age she began quite a number of ejectment suits against various parties claiming under the guardian's deeds, and as complainant represents, under his grants. These suits include actions against himself and against Eliza A. Jenness.

The bill is based on these invalid guardian's deeds which it claims should be made valid, and on some vague charges of complicity in fraud between defendant and Allen Fish in procuring a settlement of Henry Fish's estate without having these claims presented.

To this bill a general demurrer, with special objections on several grounds, was put in, and was sustained, and the bill dismissed without prejudice.

In our opinion the bill was properly dismissed. It is not disputed that if these lands were partnership lands, they were liable to be used for partnership purposes, in case of lack of other means. But, inasmuch as they were held by tenancy-in-common, the relief could only be worked out in equity, unless the guardian's deeds were good. But there can be no claim that they are valid, and there is no way wherein void guardians' deeds can be confirmed as such.

As the bill rests entirely on this claim, and contains no other, it is impossible to help it as it stands, and while perhaps the court below might have allowed amendments, yet none appear to have been asked, and the dismissal being without prejudice, and involving no more than the mere costs on demurrer, there could be no appeal on that ground.

But the defects on any theory are so considerable that an entirely new bill or set of bills cannot be dispensed with. To get relief against defendant as an heir holding a partnership interest in trust, it is manifest that the bill should show not

merely in a general way the partnership character; but where there are two firms, in one of which complainant was not a member, it must appear what interests belonged to each, and what was the condition of each, so as to denote the liability of the different lands. That could only be reached by some sort of an accounting, and no such accounting could bind any one unless Allen Fish was represented before the court.

The defects however go further. The bill is substantially a bill to quiet the titles under the guardian's sales. These titles are held in severalty, and, before any decree can be had, the owners must be represented so as to be bound by it in case the decree is adverse. Probably the original connection of these titles may be such that a bill to join them would not be multifarious. At any rate we do not now see that it would. But no person not interested in the title can file a bill to quiet it, and if complainant is interested as he seems to be, it is indirectly, and no suit by or against him could bind the other persons owning the lands, as they must be bound if any decree will be of any value. Complainant does not and cannot in his own name represent them.

The present bill is so entirely deficient in any of the important requisites that it cannot be maintained. We are not informed by the printed record what steps were taken to give the security, without which proceedings at law cannot be enjoined. The statute is imperative. *Carroll v. Farmers' & Mechanics' Bank* Harr. Ch. 197; How. Stat. § 6692

The decree must be affirmed.

The other Justices concurred.

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STREET RAILROAD COMPANY OF EAST SAGINAW v. JAMES WILDMAN.

Injunction.

1. A hearing upon an injunction bill cannot be had after the act has been done which it is the sole purpose of the bill to restrain; the remedy for any consequent injury is to be had, if at all, at law.
2. Injunction will not lie for the purpose of passing on abstract rights or wrongs apart from some threatened injury to the person seeking relief, nor when such injury is remediable at law.

Appeal from Saginaw. (Gage, J.) Oct. 15.—Oct. 28.

INJUNCTION bill. Complainant appeals. Affirmed.

Tarsney & Weadock for complainant.

Hanchett & Stark for defendant.

MORSE, C. J. August 21st, 1883, the complainant, a corporation duly organized and conducting the business of operating a street railroad upon and along the streets and over the bridges of East Saginaw, claiming the exclusive right to do so under an ordinance of said city granting it the franchise, filed a bill of complaint in the circuit court for the county of Saginaw, in chancery, against the defendant James Wildman, alleging its rights in the premises, and that said defendant was threatening to remove a large frame building, of which he was the owner, upon and along Washington avenue, over and upon its track on said street, a distance of three-quarters of a mile, in violation of its rights, to the great interruption of its business and profits, the serious inconvenience of the public, and the hindrance and delay of the United States mails which it carried, to the injury and damage of said complainant of at least $300; that such removal would be a nuisance because of its effect upon public travel; and that the damages sustained by the corporation would be of such a character as to be incapable of adjust-

ment and estimation at law; and praying for an injunction restraining defendant from removing the building, and for such other relief as the nature of the case might require.

Upon filing the bill a temporary injunction was granted as asked, and the defendant in due time answered. Proofs were taken and hearing had thereon. May 15, 1885, a decree was entered in the court below dismissing the bill.

In the view we take of the case as presented in this Court, it is not necessary to set forth the averments of the bill or answer. It appears from an examination of the record, and also from the admission of counsel for complainant, upon the hearing here, that the temporary injunction granted at the time of the filing of the bill was afterwards, and before the closing of proofs and hearing in the court below, modified so as to permit the building being moved. Also, that the building was moved before the hearing.

We need not go into the merits of this controversy. If the complainant was ever entitled to the relief prayed for, we cannot now make any decree to aid it. The bill is an injunction bill, pure and simple, asking no equitable relief except the restraining of defendant from moving the building. We can hardly prevent him from doing what has already been done. The writ of injunction can have no operation to correct the injury, if any, to complainant by the moving of this building.

It was suggested on the hearing that we ought to settle the rights of the parties so that the principle established might be a guide in other cases likely to arise. But courts of equity will not lend their aid by injunction for the enforcement of a right or the prevention of a wrong in the abstract, not connected with any injury or damage to the person seeking relief, nor when such injury or damage can be fully and amply recovered in an action at law. Nor are courts of equity established to decide or declare abstract questions of right for the future guidance of suitors. The granting of an injunction against the moving of a building already moved would be idle and useless. If the complainant has suffered any loss or damage from such moving which

it is entitled to recover from the defendant, it is a matter of dollars and cents, by the showing in the bill of complaint, and the remedy, if at all, would be in an action at law. We can certainly grant no equitable relief as the case appears in this Court.

The decree of the court below is affirmed with costs.

The other Justices concurred.

LAURA A. GOULD ET AL. EX'RS v. ELLA JACOBSON AND CHARLES JACOBSON.

Watercraft—Statutory lien for supplies—Chattel mortgage—Replevin.

1. The mortgagee of a vessel that is afterward libeled for supplies furnished in a home port and is sold by the Admiralty Court without obtaining jurisdiction, can bring replevin for it against the purchaser.
2. How. Stat. § 8236 provides that watercraft of above five tons burthen shall be subject to a lien for certain specified demands. *Held,* that a showing that a boat was five tons burthen was jurisdictional in a proceeding to establish such lien.
3. Jurisdiction is not to be presumed in the absence of facts in the record to establish it.
4. The lien, if any exists against a vessel, for supplies furnished in a home port is statutory, not maritime; but it can be enforced in the admiralty court, though the record must show that the vessel is of the class to which the statutory lien may attach.
5. The Admiralty Court, in a proceeding to enforce a lien against a vesssel, can obtain jurisdiction in rem only by its actual seizure by the marshal, notice thereof and notice by publication of the time when process shall be returned and the cause heard; and two weeks before such return such notice shall have been given at least twice. District Court Rules, 4, 9, 24.
6. A recital of due publication in a return by a marshal does not cure the want of it, where the facts are set forth in the return and show that the publication was insufficient.
7. A motion to set aside proceedings that are void for want of jurisdiction does not estop the moving party from objecting to their validity in a proceeding in which they are relied on by the opposite party.

Error to Saginaw. (Gage, J.) Oct. 15.—Oct. 28.

REPLEVIN. Defendants bring error. Affirmed.

Tarsney & Weadock for appellants. The legislature of any state has a right to pass laws giving liens on vessel property, and when a state has by its laws given such liens, admiralty courts can enforce them: Desty's Shipping § 87, n. 11; *The General Smith* 4 Wh. 444; *The Aurora* 1 Wh. 96; *Peyroux v. Howard* 7 Pet. 324; *New Jersey S. & Co. v. Merch. Bank* 6 How. 390; *The Lottawanna* 21 Wall. 558; *The Garland* 5 Fed. Rep. 924; *The Guiding Star* 18 Fed. Rep. 263–269; *The Champion*, Brown's Adm. 520; rafts of timber, dredges and scows, though never used in the transfer of passengers or freight nor furnished with motive power of their own, were vessels subject to maritime liens: *Muntz v. Raft* 15 Fed. Rep. 557; *The Hine v. Trevor* 4 Wall. 555; *The J. F. Warner* 22 Fed. Rep. 342; *The Alabama* 19 Fed. Rep. 544; *The General Cass* Brown's Adm. 334.

Hanchett & Stark for appellee. There is no maritime lien for supplies furnished in a home port, unless it is given by the statute of the state in which the boat belongs and in which the supplies were furnished: *The Lottawanna* 21 Wall. 558; *The Monongahela &c. v. The Bob Connell* 9 Rep. 507; the home port is any place within the limits of the state to which the vessel belongs: *The General Smith* 4 Wheat. 443; *Ex parte Easton* 95 U. S. 75; the United States Courts are of limited jurisdiction, and in order that the boat be seized in admiralty under the state statute, the facts which would give the court jurisdiction to act under the statute must be alleged: *Ganoe v. Scow* 18 Mich. 456; Benedict's Adm. § 408; Fields' Fed. Courts §§ 56, 126; *Ex parte Smith* 94 U. S. 455; *Hornthall v. Collector* 9 Wall. 565; *Platt v. Stewart* 10 Mich. 260; Freeman on Judgments 116, 123; *Parmlee v. The Chas. Mears* 1 Newb. Adm. Rep. 197.

SHERWOOD, J. The action in this case is replevin to obtain possession of a steamboat called "Pickwick," upon which Amos Gould, in his life-time, held a chattel mortgage. The claim made by the plaintiff is that Amos Gould, before he died, sold the boat Pickwick to defendant Charles Jacobson, a resident of St. Clair county, Michigan, for $700, and took back a mortgage thereon for the entire purchase price. Jacob-

son made but one payment of interest. The mortgage was made March 3, 1882, and renewed each year by making the affidavit required for that purpose. At the time of bringing this suit the entire amount of the purchase price of the property, with interest from March 3, 1883, remained due and unpaid. The defendant Ella Jacobson, who is the wife of Charles Jacobson, the other defendant, claims to be the owner and entitled to the possession of the tug, and relies upon the following facts to support her title to the boat, and right to the possession thereof: That in the year 1883 the firm of Howell & Co., of Owosso, libeled the tug in the United States court in admiralty for the Eastern district of Michigan for material and labor furnished and performed upon the boat in April, 1882; that subsequent to the seizure of the tug under the admiralty proceedings, and in May, 1883, an order was made by the United States district court for the sale of the boat pendente lite, and that in pursuance of said order the marshal advertised and sold the Pickwick to Warren Bordwell and Michael Maher of East Saginaw, for $285, and that afterwards Ella Jacobson purchased the boat from them.

Counsel for Mrs. Jacobson, to sustain her defense upon the trial, offered in evidence a certified copy of the proceedings in the Admiralty Court, the transfer of the property by the marshal to Bordwell and Maher, and the bill of sale thereof to her by them. Objection was made to this testimony by plaintiff's counsel upon the grounds that the defendant never had any maritime lien upon the property, for the reason that the supplies, whatever they were, were furnished in a home port; that the United States court, being one of limited jurisdiction, in order to make a legal seizure in admiralty under the statute, the facts necessary to authorize the court to act under it must be alleged, and it is not sufficient to state that the plaintiffs have a lien by virtue of the law of the State, but the facts themselves must be set forth; that the circuit court of the United States never acquired jurisdiction over the boat and parties.

The circuit judge sustained the objection made by plain-

tiff's counsel, and directed a verdict for the plaintiff; to which ruling and direction defendants excepted. The defendants bring error.

The ruling of Judge Gage was correct, and must be sustained. It is not claimed that the court ever obtained any jurisdiction of the parties, and no question upon the plaintiff's evidence is raised as to their right to maintain their suit, unless they are cut off by the proceedings in rem attempted to be had against the Pickwick in the circuit court of the United States for the Eastern district of Michigan, in admiralty, commenced after the giving of the plaintiff's mortgage.

It was under these proceedings alone that defendant Ella Jacobson claimed to be in possession of the property by title superior to the mortgage lien of plaintiff. By How. Stat. § 8236 "Every water-craft of above five tons burthen, used, or intended to be used, in navigating the waters of this state, shall be subject to a lien thereon" for certain claims of a specified character, among which was that for which Howell & Co. attempted to libel the boat. There does not appear, in the libel proceedings offered in evidence, any allegation or statement that the boat was of "over five tons burthen." This averment was necessary. It was jurisdictional; as much so as the citizenship of the parties in an action at law, which, it is held, must appear in the declaration or record, to give jurisdiction. There can be no presumption in favor of jurisdiction, when the facts necessary to show it do not appear in the record. *Hornthall v. Collector* 9 Wall. 560; *Ex parte Smith* 94 U. S. 455; Benedict's Admiralty § 408; Betts' Pr. 16; *Platt v. Stewart* 10 Mich. 260; *Ganoe v. Scow etc.* 18 Mich. 456. It is the statutory lien which was attempted to be enforced by Howell & Co. against the boat in the admiralty proceedings. They had no maritime lien. The supplies were furnished in a home port. No lien exists in such cases except by statute, in the state where the boat belongs. In such cases the lien may be enforced in a court of admiralty. *The Lottawanna* 21 Wall. 558; *The Monongahela etc. v. The Bob Connell* 9 Reporter 507; *The Gen. Smith* 4 Wheat. 443; *Ex parte Easton* 95 U. S. 75. The record

from the United States circuit court does not disclose a state of facts making the statute applicable to the defendant's case. It does describe the boat in such manner as to bring it within the class to which the statutory lien applies.

The certified copy of the proceedings in the circuit court of the United States for the Eastern district of Michigan is all the evidence we have of the doings of that court in the case which resulted, as is claimed, in divesting the plaintiffs of their interest under the mortgage. Those proceedings were ex parte and in rem. The court could only obtain jurisdiction in rem through a valid seizure of the tug by the marshal. Cohen's Admiralty 322; *Miller v. U. S.* 11 Wall. 294; *The Rio Grande* 23 Wall. 463. The seizure must be actual, and General Admiralty Rule 9 requires further that the marshal shall give public notice thereof, and of the time assigned for the return of the process and the hearing of the cause in such newspaper within the district as the district court shall order. Rule 4 of Admiralty Rules of the district court of the United States for the districts of Michigan provides that the required notice shall be given and published twice a week at least fourteen days before the return-day of the process, unless a shorter time shall be allowed by special order. Rule 24 for the district courts requires the notice to be published in the *Detroit Post & Tribune.*

Under these three rules we have the notice provided which shall be given in order to give the court jurisdiction, and the record of the court must show that they have been complied with, or the court will not have jurisdiction.

The record of the proceedings shows that the writ to seize the boat was issued April 26, 1883, and made returnable the first Tuesday of June then next, which would be June 5th. The writ commanded the marshal to seize the boat, to give due notice, and to make return of his doings in the premises. *No return is made by the marshal.* On the back of the writ a blank for return is filled, without the signature of the marshal. This blank, as filled, states only the seizure, and makes no reference to the giving of any notice. It is not signed, and remains simply a blank. On the 5th day of June is an

entry on the record of the court reciting that it is the return-day of the process, "and on reading and filing proof of due publication of the notice of the filing and contents, and the hearing of said libel," etc., no one appearing, the libel is taken as confessed. There is no return or other evidence furnished by the marshal on the record of any notice having been given by him. The proof of publication is set out in the record, and consists of the affidavit of Fred. Kelly, which states that the notice setting out the same was published in the *Detroit Post & Tribune* on the 21st, 24th, 28th, and 31st days of May, 1883.

The second publication was on May 24th, which *is not fourteen days before the return-day of the process*, June 5th, but is only eleven days; hence the record shows that Rule 4, which requires *at least two publications* fourteen days before the return-day of the process, was not complied with, and the court acquired no jurisdiction. The recital in the record of the reading and filing the proof of due publication does not cure this defect, because the proof referred to is made a part of the record, and by this it is seen just what the publication was, and it shows that the court did not get jurisdiction. *Mickel v. Hicks* 27 Am. Rep. 161; *Sibley v. Waffle* 16 N. Y. 180, 187–190; *Galpin v. Page* 18 Wall. 366.

The tug was sold pendente lite, but it can make little difference what was done so long as the proceedings were ex parte and jurisdictionally defective.

Under no view that we have been able to take of the record offered in evidence from the Federal Court can we find the jurisdiction in the case sustained that was then attempted to be exercised, and we think the objection of plaintiff's counsel to its admission well taken.

The judgment at the circuit court must be affirmed.

We do not regard the plaintiff's motion to set aside the proceedings in the Federal court such an adjudication of the matter as to estop them from making the objection they did in this case.

The other Justices concurred.

Catharine McBain v. Jacob Seligman.

Agent paying individual debt with principal's money.

A woman doing business, with her husband as agent, authorized him to sell certain notes belonging to her in order to raise money to use in the business. He indorsed the notes as agent, and then sold them to a customer to whom he was individually indebted, and without his wife's permission he allowed the purchaser to apply part of the purchase price upon his debt. *Held* (1) that the indorsement was notice enough to put the purchaser on inquiry as to his authority to make such application; (2) that in an action by the wife against the purchaser to recover back the money so applied, a contract between the husband and the purchaser, with which the wife was not shown to be connected and which provided for the payment of the husband's debt by allowances in transactions with him in the course of the wife's business, was wholly irrelevant to the issue. The agent could not charge his wife's business with this debt without showing her assent to this arrangement, and if he could this application of money was not an allowance within the terms of the contract.

The ownership of the notes discounted and the nature and extent of the agent's authority in discounting it were questions for the jury.

Error to Saginaw. (Gage, J.) October. 15—October 28.

Assumpsit. Plaintiff brings error. Reversed.

Wilbur & Brucker and *Wisner & Draper* for appellant.

Tarsney & Weadock for appellee.

Champlin, J. Plaintiff was engaged in the insurance business which was carried on by her husband as her agent. He informed her that her business required more money, and she being the owner of three promissory notes for $750, each made by Robbins and Murray, payable to her order, placed them in the hands of her husband to sell to Mr. Seligman, the defendant, and get the money on them. He sold the notes to defendant, June 6, 1881, and in the sale he allowed defendant to retain out of the purchase price, and apply upon an indebtedness due from the husband to defendant, the sum

of $400. The plaintiff claims that this was contrary to her instructions, and she brought this suit to recover from defendant the sum which she claims was misappropriated.

The testimony is all returned. It shows clearly and without contradiction that William McBain acted as plaintiff's agent in disposing of the notes, and that his authority was limited to selling them for money. It also shows a total want of authority of the agent to apply any portion of the proceeds to his individual indebtedness to defendant. The disputed point in the case turned upon the question whether defendant had or was bound to take notice that William McBain was the agent of his wife in disposing of the notes, and whether he had authority to apply the $400 to the payment of his individual indebtedness.

The defendant, against plaintiff's objection, introduced in evidence a written contract entered into between him and William McBain, dated the 23d day of March, 1881, which recited that "McBain is indebted to defendant at this date in the amount of $1559.95, and is desirous of paying the same in the following manner, and which defendant accepts, when completed and carried out, for all insurance which the said Seligman has, or is interested in, that is now carried or hereafter to be carried in the office of McBain. The said McBain agrees to carry the same, and to put in the best of insurance companies all said insurance that said Seligman may desire, together with any and all other insurance he may solicit from others, and allow said Seligman one-third of amount of premiums on all said insurance, which is to apply on the old indebtedness before mentioned. And the said Seligman further agrees to make the rates of said insurance as low as another responsible agency in equally good companies; and further to allow the said Seligman interest at the rate of seven per cent. per annum on all amounts due him until the time of final payment; said amounts of one-third of the premiums to be indorsed on the said old indebtedness. And the said Seligman hereby agrees to give the said McBain insurance as heretofore mentioned, to cancel said obligation of McBain to Seligman, provided the rates and companies are satisfactory, and the said McBain remains continuously as now in the insurance business. The aforesaid indebtedness is for endorsements on a Stewart paper, for which judgment has been rendered in favor of Seligman."

No attempt was made to connect the plaintiff with this contract. The indebtedness mentioned therein had been standing some two years, and was the individual indebtedness of William McBain. It was entirely irrelevant to the issue between the parties, and its admission was erroneous. The court instructed the jury that "this contract was made by Mr. McBain in reference to the insurance business, although the business had been purchased by his wife from the parties who were previously agents. Mr. McBain was the agent, and of course was authorized to make contracts in reference to insurance. This contract, in the view of the court, appears as a charge on that business. He was bound by that contract to do Mr. Seligman's insurance, all the insurance he might bring into that office, and to take right out of the money, or some of the money, at least, that belonged to the company,—that is, one-third of the premiums,—and it was to be credited on this paper. That was a charge on the business which a man naturally would like to be relieved of, and it required capital to carry it on, also; and in the view of the court, he needing capital in the business, I think relieving himself of this charge on the business to the extent of $400, by having that amount indorsed on the paper, was a legitimate use of the money, in view of his statement what his wife authorized him to do with it. I don't think she could have called him to account for misappropriating it; the effect being to relieve the insurance business of a charge such as is mentioned in this paper to the extent of $400. Therefore, there being no dispute about the testimony, Mr. McBain being the only one who states what his wife directed him to do with the notes, in that view of the case, he having made, in the judgment of the court, a legitimate use of the money, in view of the instructions given him by his wife, your verdict should be for the defendant in this case."

This instruction was erroneous. There is no doubt that Mr. McBain would naturally like to be relieved of the indebtedness, but he had no authority to charge the business of the plaintiff with his individual indebtedness, without some evidence to show that she assented to it. But even if the contract constituted a charge upon the business, the $400 in question was not received for premiums in the insurance business, and had no connection whatever with the contract. The notes appear to have been endorsed by William McBain

as agent, and it therefore appears upon the face of the papers that the person who negotiated the sale was acting in the capacity of agent, and this was notice to defendant that Mr. McBain was not the owner of the notes, and put him upon inquiry of the authority of McBain to act. The ownership of the paper discounted or sold to Mr. Seligman, and the nature and extent of the authority of the agent in selling it, were legitimate subjects of inquiry, and were questions of fact which ought to have been submitted to the jury.

The judgment is reversed and a new trial ordered

The other Justices concurred.

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JOHN H. KERRICK v. WILLIAM H. STEVENS ET AL.

Suit on note—Blank indorsement—Lien.

1. An indorsement by the payee in blank does not affect his right to sue upon a note to his order while it remains in his hands.
2. Proceedings taken to establish a lien upon partnership property to satisfy a debt evidenced by their note are immaterial in an action on the note if the lien has not been enforced or anything realized from it.

Error to Montcalm. (V. H. Smith, J.) Oct. 15.—Oct. 28.

ASSUMPSIT. Defendants bring error. Affirmed.

Palmer & Lyon and *J. C. Shields* for appellants

N. O. Griswold for appellee.

CAMPBELL, J. This is the same case which was before us as reported in 55 Mich. 167, and does not present any serious differences upon the main questions. Defendants were sued on two notes made in the name of the Hastings Ladder Co. to the order of plaintiff, who did business in the name of J. H. Kerrick & Co., and upon the common counts. One

of these notes, for $210.80, was dated July 19, 1882, at Hastings, Minnesota, at ninety days. The other having been thrown out of the case as made after defendants' partnership was dissolved, is of no consequence. Recovery was had on the first note, and upon a bill of $175, for goods furnished.

The note, when produced, had upon it a blank endorsement of the payee, but this was immaterial and could be disregarded, in his hands, and so it was held.

The consideration of both note and bill was articles furnished by plaintiff to the Hastings Ladder Company, and the defense is based partly on the denial of any such partnership, and partly on the absence of power in the defendant Riches to incur debts.

We held, when the case was formerly before us, that the articles signed by defendants made them partners at once, and we do not feel disposed to open that controversy. Neither do we conceive on what ground the power of the partner at Hastings to incur debts for the purchase of articles to be used in the business can be questioned. The firm, whose identity was sufficiently shown, was not one involving any peculiarities, and the purchase was within the ordinary purposes for which it was created.

It was sought to show that plaintiff had taken steps to establish a lien against the partnership property for his debt. Defendants, however, made no proposal to show that it had been enforced or anything realized from it. This being so the court rightly held it immaterial.

The record presents no important points, and as no errors appear,

The judgment must be affirmed.

The other Justices concurred.

BENJAMIN M. POWELL v. LAURA POWELL.

Divorce—Desertion.

Where a bill of divorce against a wife is grounded on adultery it will not sustain a decree for desertion if the only allegations on that point are that defendant has lived away from her husband for a period of less than two years in adulterous cohabitation with a specified person, and that complainant has not voluntarily cohabited with defendant since the discovery of such adultery.

Appeal from Montcalm. (V. H. Smith, J.) Oct. 15.—October 28.

DIVORCE bill. Complainant appeals. Affirmed.

N. O. Griswold for complainant.

MORSE, C. J. The complainant filed his bill of complaint in the circuit court for the county of Montcalm, in chancery, alleging adultery on the part of defendant with one Waldron; and also setting forth, further, that while complainant and defendant were living and cohabiting together as husband and wife, said Waldron, who had been treating the defendant professionally as a physician, on the 15th day of December, A. D. 1879, without the knowledge or consent of complainant, and while he was away, procured teams and moved all the household furniture, clothing, and personal effects of the defendant seven miles away from Murray township, where complainant lived, to Brighton, Ontario, a distance of seven miles; and that soon thereafter the said Dr. Waldron and the defendant resided in Brighton as husband and wife in open and lascivious cohabitation, and continued to so reside together until the spring of 1881, when Dr. Waldron died at the house where he and defendant were so living; "and that the said Laura Powell, without any cause or provocation, deserted your orator as aforesaid, and continued from the date aforesaid to reside separate and apart from your orator and with the said Dr. Waldron until his death, aforesaid."

This allegation is relied upon as a proper averment of desertion under the statute, and is the only reference in the bill from which desertion can be claimed.

There was no personal service upon defendant, but upon proof of publication the bill was properly taken as confessed against her, and referred to a commissioner to take proofs and make report. Testimony was obtained by commission on interrogatories, and two witnesses also sworn and examined by the circuit court commissioner. Upon his report to the circuit court in chancery a decree was entered therein dismissing complainant's bill, and he appeals to this Court.

It will readily be seen that the allegation of desertion in the bill is not sufficient. The charge therein covers only a period from December, 1879, until the spring of 1881, less than two years, and is entirely silent as to what took place afterwards, save that complainant has not *voluntarily* cohabited with defendant "since the discovery of such adultery on the 15th day of December, 1879." It is evident that the bill was filed upon the theory of adultery only, and that the claim of desertion is an after-thought. There is no proof whatever of adultery. The brief filed in this Court by the solicitor of complainant does not ask a decree on that ground, but the argument is made that he is entitled to a decree on account of desertion. But if the allegations in the bill of complaint were sufficient to admit of evidence to support the charge of desertion, the testimony shows that the parties had separated before defendant moved to Brighton, and there is nothing to show but that such separation and her removal to Brighton was not with the full and free consent of complainant. In fact, the inference is, from the whole proofs, that complainant deserted defendant because he suspected her of adultery, which he has failed to establish in this cause.

The decree of the court below is affirmed.

The other Justices concurred.

HUGH FINAN v. SIMEON BABCOCK AND MICHAEL ENGELMANN.

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Novation—New trial—Trade orders—Amendment of declaration—Agency—Commercial paper—Error without injury—Costs.

1. New trial will not be ordered for an error which could not have prejudiced appellant.
2. A lumberman's order in this form: [Date and address] Pay to the order of H. F. the sum of ten dollars, and charge the same to Camp 8. [Signature] is in essentials a draft, and must be accepted before it will sustain an action.
3. The rights and liabilities of parties to commercial paper appear on its face; and where there is nothing to show that it was signed by an agent or for whom the agent acted parol proof to that effect is inadmissible.
4. A declaration in an action for the amount of an order may be amended in the discretion of the trial court so as to admit testimony that the person giving the order acted as agent and that it amounted to a novation of the indebtedness.
5. A novation arises where A owes B and B, C, and B pays C with an order charged to B on A's books and drawn by A's authorized agent; this shifts A's indebtedness from B to C.
6. Where a question of fact is properly submitted and the finding thereon necessarily determines the result, an error of the judge in the theory on which he submits the case may not be such error as to require reversal.
7. Costs were withheld on affirmance where error appeared which could not affect the result.

Error to Manistee. (Judkins, J.) Oct. 16.—Oct. 28.

ASSUMPSIT. Defendant brings error. Affirmed.

Ramsdell & Benedict for appellants. An agent is personally liable on a note signed by him unless he signs as agent: *Leadbitter v. Farrow* 5 M. & S. 345; *Sowerby v. Butcher* 2 C. & M. 368; 4 Tyrwh. 320; Byles on Bills (8th ed.) 33; Dicey on Parties 240; *Williams v. Robbins* 16 Gray 77; *Dubois v. Canal Co.* 4 Wend. 285; *Woodbury v. Blair* 18 Ia. 572; *Bickford v. Bank* 42 Ill. 238; *Rand v. Hale* 3 W. Va. 495; *Moss v. Livingston* 4 Comst. 208; *Hovey v. Ma-*

gill 2 Conn. 680; *Rossiter v. Rossiter* 8 Wend. 494; *Emerson v. Providence &c. Co.* 12 Mass. 237; *Bradlee v. Glass Co.* 16 Pick. 347; *Long v. Colburn* 11 Mass. 97; *Ballou v. Talbot* 16 Mass. 461; *Roberts v. Button* 14 Vt. 195; *Campbell v. Baker* 2 Watts 83; but see *DeWitt v. Walton* 5 Selden 571; *Rice v. Gove* 22 Pick. 158; where the principal's name does not appear, he is not liable on a bill or note as a party to the instrument: *Pentz v. Stanton* 10 Wend. 271; *Bult v. Morrell* 12 Ad. & E. 745; 10 L. J. (Q. B.) 52; compare *Lindus v. Bradwell* 5 C. B. 583; 17 L. J. (C. P.) 121; *Stockpole v. Arnold* 11 Mass. 27; *Briggs v. Partridge* 63 N. Y. 357; *Baker v. Mech. F. Ins. Co.* 3 Wend. 94; *Sturdivant v. Hull* 59 Me. 172; *Haverhill Ins. Co. v. Newhall* 1 Allen 130; *Fiske v. Eldridge* 12 Gray 474; *Tilden v. Barnard* 43 Mich. 376; *Fenn v. Harrison* 3 Term 761; *Holmes v. Burton* 9 Vt. 252; *Newhall v. Dunlap* 14 Me. 180; *Morell v. Codding* 4 Allen 403; *Guernsey v. Cook* 117 Mass. 548.

A. J. Dovel for appellees. A principal is liable either when he has given the agent sufficient authority, or when he justifies the party dealing with him in believing that he has given him such authority: *Kasson v. Noltner* 43 Wis. 646; *Bouck v. Enos* 61 Wis. 660; see Pars. N. & B. 100; *Wood v. Auburn* 8 N. Y. 160; *Edwards v. Schaffer* 49 Barb. 291; where a clerk is usually intrusted to sign notes or usually does sign notes for his principal, which are afterwards paid, or recognized to be valid, he is presumed to possess a rightful authority to do so in other instances within the scope of the same business. Story on Agency § 55.

Champlin, J. The defendants composed the firm of S. Babcock & Co., and in December, 1884, were engaged in carrying on the lumbering business. In one of their camps they employed James Finan as foreman. He was authorized to keep the time of the men, and when they wanted their pay to settle up with them by giving them a statement, addressed to Babcock & Co., of the number of days which they had worked, and the price agreed to be paid, and their account at the camp signed by Finan as foreman. He was authorized to draw orders on the firm of Salling, Hanson & Co. in the name of the firm of S. Babcock & Co., by himself as foreman. If he wanted money himself he drew his draft, or

gave orders signed by himself, which if paid were charged to him individually. He had the powers usually given to foremen of lumber camps. He employed men and discharged them, kept their accounts in camp, credited them with their work, gave them their time, bought hay and potatoes, certified to correctness of bills, and the bills were paid on his certificate. He gave his personal order or drafts, which defendants paid and charged to him. If on settlement with him such personal orders or drafts appeared to have been for the benefit of the firm, they were allowed and credited up to him on his personal account.

Thomas Hislop had been employed by defendants in their camp of which James Finan was foreman, and on the 6th of December, 1884, the defendants were indebted to him in a sum exceeding ten dollars. He, being indebted to Hugh Finan, procured from the foreman the following draft or order:

"PORTAGE, December 6th, 1884.

S. Babcock & Co.: Pay the order of Hugh Finan the sum of ten dollars, and charge the same to Camp 8.

JAMES FINAN."

The foreman then charged Hislop with the amount upon the books, and Hislop delivered the order to Hugh Finan in payment of his debt to him. On the same day the foreman gave a similar order to Thomas Hislop, as payee, for another ten dollars, which was paid by defendants on presentation. On the trial the camp-book was produced and identified by the foreman, in which two orders, amounting to twenty dollars appear charged to Thomas Hislop, under date of December 6th, 1884. The record shows that at the time of the trial no settlement had been had between Thomas Hislop and defendants, but that defendants still owed him ten dollars or more. The defendants never accepted the order in writing, and there was no evidence that it was ever presented for acceptance before suit brought. There was evidence of a communication between plaintiff and defendants' book-keeper respecting the order, which was immaterial, and admitted against the defendants' objection on that ground, but in the

view we have taken of this case its admission worked no injury to defendants, and the case will not be sent back for a new trial for that error.[1]

The defendants' counsel requested the court to instruct the jury as follows:

1. That the plaintiff was not entitled to recover from the defendants on the evidence.

2. That if James Finan understood that orders drawn by him on defendants in the form of the order sued on were, when paid, to be charged to him, then the order is not a liability against the defendants until accepted.

3. That plaintiff cannot recover on the facts of this case unless the order was accepted by the defendants in writing.

4. That the novation of the debt of Thomas Hislop is simply a transfer of his claim against defendants to James Finan, but defendants would not thereby become liable to plaintiff, except through their written acceptance of the order in suit.

These requests were refused, and the court instructed the jury as follows:

"I will say to you, and let it go upon the record, that if you find that this man was the duly authorized agent of Babcock & Co. to draw this kind of an order, and fix the amount of it, and give it to the man in payment for his claim, it would be binding upon the firm without a written acceptance, and the plaintiff should recover upon it, and would stand in the same situation as though Babcock himself had drawn it upon himself. There would be no question in the law if Michael Engelmann or S. Babcock had drawn this order and signed their names to it, either one of them; upon their firm it would be binding in law, and legal without any acceptance, because in itself, it fixed the liability of the firm; and I believe myself, at the present time, that if this man was the duly authorized agent for that purpose, and he drew it, that it would stand upon the same basis in law as though it was drawn by S. Babcock or Michael Engelmann. Now, then,

[1]This communication was by telephone with a person whom the plaintiff supposed to be defendants' book-keeper, and the essential point in it was that the book-keeper admitted that there was nothing the matter with the order, and the firm would pay it when they got money.

that being the law of the case, the next question is to apply the facts to that proposition of law, and decide this case properly and correctly. There has been proof introduced here on the part of the plaintiff tending to show that James Finan was the duly authorized agent for this purpose. If you find he was the duly authorized agent, you may allow the plaintiff to recover for the amount of this paper, and the interest upon it from the time the demand was made. On the other side, there has been proof offered on the part of Mr. Babcock, one of these defendants, that he never authorized this man to draw this kind of a paper at all; that he never did; and he had no instructions and no authority whatever in that direction, and that he trespassed, and went beyond the scope of his agency, in this behalf, and therefore they are not liable. If that is true, then of course, they are not liable. If this man James Finan had no power to draw this, no authority to draw it, then it would stand upon the same basis as though I had drawn it, or you had drawn it, and would have no binding force whatever. Now, in settling that question, you are to be guided and controlled by the evidence in the case. You will take all the circumstances in the case together—the conduct of this man Finan in making out papers, if any were made of this character, or a similar character, and the knowledge and acquiescence of Babcock & Co. Take into consideration the positive testimony of Mr. Babcock that he had no such power, or instruction or agency; take into consideration the testimony of Mr. Finan as to what he claimed the agency was,—and then settle this case in such a way as satisfies your judgment as to what is right. I think, as a matter of law that on no other theory can the plaintiff recover in this suit. I think there was no such novation as would authorize the plaintiff to recover. I have thought that matter over somewhat, and I think the only chance for the party to recover in this suit is upon this order. That was the theory that the action was commenced upon; that was the theory the action was tried upon in justice court, and the theory upon which he can recover,—upon the mere theory that Mr. Finan was the duly authorized agent to draw this order,—and that will raise the question fairly; and if, as a matter of fact, the court should afterwards hold that this order is not valid until accepted, then it disposes of the case."

The learned circuit judge was in error in instructing the jury that the plaintiff's right to recover depended upon the order alone and upon the authority of Mr. Finan to draw it.

If the order should be considered the basis of recovery, independent of the transactions out of which it arose, the plaintiff could not recover without proof of acceptance. The writing is in the form of a draft, and does not differ in any of its essential features from that class of commercial paper; and if a recovery is sought upon it as such, the action and evidence must be governed by the law applicable to that class of contracts. The law is well settled that the rights and liabilities of parties to commercial paper are those which appear upon the face of the instrument, and that it is incompetent to show by parol proof that the maker of a draft or note signed it in the character of agent, where there is nothing upon the face of the paper to indicate that it was so signed, or for whom such agent acted in making the paper. *Williams v. Robbins* 16 Gray 77.

If the present case had been tried upon the theory stated by the court to the jury, we should feel compelled to reverse the judgment. The record, however, which contains all the evidence and proceedings upon the trial, shows that the case on the part of the plaintiff was tried in the circuit court upon a different theory. On the trial an amendment to the declaration, which we think was within the discretion of the trial judge, was permitted, under which it was competent to introduce evidence tending to prove the agency of James Finan and the novation of the indebtedness in question in this suit. And this was the theory upon which the plaintiff tried the suit in the circuit. There was no dispute respecting defendants' indebtedness to Thomas Hislop, nor of his to Hugh Finan, nor of Hislop's paying his debt to Finan by the order in question, which was charged to Hislop on defendants' books. The jury found that Finan had authority to draw and sign this order as the agent of defendants. It follows that the indebtedness of defendants to Hislop to the amount of this order was paid and discharged, and also the indebtedness from Hislop to Hugh Finan, and that, instead of the indebtedness to Hislop, the defendants owed to Hugh Finan what they had before owed to Hislop. The facts proved operated as a complete novation, as we held

under similar circumstances in *Mulcrone v. American Lumber Co.* 55 Mich. 622, decided at the last January term; and the court should have submitted the case to the jury upon plaintiff's theory.

The question remains whether the judgment should be reversed for this error. From the testimony in the case we do not see that there was any room for a different conclusion than that to which the jury arrived, and we are satisfied that upon the evidence the plaintiff was entitled to recover.

The only evidence upon which there was any dispute was the extent of the agent's authority, and whether it extended to the making of the order. This question the court submitted to the jury, and they have found that it did. We do not see that the error of the court tended in any degree to prejudice the rights of the defendants; the whole question was gone into upon the trial, under the plaintiff's theory, and the judgment must be

Affirmed, but without costs to either party in this Court.

The other Justices concurred.

LORENZO C. MUDGE v. DAVID R. YAPLES.

Justice's docket entry.

1. While a justice's docket entry is entitled to a fair and reasonable interpretation, it must nevertheless show by reasonable intendment that he had jurisdiction. And it must show affirmatively the day and hour of the appearance of the parties, and if defendant was absent that plaintiff appeared on the return day of the summons, and within one hour after the time fixed therein. Otherwise the judgment is void.

2. Parol proof is inadmissible to vary or explain a justice's docket so as to give him jurisdiction that does not appear on its face.

Error to Oceana. (Russell, J.) Oct. 16.—Oct. 28.

58 307
61 436
62 368

58 307
70 643

58 307
77 112

58 307
88 102
89 33

58 307
90 23

58 307
95 273

58 307
98 17

58 307
104 559

58 307
111 195

58 307
123 701

58 307
125 356
d125 511

58 307
146 1 60

58 307
s25NW 297
e132 1624

58 307
158 2 74

REPLEVIN. Defendant brings error. Affirmed.

James Brassington for appellant.

W. E. Ambler for appellee.

MORSE, C. J. Action of replevin for the recovery of the possession of two black steers, grade Galloways, two years old. Defendant attempted to justify his claim under a justice's judgment, execution and levy, and for that purpose offered in evidence the following entry of a judgment upon the docket of Jared H. Gay, a justice of the peace, to wit:

"*Wm. B. O. Sands and Edgar G. Maxwell, Plaintiffs, v. Lorenzo C. Mudge, Defendant.*

1884, July 23rd. Issued summons returnable 30th instant at 10 o'clock in the forenoon at my office, in the township of Crystal, said county of Oceana.

July 23rd. Summons returned personally served on the 23rd instant by David R. Yaples, constable. Fees, 45c.

Plaintiffs appeared by James Brassington, their attorney, who swore to his authority. The defendant not appearing, the plaintiff declares orally in trespass on the case upon promises, and upon all matters provable under common counts, to their damage of three hundred dollars or under.

Witness sworn for the plaintiff, I. C. Harwood. Whereupon I waited one hour and five minutes. After hearing the testimony I thereupon rendered judgment against the defendant for ninety and 14-100ths dollars damages and two and 70-100ths dollars costs.

Wm. B. O. Sands and Edgar G. Maxwell, the plaintiffs in above cause, at the time of rendering this judgment applied for an execution, based upon the oath of Robert Hyde.

Robert Hyde sworn, and says he is the agent for Sands and Maxwell, the plaintiffs, and knows that said defendant, Lorenzo C. Mudge, has sold and disposed of his property to defraud his creditors since the commencement of this suit, and that said plaintiffs will be in danger of losing said judgment without immediate execution. Thereupon I issued an execution for the same this 30th day of July, A. D. 1884, and delivered the same to David R. Yaples, constable for said Oceana county.

JARED H. GAY, Justice of the Peace."

To the introduction of said docket entry the plaintiff objected on the ground that said docket did not disclose the time when the plaintiffs appeared and judgment was taken. The circuit judge sustained the objection and excluded the docket. The defendant then offered oral testimony to prove that the appearance of plaintiffs was on the 30th day of July, 1884, and within the hour named in the summons, and that judgment was rendered on same day. To this plaintiff objected, and the court refused to admit the offered proof, and plaintiff had judgment. Error is assigned and argued on these rulings.

In our opinion the circuit judge was correct. While the docket of a justice must receive a fair and reasonable interpretation, and due allowance be made for the fact that our ordinary justices of the peace are not legal experts, and not expected to keep their dockets with the same nicety of legal form and expression to be found in the records of our higher courts, as held in the case of *Vroman v. Thompson* 51 Mich. 454, yet the docket must show by a reasonable intendment that the justice had jurisdiction. The appearance of the plaintiff within one hour of the time named on the return-day of the summons must be affirmatively shown where there is no appearance of the defendant, or jurisdiction is lost.

We think the docket entry shows that on the same day of rendering the judgment the execution was issued, and that this was on the 30th day of July, 1884. It also clearly shows that the plaintiffs appeared by attorney upon the same day, but at what hour the docket is entirely silent. From aught that appears therein it might have been at eight o'clock in the morning, or any hour in the afternoon. This defect is fatal. The statute specifically requires the time of the appearance of the parties to be entered, and for good and obvious reasons, and such an omission is a jurisdictional defect. See *Redman v. White* 25 Mich. 523. We consider the hour of the appearance as necessary to be entered as the day. A judgment rendered by a justice in favor of the plaintiff before the return-hour of the summons, without the consent or appearance of the defendant, or when the plaintiff has

failed to appear within one hour thereafter, is void. Nor can oral evidence be introduced to vary, amend or explain the docket of a justice so as to give him jurisdiction which does not appear on its face. The docket is the best evidence, and oral proof cannot be given of the proceedings which the law requires to be docketed.

The judgment must be affirmed with costs.

The other Justices concurred.

WATSON SHERMAN v. ADDIS E. KILPATRICK.

Trespass by animals—Exemplary damages.

Exemplary damages cannot be allowed in an action for trespass by animals, where the declaration claims no such damages, even though defendant has rescued the animals by force from the plaintiff's keeping.

Error to Leelanaw. (Ramsdell, J.) Oct. 16.—Oct. 28.

CASE. Defendant brings error. Affirmed.

Pratt, Hatch & Davis for appellant.

James R. Adsit for appellee.

SHERWOOD, J. The parties in this case were neighbors and farmers. The colt of the defendant trespassed upon the land of the plaintiff, and while doing damage thereon was taken up by the plaintiff and impounded in his barn, there being no public pound in the township. This was done on the 11th day of October, 1884. After the impounding, and about seven o'clock in the evening, the plaintiff gave the defendant written notice that he had taken up his colt, and would like to have him come and get it and pay the damages. About six o'clock the next morning the defendant came and took the animal away, against the protest of the

plaintiff, and without paying any damages, using force to obtain possession of the property.

The plaintiff brought suit before a justice of the peace to recover his damages for the injury done by the colt, and his fees and charges for impounding. On the trial the justice rendered a judgment for the plaintiff for the sum of $13.00, made up as follows: $3 actual damages, $10 exemplary damages, and in addition thereto $5.40 costs. The defendant removed the judgment into the circuit court for the county of Leelanaw by certiorari, wherein the judgment was affirmed and the proceedings are now before us for review.

The defendant claims no exemplary damages should have been allowed, and in this he was correct. The plaintiff in his declaration only claims for his actual damages and charges before the rescue; ten dollars were allowed as exemplary damages, which must be deducted from the amount allowed, and with this modification

The judgment will be affirmed without costs.

The other Justices concurred.

VINCENT J. SCOTT AND ROBERT LAIDLAW v. JOHN J. SPEED, JUDGE OF THE CIRCUIT COURT FOR WAYNE COUNTY.

SAME RELATORS v. WILLIAM JENNISON, CIRCUIT JUDGE.

SAME RELATORS v. J. LOGAN CHIPMAN, JUDGE OF SUPERIOR COURT OF DETROIT.

58	311	
58	316	
58	311	
111	396	
58	311	
118	354	
58	311	
141	2563	

Assignments for benefit of creditors—Removal of cause—Municipal court—Receivership—Mandamus.

1. Statutory proceedings to take charge of and administer assigned estates are special and peculiar, and not like an ordinary suit in chancery. And they are not removable to a court of merely municipal jurisdiction from the court which is designated throughout the statute as the proper one to take cognizance of them. How. Stat. ch. 303.

2. Municipal courts are created only for the common judicial business of a municipal tribunal.

3. Mandamus will not lie, whether an appeal does or not, to review an order for the appointment of a receiver for an assigned estate.

Mandamus. Submitted Oct. 20.—Denied Oct. 28.

S. E. Engle, *A. Russell* and *D. M. Dickinson* for relators.

Edward E. Kane and *C. I. Walker* for respondents.

CAMPBELL, J. These are three applications for mandamus, all of which relate to but one main question, which is whether a cause begun in the Wayne circuit by creditors to wind up an assigned estate has been lawfully transferred to the Superior Court of Detroit. One of them presents the further point, whether the order of the Wayne circuit court appointing a receiver of the assigned estate is of such an illegal character that it should be vacated by mandamus.

Upon the argument it was claimed for respondents that the proceeding under the statute to assume charge of and administer assigned estates, is not an ordinary equitable proceeding, subject to removal as between proper parties, but is a peculiar, and in some respects anomalous, proceeding which is specially vested in the circuit courts to the exclusion of all other courts of original jurisdiction. We think that such is the character of the proceeding.

The statute which prescribes how assignments shall be made, and requires them to give no preferences, makes it necessary to their validity that they shall be acknowledged and filed with a proper inventory and bond in "the office of the clerk of the circuit court of the county where the assignor resides," or in case of non-residence, in the county of the assignee, if a resident. How. Stat. § 8739. This must be done within ten days after the making. Other action of the assignees must be filed in the same office.

In case of fraud, or of failure to conform to the statutory regulations, any person interested may file a bill to enforce the trust, and a receiver may be appointed, and the court

may order a summary examination of parties or witnesses at any stage of the cause. § 8744.

Where any claim is disputed by assignee, receiver or creditor, a trial is to be had on the law side of the same court, in a contest entered as a cause between creditor and assignor, and on a verdict a judgment is to be entered but no execution can be issued on it. Provision is also made concerning the declaration of dividends and other matters, and it is finally provided that the circuit court in chancery shall have supervisory power over all matters, questions and disputes arising under assignments, and may, upon the application of the assignee or any person interested, make all necessary and proper orders for management, disposition and distribution, and for the recovery of property claimed by third persons, and may from time to time require new bonds or securities. § 8749.

It so happens that the circuit court clerk is the person who is clerk of the county, but the fact that his proper title being county clerk, he is here only spoken of as clerk of the circuit court, is of some significance as indicating that all the proceedings, whether a suit in equity is begun or not, belong in the court records and not in the general records of the county. This alone is not conclusive. But when we look at the whole statute, it will be found to partake of several of the characteristics of bankrupt and insolvent laws, and to involve quite as many administrative as forensic duties. In some cases it requires a proceeding which is in form but not in fact a common-law action, begun, not by the apparent plaintiff, but in his name, at the suggestion of adverse interests. The power to regulate and control the proofs of debts, the collection and distribution of assets, and the hearing of questions from time to time in advance of any final hearing on pleadings and proofs, all distinguish the proceedings from regular chancery cases in the usual course of justice. It is hardly possible that some of the inquiries under the statute would not be beyond the jurisdiction of any merely municipal court. But however this may be, those courts are not created for any purpose but the common judicial business of

a municipal tribunal, and where a particular court is named throughout, and where the powers granted are special and peculiar, it cannot be assumed that a choice of tribunals is left to parties. Some of the duties prescribed by the statute are to be performed by the clerk or the court without the pendency of any regular chancery proceedings, and some are to be performed by subsidiary inquiries, when the parties to the record, for anything we can know in the matter, could not be forced into a city court.

We consider the subject as one which is not within the ordinary range of judicial causes, and as not within the jurisdiction of the Superior Court. The questions of practice do not, therefore, become material.

Whether the appointment of the receiver can be complained of by relators, and if so, under what circumstances, is a question which cannot conveniently be disposed of on mandamus. There are certainly cases where a trust of this kind may be placed in the custody of the court, and where, unless done in advance of the final hearing, it would be of no use. But this does not necessarily preclude inquiry how far it may have been done in violation or disturbance of legal right. If such an order can be interfered with by an appellate court, it must be appealable, and an appeal, if it lies (which we do not now determine), will bring up, as a return to a mandamus cannot, the whole facts on which the court below acted, for review.

We think therefore that all of the applications must be denied, with costs against relators.

The other Justices concurred.

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89 535

58 315
116 569

THE FIRST NATIONAL BANK OF DETROIT v. THE E. T. BARNUM WIRE AND IRON WORKS.

Assignment for benefit of creditors—Final orders—Removal of receiver and sale by him.

1. Any proceeding however called, whereby private rights are seriously affected or wrongfully divested, is reviewable in some form.
2. A receiver of an estate assigned for the benefit of creditors is a trustee, and subject to the general duties requiring impartiality; he cannot collude with any one, or prefer one set of interests to another. And the power to appoint him is subject not only to all rights paramount to the assignment, but to legal conditions.
3. Redress against the receiver of an assigned estate for injury to private rights therein must be had by petition in the court appointing him, and not by original bill. But the form of the remedy does not destroy its substance, and the action of the court thereon is reviewable on appeal if the fund in which the complaining party claims an interest is alleged to be liable to such danger as to be within the risks against which the law gives protection.
4. The jurisdiction to entertain an appeal is not affected by the question whether or not the charges made turn out on hearing to need redress, or the particular redress asked for.
5. The merits of a case cannot be considered on a motion to dismiss an appeal therein.
6. An order for the sale of assigned property by a receiver is final and appealable where it provides for an entire disposal of the trust funds, and may affect the claims of creditors and others, and where also it contains special and unusual provisions as to notice of sale, and sale in large lots, and allows to some claimants but denies to others interested certain privileges of buying on credit, and allows sales without mortgage or other property security.
7. An appeal in chancery can be dismissed for want of jurisdiction only.

Mandamus. Submitted Oct. 20. Denied Oct. 28.

Hoyt Post for relator.

Henry M. Duffield and *Isaac Marston* for respondent.

CAMPBELL, J. This is a chancery cause begun for the pur-

pose of administering an assigned estate, and a receiver was appointed by consent, and with certain agreed powers and conditions. During the progress of the proceedings, Henry M. Duffield, who is recognized as a previous attaching creditor, but whose suit in attachment is not yet disposed of, filed a petition seeking relief and the removal of the receiver, on various charges of illegal conduct, involving among other things alleged collusion with certain alleged creditors and parties, whereby they were given advantages over petitioner and other parties. The circuit court removed the receiver's solicitor, on the ground that he was appointed at the instance of a large creditor whose solicitor he continued to be, and who had become one of the receiver's bondsmen, as it is claimed, on the understanding that he should act for the receiver. The court, however, did not remove the receiver. This refusal and the order which was made on the hearing of the petition, being regarded by petitioner as a legal grievance, he appealed from it; and the receiver moves to dismiss the appeal, which can only be done for want of jurisdiction.

Another appeal, which the receiver also moves to dismiss, is from an order directing the receiver to sell all of the assets, real and personal, in certain lots and on certain prescribed notices, and authorizing him to receive in payment the bonds of claimants to the amount of their claims.

On the argument of these motions a great deal was said on the general merits. But the only thing we can consider is the single legal question whether the orders complained of are of such a nature as to come within our statute concerning appeals and final orders. We cannot prejudge the facts.

One main objection was that these orders were interlocutory and, as claimed, discretionary. In the cases arising under Vincent J. Scott's assignment [*Scott v. Wayne Judges* ante, 311], heard at the same time with these motions, we held that the proceedings under the assignment law differed essentially from ordinary chancery proceedings, and included collateral and peculiar duties and inquiries. No rule is better settled than that private rights are not subject to uncontrolled discretion, and any proceeding, whatever may be its

name, whereby they are seriously affected or divested wrongfully must necessarily be open to review in some form. The power to appoint a receiver under an assignment, is not only subject to all rights paramount to the assignment but it is also subject to legal conditions. It would be impossible to hold that by appointing a receiver, any court could authorize him to violate private rights or to commit frauds without control. He is a trustee, and subject to the general duties requiring fairness and impartiality. He cannot lawfully collude with any one, and cannot lawfully prefer one set of interests to another. The rules which have been uniformly recognized as governing receivers would be of no use, unless the action of the court retaining him or permitting him to act unlawfully, could, so far as private rights were involved, be examined in an appellate court.

Any ordinary trustee or assignee could always be sued by bill in equity, and restrained or removed in a proper case on complaint of an injured party. The statute under which these proceedings are had has drawn to the circuit courts in chancery the entire disposition of assigned estates, and it has never been allowed injured parties to file original bills against receivers for such redress. All such action must be had in the court appointing them. But it would be absurd to hold that there could be no redress, merely because what would in other cases be an independent bill must here be a petition. The form of the remedy does not destroy its substance. When the facts are shown and the court has heard the contest, the decree must follow law, and be subject to law. The discretion of the court may or may not require the granting of the precise relief prayed. But the complaining party has a right to have it reviewed if the fund in which he claims an interest is alleged to be liable to such danger as to be within the risks which the law protects against. A trustee who violates his duty to the prejudice of the beneficiaries may be complained of. Whether the charges made turn out, on hearing, to require redress or not or the particular redress asked for, cannot affect the jurisdiction; and on this motion we cannot consider the merits.

The order of sale provided for an entire disposal of the trust funds, and all of the claims of creditors and others may be affected by it. It is the chief end of the trust dealings. It contains special and, as it is claimed, unusual provisions both as to notice of sale and sale in large lots. It also allows to some claimants privileges of buying on credit which are denied to others interested, and these sales of land as well as of personalty on personal liability without mortgage or other property security. The effect of this may be serious. We cannot, without a knowledge of all the facts and without a hearing on them, decide how far, if at all, this order should be modified. But that it is a final order we have no doubt, and being so, it is appealable.

The motions must be denied.

The other Justices concurred.

STATE OF MICHIGAN v. CHAS. K. EDDY.

Taxation—Invalid decree.

An invalid decree of sale for taxes should be annulled by reversal instead of being permitted to stand as a null decree. And both parties should be placed in the condition in which they would have been if no proceedings in court had been taken.

Appeal from Isabella. (Hart, J.) Oct. 22.—Oct. 28.

Petition by Auditor General for tax sale. Claimant appeals. Reversed.

Attorney General *Moses Taggart* for petitioner.

Wisner & Draper for appellant.

CAMPBELL, J. The circuit court for Isabella county having rendered a decree for taxes which is admitted to be erroneous, and of no avail under present statutes, the only

question presented to us is whether it should stand as a null decree, or should be formally annulled by reversal. We think, in conformity with the practice usual in such cases, it should be reversed, and both State and respondent placed where they would have been had no proceedings been brought into court. A decree of reversal will therefore be entered, saving all rights belonging to the State prior to such proceedings unchanged, and restoring the defendant to any rights he would have had prior to such proceedings. No costs will be awarded in either court.

The other Justices concurred.

THE PEOPLE v. HORATIO J. HENDRYX.

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Criminal prosecutions—Private counsel.

General counsel for a bank cannot take part in a criminal prosecution for obtaining money therefrom by false representations to its president, especially if such counsel is also acting for the bank in a civil suit involving the same subject matter. The fact that complaint was made by the president and that the counsel was not retained by him personally makes no difference.

Error to Cass. (A. J. Smith, J.) Oct. 22.—Oct. 28.

Information for obtaining money by false pretenses. Respondent brings error. Conviction set aside.

Attorney General *Moses Taggart* for the People.

O. N. Hilton and *F. J. Atwell* for respondent. Private counsel cannot take part in a criminal prosecution in the interest of his client: *Meister v. People* 31 Mich. 99; *Wellar v. People* 30 Mich. 17-24; *Sneed v. People* 38 Mich. 248; *People v. Bemis* 51 Mich. 422; *Hurd v. People* 25 Mich. 406; *Ulrich v. People* 39 Mich. 246; *People v. Hurst* 41 Mich. 328.

CHAMPLIN, J. The information charges the respondent

with having obtained from the First National Bank of Dowagiac certain money by reason of false representations and pretenses made to Daniel Lyle, its president. The pretenses and representations are set out with great particularity, and their falsity averred, and that by means thereof he feloniously, unlawfully and designedly obtained from the First National Bank the sum of $120, with intent to cheat and defraud it thereof. The first assignment of error is based upon the action of the court in permitting Spafford Tryon to assist in prosecuting the cause, against objection made by the respondent, and in not permitting him to show that Tryon was employed by the bank and private individuals, and paid by them, to prosecute respondent, and in only permitting respondent, if he could, to show such employment of Tryon by the complaining witness, Lyle, alone.

The record discloses that at the outset of the trial, and before any evidence was introduced, the respondent objected to Spafford Tryon so appearing and prosecuting the cause, for the reason that he (Tryon) had been employed by the Bank of Dowagiac, of which the complainant was president, to do all the business of the bank generally, and then offered to show by the evidence of said Spafford Tryon and others that he was so employed and paid by the bank, and that then he was the regularly retained attorney for said bank, employed and paid by it to do its business by the year; that he had so acted for a number of years, and was then at such time the attorney of record of the bank in a civil suit, then pending in said court, involving the same matter; and that by virtue of such employment, and while acting as such attorney for the bank, drew, with his own hand, part of the original complaint against respondent, and that the second count of the same was in his handwriting. The court said: "If you claim that you can show that Mr. Tryon is employed by Mr. Lyle to prosecute this suit I will hear it, and if you show that fact I will exclude him." Counsel for respondent stated that they did not propose to show that; and the court then stated that he saw no objection to his serving. Mr. Tryon was thereupon permitted to assist in prosecuting the case to

its close; and the respondent was convicted. Mr. Tryon was not the prosecuting attorney of the county in which the cause was tried. Neither was he procured by the prosecuting attorney to assist him, under the direction of the court, under the authority conferred by Act 195 of the Laws of 1879, p. 179. He was clearly disqualified, if respondent established the facts proposed, from assisting the prosecuting attorney under the proviso to that act, which reads as follows:

"Provided, that no person or attorney shall be employed as assistant who is interested as attorney or otherwise in any case involving the same facts or circumstances involved in said criminal suit, or who has received any compensation from any person or persons who are interested in prosecuting the party charged with said felony."

What respondent proposed to show was directly within the terms of this Act, and within repeated rulings of this Court. The action of the circuit judge was erroneous.

Without passing upon the other errors assigned, for this error the conviction must be set aside, and a new trial granted.

The other Justices concurred.

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THE PEOPLE v. CHARLES QUICK.

Indorsement of names of witnesses on information—Rebutting evidence—Prosecuting attorney.

1. The names of all witnesses for the prosecution in a criminal case must be indorsed on the information before the trial or as soon as discovered after it begins; the respondent is entitled to a chance to canvass their character whether they are examined in the main case or on rebuttal.

2. The evidence on which the prosecution relies in a criminal case must all be put in, if possible, before the prosecution rests, though testimony that could not be had earlier may be admitted afterwards on cause shown. But none of that which properly belongs to the case

in chief can be reserved until after the defense rests, to be then introduced as rebutting evidence.

3. A public prosecutor has no right to urge to the jury that respondent's failure to discredit an adverse witness by the testimony of others, instead of relying alone on cross-examination, is significant against him, and that he could show the facts if they existed.

4. A prosecuting attorney must be entirely impartial as between accuser and accused, and must act only in furtherance of justice; and he cannot be permitted to assert to the jury 'under the solemnity of his official oath' his belief in the guilt of a respondent.

5. Evidence that tends to prove the commission of a crime or its immediate surroundings can hardly be treated as rebutting evidence.

Error to Oakland. (Stickney, J.) Oct. 22.—Oct. 28.

Information for larceny from the person. Respondent brings error. Reversed.

Attorney General *Moses Taggart* for the People.

Thomas J. Davis for respondent.

CAMPBELL, J. Respondent was convicted of stealing a watch from the person of one David Wright. The case was before us on conviction upon a former trial, which was set aside on a single ground, on the supposition that the prosecution would on a second trial avoid other errors which we did not think it necessary to dwell on. 51 Mich. 547. A further trial was had, and the case comes up again upon several assignments of error, which are within well-settled rules of law. We shall not take them all up in course, but point out such as may be grouped together.

We have held on several occasions that the defendant has a right to know in advance of the trial what witnesses are to be produced against him, so far as then known, and to have any new witnesses endorsed on the information as soon as discovered. The object of this is not merely to advise a respondent what witnesses will be produced on the main charge. It is to guard him against the production of persons who are unknown, and whose character he should have an opportunity to canvass. It is as important to impeach a rebutting wit-

ness as any other. In the present case, however, the witnesses who were received as rebutting witnesses were not such. They were called to prove what belonged to the people's case in chief. Cases may sometimes arise where testimony which could not be had in the opening may be let in upon good cause shown thereafter. But it is not proper to divide up the testimony on which the people propose to rest their case, and nothing which tends to prove the commission of the crime itself or its immediate surroundings can be classed as rebutting evidence under ordinary circumstances, if at all. In this case that rule was repeatedly violated.

Complaint is also made with reason against the allowance, and apparently the approval, of various statements made by the prosecuting officer in his summing up. We are not at all disposed to reverse judgments for merely indiscreet ebullitions of counsel which may be allowed for, and are neutralized by the effect of the charge. But in the present case there were some things said to the jury which could hardly fail to do mischief. The case was one where the evident character of several of the persons brought forward would make it necessary for the jury to weigh their testimony with more than usual care. The prosecuting witness was an admitted criminal, whose cross-examination was in our opinion restricted more than it should have been. It was claimed that witnesses on both sides were open to criticism and suspicion, and it could not be avoided that in their conflict of testimony their respective claims to credit should be the chief contention. Any discussion on the facts themselves, if kept within proper limits of decorum, might be expected.

But here the prosecuting counsel was allowed in his closing, against objection, more than once to urge to the jury that a failure to prove by other witnesses discrediting facts on which a witness had been cross-examined was very significant, and that if such facts existed respondent could have shown them. The court no doubt intended to correct this in the charge. But it was repeated and pressed against objection during the argument, and the reference to it in the charge

was not such as to plainly correct it. A specific request for such an instruction was refused, and nothing was adequately done to prevent the jury from acting on a false impression.

A much more serious example of a similar mischief was presented by this passage of the address,—which was complained of on the spot and not rebuked, and which was again complained of in a specific request to charge, which was refused, and not rectified, in the charge given:

"I stand here to-day under the solemnity of my official oath, and say to you, as a man and a citizen, that I believe they not only lied, but I believe they committed willful and deliberate perjury. I do not believe that they were there that night, nor do I believe that that man, the defendant, ever in God's world took that watch from the sidewalk, but he stole it from the person of David Wright, and then hid it away within five minutes."

This language came from an officer whose sworn duty required him to act only in furtherance of justice, and who is bound by statutory requirements to stand entirely impartial between the complainant and the prisoner. When such an officer gives the jury to understand that what he says is under the sanction of his official oath, and the court, when applied to, declines to correct that statement, it cannot be supposed that jurors may not give credence to it and govern their decision more or less by it. The impropriety of expressing a personal opinion to the jury upon disputed facts has always been regarded as great, and has in some notable instances led to unpleasant strictures on the character of celebrated counsel. Whatever allowance may be made for professional enthusiasm, a deliberate and solemn averment of counsel's opinion should never be allowed to influence the jury, and when given as here, as an opinion under oath, it should have been at once shut out and its influence guarded against by proper instructions as requested.

For these reasons the judgment must be reversed.

The other Justices concurred.

The People v. Gilbert M. Belcher et al.

Justice's court—Larceny—Warrant—Allegations of value—Amendments.

1. A warrant for the arrest of a person for a crime triable by a justice must state the offense, and, in cases of larceny, the value of the property stolen.
2. In larceny triable by a justice the value of property stolen is of the essence of the offense and the averment thereof in the warrant a substantial allegation, for the jurisdiction depends on it and the warrant must show jurisdiction.
3. A justice may, before trial for larceny, permit the warrant to be amended to show the value of the property taken; but if he does not the circuit court on appeal cannot allow such amendment.

Exceptions before judgment from Gratiot. (Hart, J.) Oct. 22.—Oct. 28.

Information for larceny. Respondent was convicted. Reversed; prisoner discharged.

Attorney General *Moses Taggart* for the People. Where an information for larceny contained no allegation of the value of the property an amendment was allowed by the court: *People v. Donald* 48 Mich. 491; 1 Archb. Cr. Pl. 100; 1 Bish. Cr. Pro. § 611; statutes permitting amendments should have a broad construction: 3 Russ. Crimes 324, 332.

W. A. Sweet, Jr. and *Blanchard & Cagwin* for respondents. Where the warrant gave the justice no jurisdiction the circuit court could not amend on appeal to save the case: *Fowler v. Hyland* 48 Mich. 179.

Champlin, J. The defendants were arrested on a warrant issued by William L. Phillips, a justice of the peace, on complaint of K. P. Peet, for the larceny of one buggy-pole and five sheep, the property of one John Kipp. A trial was had, and the defendants were convicted and appealed to the circuit court of Gratiot county. The record discloses the fact that the complaint states the value of the property alleged to have been stolen to be twenty dollars, while the warrant, at

the time of the trial before the justice, omitted to state any value. When the case came on for trial in the circuit the counsel for defendants moved the court to quash the proceedings and discharge the defendants for the reason that the property alleged in the warrant to have been stolen was not alleged to have any value, which motion was sustained by the court; and thereupon the prosecuting attorney asked of the court leave to amend the warrant by inserting the words "all of the value of twenty dollars," which was granted, against the objection of the defendants that the court had no power to amend, and that the case must be tried upon the same charge as in the justice's court.

In cases of crimes triable before a justice of the peace it is necessary that the offense for which the prisoner is tried must be stated in the warrant. This is not only implied from the language of the statute, which says that "the charge made against the accused, as stated in the warrant of arrest, shall be distinctly read to him," and if the accused pleads "not guilty," the court is to "proceed to try such issue," but it must appear upon the face of the warrant that the justice has jurisdiction to try the case. This jurisdiction in cases of larceny depends upon the value of the property stolen. The value of the property alleged to be stolen is a substantial allegation, and not a mere formal one, and is regarded as "of the essence of the offense." *Merwin v. People* 26 Mich. 305.

No offense known to the law was charged in the warrant under which the accused was tried before the justice. Doubtless it was within the province of the justice to have permitted an amendment by inserting the value of the property before trial as fully as a circuit court might permit an amendment of an indictment or information in this respect before trial. *People v. Donald* 48 Mich. 493. But this cannot be done by the circuit court in a case appealed from a justice's court. If the circuit court permits an amendment so as to allege the value of the property to be less than twenty-five dollars, he creates an offense within the exclusive jurisdiction of a justice of the peace, and one for which the accused has not been

tried, while, if the court should insert a value exceeding twenty-five dollars, the offense would not be cognizable before a justice, and could not be tried in the circuit because the accused would not have had a preliminary examination before a justice upon that offense.

The defect pointed out in the warrant was fatal, and the accused should have been discharged.

There are other errors in the record which would call for a reversal, but, as the one above mentioned fully disposes of the case, they need not be noticed.

The conviction is reversed and the accused discharged.

The other Justices concurred.

The People v. Henry Seller.

Horse-stealing.

1. The punishment provided for horse-stealing by How. Stat. § 9180 can only be imposed when the information or indictment is expressly based on the statute; and where that is not the case the excess beyond the ordinary penalty for larceny will be remitted on review by reversing the judgment to that extent.
2. Whether the theft of other property besides a horse can be included in an information based on the special statute imposing an excessive penalty for that offense—Q.

Error to Ottawa. (Arnold, J.) Oct. 22.—Oct. 28.

Information for horse-stealing. Respondent brings error. Reversed as to excess.

Attorney General *Taggart* confessed error.

Watts & Smith for respondent.

Campbell, J. Respondent, under an ordinary charge of larceny, of a horse, buggy and harness of the value of $175,

pleaded guilty, and was sentenced to imprisonment in the State prison for eight years. Error is brought because of excessive sentence.

As the law now stands a sentence which is merely bad for excess may be reversed for the excess, and left to stand for so much as could lawfully be imposed. It is probable that the sentence was intended to be given under the Act of 1877 (How. Stat. § 9180) relating to horse-stealing. It was held in *Boody v. People* 43 Mich. 34, and *People v. Jones* 49 Mich. 591, that the excessive punishment imposed by that statute could only be given when the information or indictment was based upon it. That was not the case here, and other articles were included in the charge. The Attorney General confesses error as to all of the sentence beyond five years, and

The judgment must be reversed to that extent.

The other Justices concurred.

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The People v. James Cummerford.

Closing saloons.

A saloon is not "closed" within the meaning of the law requiring such places to be closed at certain times (How. Stat. § 2274), so long as it is possible for persons desiring liquor to get in peaceably, whether by the outside entrance or any other, or so long as any customer who is inside at the time for closing remains inside. And it is not important that there is no one attending the bar, if the liquor is accessible, nor is it important that none is sold.

Error to the Recorder's Court of Detroit. (Swift, J.) October 22.—October 28.

Complaint for keeping saloon open on Sunday. Respondent brings error. Affirmed.

Attorney General *Moses Taggart* and Prosecuting Attorney *George F. Robison* for the People.

Wm. B. Jackson for respondent.

MORSE, C. J. The defendant was convicted of the offense of not keeping his saloon closed on the night of the 30th of January, 1885, from and after the hour of ten o'clock in the evening until six o'clock in the morning of the succeeding day. Before the jury were impaneled in the Recorder's Court of the city of Detroit, where the case was tried, the defendant, by his counsel, moved to quash the complaint, on the ground that it did not set forth any offense under the laws of this State, which motion was denied, and exception taken. John Spillane, an officer of the Metropolitan police, testified that defendant kept a saloon where intoxicating liquors were sold at retail; that there was a restaurant connected with said saloon; that the entrance to the restaurant was on Randolph street, and the entrance to the bar-room, the only room where such liquors were sold, was on the Michigan Grand avenue side of the building; that the restaurant and bar-room were in separate rooms, with a door between them, which closed with a self-acting spring; that on the night in question the entrance to the bar-room was closed, so far as the witness knew, at ten o'clock, and no person went in or came out of said bar-room by that entrance after that hour; that the witness and another officer went into the restaurant, by the Randolph-street door, at half past eleven o'clock that night; that said door was open; that the door leading from the restaurant to the bar-room was closed; that they pushed it open and entered the bar-room. Just before they went in they saw several persons enter the restaurant and pass through the spring-door into the bar-room, which was lighted.

The following question was then asked witness: "Whom did you see in the bar-room?" Objected to by defendant's counsel as incompetent, irrelevant, and immaterial. The objection was overruled, and witness testified that he saw the defendant and others at the bar, and the bartender behind the bar. *Question*: "Did you see any liquors sold at that

time?" Objected to for the same reasons given above, and overruled. Witness then gave evidence that the bartender put drinks on the bar, and of what took place in the bar-room, and also that people were continually going in and coming out of the bar-room, through the restaurant, until about half past three in the morning.

Other evidence was received tending to show the same state of facts; also evidence on the part of the defendant tending to contradict the witnesses for the prosecution, and that no liquors were sold, and no business done, of any kind, in the bar-room.

The court charged the jury, among other things, as follows: "If the saloon was open, and people went in and liquor was sold to them, then the saloon was open in the meaning of the law. It makes no difference whether the door was open or not. If they went into the restaurant and from there found any means of access to the saloon, and liquor was sold them in the saloon, then it was open for business. It makes no difference how many people were in there; the only question is, was the saloon open for business?" To this part of the charge the defendant excepted.

We find no error in the proceedings. The charge was too favorable to the defendant. If the jury found the saloon lighted, the bartender inside behind the bar, with a spring-door from the restaurant, which only needed a push to open it, and that people were passing in and out through this door, it was a plain violation of the statute, whether any liquors were sold or not. It was the same in our view of the law as an open door, or an open entrance without a door. The statute contemplates that a closed door shall be one that cannot be opened by a mere push of the hand. Such a door is an evasion of the law, and its continuance in the shape it was in, in this case, we are inclined to think, would be a violation of the statute, without either the defendant or his bartender inside ready to wait upon customers, because if any persons in the restaurant wanted liquor they would only have to push open this spring-door and help themselves.

It was also entirely competent to show what took place

inside of the bar-room. If the saloon had been securely locked and fastened both at the main entrance and also at the door leading into the restaurant, and yet after the hour of ten o'clock in the evening the defendant and his bartender were inside furnishing drinks to others, also inside, he would be amenable to the statute, because either the persons inside must have got in after ten, or have been left inside when the doors were closed and locked. In either case the law would be violated. When the statute requires the doors to be closed, it means that no one shall be inside, or get inside thereafter, before lawful hours, at least with the consent of the defendant or his authorized agents. We had supposed the meaning of the term "closed door," under the statute, had been fully heretofore set forth by this Court in the cases of *Kurtz v. People* 33 Mich. 282; *People v. Waldvogel* 49 Mich. 337; *People v. Blake* 52 Mich. 566, and others. It is not alone the intent or purpose for which the saloon is kept open that is offensive to the law, but also the opportunity furnished persons to obtain liquors at the hours and on the days prohibited by the statute.

We also think the complaint sufficient. There being no error,

The judgment of the Recorder's Court is affirmed.

The other Justices concurred.

WILLIAM M. MUNSON v. CHARLES E. ELLIS.

Assignments for benefit of creditors—Approval of assignee's bond—Penalty of bond—Insolvents.

1. The omission of the county clerk to indorse his approval on the bond of an assignee within ten days after his appointment does not invalidate the bond. How. Stat. § 8739.

2. An assignment for the benefit of creditors is not made void by the failure to make the penalty of the assignee's bond double the amount of the inventory. How. Stat. § 8739.

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3. Insolvency may be mere inability to pay one's debts as they mature in the ordinary course of his business, even though the insolvent's assets exceed his liabilities.

4. One can make an assignment for the benefit of his creditors without being insolvent; and the assignment will be valid unless creditors can show that it was made with the fraudulent intent of hindering them.

5. Whether an assignment for the benefit of creditors can be assailed at law for the failure to file the assignee's bond until after creditors have levied, if no proceeding has been taken in equity to enforce the trust—Q.

Error to Eaton. (Hooker, J.) Oct. 22.—Oct. 28.

REPLEVIN. Plaintiff brings error. Reversed.

Cahill, Ostrander & Baird for appellant.

Sagendorph & Powers for appellee.

CHAMPLIN, J. On and prior to January 26, 1884, Frank A. Ruggles and Frank Weston were and had been engaged as copartners, under the firm name of Ruggles & Weston, in the furniture and undertaking business, in the city of Charlotte, Michigan. On that day they executed a general assignment of all their property for the benefit of their creditors to William M. Munson, the plaintiff in this suit. An inventory was made, and on the 4th day of February a bond of the assignees, with two sureties, was filed with the clerk of Eaton county. The sureties appeared before the clerk and justified as to their responsibility, and the bond and sureties were satisfactory to the clerk, but he neglected to endorse his approval thereof upon the bond. The inventory showed the value of the assigned property to be $8324.67. The penalty of the bond was in the sum of $14,000. The assignee accepted the appointment, took possession of the assigned property, and proceeded to execute the trust, and make sales of the goods, until the 11th day of March. On that day the sheriff, at the suit of certain creditors of the assignors, levied upon the property and took it in his possession. The plaintiff demanded the property from the sheriff,

and he refused to deliver up the same, and thereupon plaintiff brought replevin. To maintain his action, upon the trial he offered in evidence the assignment and other papers connected therewith, including the bond. The bond was objected to as irrelevant, immaterial and incompetent; that the bond was not executed, filed or approved as required by law, and within the time required by law; that it was not in double the amount of the value of the goods or the property, as shown by the inventory annexed to and filed with the assignment. The objection was sustained, and exception was taken. The plaintiff had previously proved by the county clerk that he did in fact approve of the bond at the time it was filed, and that his failure to endorse his approval thereof upon the bond was an oversight; and that he formally endorsed such approval on the bond on the 13th day of March, 1884, which was five days before the replevin suit was commenced. The plaintiff then (having the sureties in court) requested leave and offered to increase the penalty of the bond to $17,000, which the court refused to permit. He then tendered and offered to file a new bond in the penalty of $17,000, in which the sureties had justified, and which had endorsed thereon the approval of the county clerk, which was also refused by the court.

The statute relative to assignments for the benefit of creditors does not in express terms require that the approval of the clerk shall be endorsed upon the bond at the time it is filed; nor does it declare that the assignment shall be void if it is not endorsed with the clerk's approval. The language of the proviso to How. Stat. § 8739 is, "that no such assignment shall be effectual to convey the title to the property to the assignee until such bond shall be executed, filed with, and approved by said clerk." These three requisites were complied with in this case. The act of endorsing the approval upon the bond was merely ministerial, and could be done at any time; the approval of the bond involved an exercise of judgment and discretion, and was necessary to be exercised before the assignment would be effectual to pass the title to the assignee. So far, therefore,

as the ruling of the court was based upon the fact that the approval of the clerk was not endorsed upon the bond before the levy it was erroneous. The statute requires the penalty of the bond to be at least double the amount of the assigned property, as shown by the inventory; and the question is whether this irregularity rendered the assignment absolutely void, and so prevented the title to the property from passing to the assignee. This act was passed in 1879. Section 1 provides that all assignments for the benefit of creditors shall be void unless made without preferences, and unless it shall be of all the property of the assignor not exempt from execution, and unless the assignment, or a duplicate thereof, an inventory of the assigned property, a list of creditors of the assignor, and a bond for the faithful performance of the trust by the assignee, shall be filed in the office of the clerk of the circuit court of the county where the assignor resides, within ten days after the making thereof. The statute then declares that "Such assignment shall convey to the assignee all property of the assignor not exempt from execution, and all rights, legal or equitable, of said assignor: provided, that no such assignment shall be effectual to convey the title to the property of the assignor to the assignee until such bond shall be executed, filed with, and approved by said clerk."

The record shows a substantial compliance with this section by the assignors. It will be observed that this section makes no allusion to the penalty of the bond. Unless the bond filed by the assignee is conditioned for the faithful performance of the trust, and is filed with and approved by the clerk, the assignment is not effectual to convey the title. When section 1 is complied with, the title passes to the assignee. The next section prescribes how it shall be acknowledged, what the inventory and list of creditors shall contain, by whom and how it shall be verified, to whom the bond shall be executed, its penalty and condition, the number of sureties, and the manner and amount in which they shall justify. A deviation from these requirements does not affect the validity of the assignment to transfer the title to the assignee, but it places it in the power of the circuit court in chancery,

upon the complaint of any person interested therein, to enforce the trust created by the assignment, and in its discretion to take the execution of the trust from the assignee and place it in the hands of a receiver. Section 6. And if the bond should be deemed defective, or the sureties insufficient, the court is authorized from time to time to require new bonds or sureties, who shall justify as therein provided. Section 11, being How. Stat. § 8749. These provisions show that it was the intention of the Legislature to preserve the trusts created by a common-law assignment for the benefit of all creditors of the debtor, and to protect and enforce them, either through the assignee appointed in the instrument, or by a receiver appointed by the court at the instance of creditors. What we here determine is that within the meaning and spirit of the law the assignment in question was not void by reason of the fact that the penalty was less than twice the amount of the inventory, and the court was in error for excluding the bond on that ground.

It is claimed that the assignment is void because the footings of the assets, as shown by the inventory, far exceed the debts, as shown by the footings of the amount due to the creditors, and that only insolvent debtors can make a valid voluntary assignment. But we think this is a mistaken view of the law. A person may be insolvent, in the proper signification of that term, although his assets may exceed his liabilities. A person may be said to be insolvent when he is unable to pay his debts as they mature in the ordinary course of his business, and this seems to have been the condition of the assignors in this case. Moreover, a person, whether insolvent or not, may legally execute a conveyance of his property to a trustee or assignee to pay his indebtedness, if he have any. Such conveyance would not be void upon its face, nor intrinsically so. Creditors could attack its validity upon the ground that it was made with intent to hinder, delay and defraud them, and unless they could establish such intent the assignment would be valid.

Counsel for defendant relies upon what was said in the case of *Fuller v. Hasbrouck* 46 Mich. 78, as justifying the court

below in excluding the bond from evidence, in which it was intimated, but not decided, that if the bond is not given in ten days after the assignment, execution levies might perhaps be perfectly valid if creditors fail to invoke the intervention of equity, since it is only when the execution of the trust under the sixth section of the statute is called for that they are displaced.

Attention is called to the fact that no creditor has sought the intervention of equity, and that they are assailing the validity of the assignment at law. But, as we hold that the objections urged do not affect the validity of the assignment, the point alluded to in *Fuller v. Hasbrouck* does not arise. Had no bond been filed, or had it not been filed until after the expiration of ten days, and not until after creditors had levied, and no proceedings had been taken in equity to enforce the trust, we should have been called upon to decide the question whether the assignment could be assailed at law. But that is not the case here.

The judgment of the circuit court must be
Reversed and a new trial ordered.

The other Justices concurred.

SIDNEY EDSON ET AL. v. EUGENE ANGELL ET AL.

CHESTER DOWNER'S APPEAL.

Bank drafts.

Where a draft is deposited in a bank without instructions that it shall be treated as a separate fund, and is forwarded by the bank to its correspondent for collection and deposit to its credit, and the fund in the correspondent bank is continually changing by reason of drafts and deposits so that no specific moneys can be identified, the original depositor cannot, on the failure of the first bank, reclaim the entire amount of his draft from funds then remaining in the correspondent bank to its credit; nor can he recover more than his pro rata share like any other creditor.

Appeal from Ingham. (Gridley, J.) Oct. 23.—Oct. 28.

Intervening petition. Petitioner appeals. Affirmed.

Olds & Robson for appellant, to the point that petitioner's money received by the insolvent was a trust fund in his hands, cited *Marine Bank v. Fulton* 2 Wal. 252, and claimed that it could be followed into the receiver's hands: *St. Louis v. Johnson* 5 Dill. 241; *Van Alen v. Nat. Bank* 52 N. Y. 1; *Nat. Bank v. Ins. Co.* 104 U. S. 54; *Bayne v. United States* 93 U. S. 642; *Cook v. Tullis* 18 Wall. 332; the receiver is invested with those rights only which the insolvent had before his failure: *Peak v. Ellicott* 30 Kan. 156; *Matter of LeBlanc* 14 Hun 9; 75 N. Y. 598; *Lowene v. Am. F. Ins. Co.* 6 Paige Ch. 484; Story's Eq. Jur. § 1261; a fund that can be identified can be followed: *Frith v. Cartland* 2 Hem. & Mill. 417; *LeRoy v. Globe Ins. Co.* 2 Edw. Ch. 657; 2 Pom. Eq. Jur. § 1051.

Chas. F. Hammond and *Cahill, Ostrander & Baird* for the insolvent's receiver. A banker with whom money is deposited which is not to be kept intact becomes the depositor's debtor: Story on Bailments 47, 88; *Keene v. Collier* 1 Metc. (Ky.) 415; *Aurentz v. Porter* 56 Penn. St. 115; *Shoemaker v. Hinze* 53 Wis. 116; general deposits create debts instead of bailments: *Lansing v. Wood* 56 Mich. the title thereto vests in the depository: *Neely v. Rood* 54 Mich. 134; if a trustee mingles trust funds with his own and then becomes insolvent the cestui que trust has no lien on specific moneys but only the right of a general creditor: Perry on Trusts § 128; Story's Eq. Jur. § 1289; *Ill. T. & S. Bank v. First Nat. Bank* 15 Fed. Rep. 858; *Kip v. Bank of N. Y.* 10 Johns. 63; *Bank of Commerce v. Russell* 2 Dill. 215; *Mills v. Post* 76 Mo. 426; *In re Janeway* 4 N. B. R. 100; *In re Hosie* 7 N. B. R. 601.

CAMPBELL, J. In May 1883 Eugene Angell, a private banker in the city of Lansing, became insolvent and made an assignment for the benefit of creditors. The estate was brought into the circuit court for Ingham county, where a receiver was appointed. He received some assets from the bank at Lansing, and some money from banks elsewhere that held funds subject to draft. Among these was the Chase National Bank in New York city, which had at the time of

the failure about $2900. Drafts had been drawn to more than cover this balance, but were not presented before the failure, and were afterwards dishonored.

Petitioner Downer's claim is for something over $800, which he claims was a trust fund included in the Chase National Bank deposit, and which he insists must be paid him in full, instead of putting him to share in a pro rata dividend among general creditors.

The facts which he relies on are not entirely agreed upon, although they are mainly so. In April 1883 Mr. Downer owned some buildings in North Lansing which were rented, and some which were to be repaired and improved. As he lived in another state, and wished to have some one in Lansing look after matters, he made an agreement with Angell to look after his rents and taxes, and to pay the repairing bills as they accrued to two contractors who had them in charge. For this service Angell was to have $100 at any rate, and $25 more if he thought it a proper charge. Mr. Downer left with Mr. Angell a draft for $1000 on a Boston bank, out of which Angell was to make his payments. This draft Angell put to Downer's credit, at $1000, and sent it forward in the usual course of collection to the Chase National Bank, which collected it and placed the proceeds to Angell's general credit. Between the time when Angell took this draft Angell drew continually on the Chase National Bank, and kept his balance there replenished by new remittances, so that in the interval before his failure he had drawn from that bank about $16,000, and sent forward not far from the same amount, his running balances being usually about $4000. The draft, when forwarded, was not distinguished from other remittances, and in Angell's bank books was entered like ordinary deposits.

We have had occasion heretofore, to consider whether persons holding drafts on the Chase National Bank obtained thereby a specific lien on the money there held to Angell's credit, and we concluded that the relation between Angell and that bank was that of debtor and creditor, so that no specific right in that fund was transferred to the persons

receiving drafts on that bank. We see nothing in the established facts here to distinguish it.

There is nothing which leads us to believe that Downer ever required that Angell should keep the proceeds of the $1000 draft separate from his other funds. As a matter of fact it was not so kept. It was entered as a credit on the same books containing all bank accounts, and the draft formed only a part of remittances collected and placed to Angell's general credit, where balances were daily changing by drafts and receipts, and where there was nothing to interfere with the complete absorption of all the balances whenever Angell should draw enough, as he did draw enough, to exhaust them. Had all the drafts which he drew been presented before his failure, there would have been nothing left.

Whatever may have been the propriety of Angell's keeping a special fund of this $1000 and its proceeds, the testimony satisfies us that he was not ordered to do so, and never did so in fact. It was at once credited to Mr. Downer as so much cash, and charged to the Chase National Bank as a remittance. The payments made by Angell to the contractors on Downer's account were in no case charged to the fund in New York, but were made at Lansing. Whether any of them were made in the interval between the delivery of the draft on April 19th and the reception of notice of its credit to the account in New York by the Chase National Bank does not very plainly appear. It was never separated in that bank, and the amount of it and of all the deposits held with it, was exhausted and renewed some four times. It would be idle to consider such money as a trust fund capable of identification in the New York banking-house. It stood with that always as part of general remittances taken in and paid out in the usual course of business like any other deposits for which the bank became liable to its depositors. It would be as entirely consistent to treat this money as drawn to Lansing, where it was all to be paid out by the first drafts of an equal amount disposed of by Angell, as to regard it as continuing unaffected by the many business drafts drawn from day to day, and only made good by continual remittances

to cover them. None of these were payable out of special funds. They were all drawn on the credit balances, which included the proceeds of Downer's draft among the rest. There is no more reason for treating it as Downer's money than for regarding it as appropriated to the use of the bona fide draft purchasers, whose drafts would have exhausted it, and who knew nothing of any equities to impede them. But we have already held that these draft-holders did not get any lien on the fund.

We can see no reason why Mr. Downer has any more equities as against this fund than any other creditors who trusted Angell with their money, or who purchased drafts on his New York correspondent. They must all be treated alike and share in the dividends from his estate in the same way.

The decree must be affirmed with costs.

MORSE, C. J. and CHAMPLIN, J. concurred. SHERWOOD, J. concurred in the result.

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JAMES A. KELLOGG, ADM'R v. HENRIETTA B. BEESON.

Suit by administrator to set aside decedent's mortgage.

An administrator de bonis non cannot bring suit to set aside a mortgage made by his decedent without averring a deficiency of assets in his hands and in those of his predecessors in the trust, to satisfy the obligations existing against the estate. How. Stat. §§ 5384–5.

Appeal from Berrien. (A. J. Smith, J.) October 23. —October 28.

FORECLOSURE: bill of review. Defendant appeals. Reversed.

Orville W. Coolidge, James Brown and *James A. Kellogg* for complainant.

Edward Bacon for defendant appellant.

CHAMPLIN, J. This is a bill of review, filed by the complainant as administrator de bonis non with the will annexed, of the estate of Richard P. Barker, deceased. To this bill the defendant filed a general demurrer, which was overruled by the court, and the defendant appealed. The bill of complaint abounds in redundant matter, which makes it somewhat difficult to arrive at the substantial merits relied upon by complainant as a ground of review, but in disposing of the case we shall take the statement of what the bill alleges as presented by the complainant in his brief filed in this cause, which is as follows:

"Richard P. Barker died intestate on the 15th day of September, A. D. 1873, leaving a last will and testament; that Phœbe S. Barker was duly appointed administratrix, with the will annexed, and subsequently died, and Laban Harter was appointed administrator de bonis non with the will annexed; that on the 22d day of July, A. D. 1876, Henrietta Barker, of the city of Niles, in the county of Berrien and State of Michigan, exhibited her bill of complaint in the circuit court for the county of Berrien, in chancery, against James H. Barker, Walter Barker, Lewis F. Barker, the heirs, and Laban Harter, administrator, etc., of the estate of Richard P. Barker, deceased, and set forth that on the 21st day of April, 1869, said Richard P. Barker was indebted for borrowed money, and otherwise, to Smith Barker, surviving guardian of James H. Barker, Walter Barker, Lewis F. Barker and Henrietta Barker, and gave him, said Smith Barker, a promissory note for $8000, and to secure the payment of said note, gave a mortgage to said Smith Barker on certain lands therein described, but that said note and mortgage had been lost; that said Smith Barker died the 18th day of June, 1873, intestate, at the city of New York, and on the 29th day of May, A. D. 1876, Lewis F. Barker was appointed administrator of his estate by the probate court of Berrien county, Michigan, and thus became entitled to assign said mortgage to Henrietta Barker, which he did; and further, that by reason of certain payments, settlements, and delivery of things of value, duly made, James H. Barker and Lewis F. Barker have ceased to have any interest, if any they ever had, in the aforesaid mortgage and the moneys therein mentioned, and that the whole of the principal and interest that remains unpaid on said note and mortgage belongs, in equity, to said Henrietta Barker, and she has long been, in equity,

entitled to the money thereof; and that on the 19th day of July, A. D. 1876, at the city of Niles, said Lewis F. Barker, administrator as aforesaid, for and in consideration of the sum of $100, assigned said note and mortgage, and all that remained unpaid therein, amounting to $3000; that the real estate of said Richard P. Barker was devised in trust for said James H. Barker, Walter Barker, Lewis F. Barker and Henrietta Barker. This bill was taken as confessed against the said Laban Harter, administrator, and a decree of foreclosure was duly entered thereon; that said Laban Harter remained administrator of said estate until the 29th day of January, 1885, when he was removed, and on the 26th day of February, 1885, complainant was duly appointed in his stead; that a claim by Mary C. Brown against said estate for the sum of $1575.50, and another by John G. Saxe for $633.83, were allowed; that these creditors filed a bill to enjoin said Henrietta Barker from selling under her decree said mortgaged premises, which injunction still remains in force; that said Laban Harter was repeatedly importuned to appear and defend against said bill of complaint, and was advised that said mortgage and note was not a bona fide claim, and that a portion of said land was, at the date of said mortgage, a homestead right, and that the mortgage was not signed by the wife of Richard P. Barker, and was therefore void; that said Laban Harter refused to do anything, and did not do anything, in the matter, and that repeated efforts were made to procure his resignation or removal, but to no avail; that an order of the probate court, requiring him to proceed to sell the real estate of said estate was made; that said Harter petitioned said probate court for license; that the same was granted, but that said Harter proceeded no farther, and when requested by the creditors to proceed, 'returned false, snubbing, and insulting refusals;' that there was a conspiracy existing between complainant, Henrietta Barker, Laban Harter and Lewis F. Barker to prevent the creditors of said estate from realizing their claims from the assets of said estate."

These, the counsel for complainant states, are the substantial facts as set forth in this bill for review. The relief asked is that the decree made in the foreclosure suit may be reviewed, reversed and set aside, and no farther proceedings taken thereon, and the said mortgage be declared void, and the bill to foreclose the same dismissed, and for general relief.

The demurrer to this bill is well taken. The complainant shows no right or interest in having the mortgage declared void except as administrator of the estate of the mortgagor. He only claims to act in the interest of creditors, and this inferentially, as no statement is made in the bill of complaint that he has been applied to by any of the creditors of the estate of Richard P. Barker to bring this suit, and in no event would he be authorized to institute the suit unless there was a deficiency of assets in his hands and in the hands of his predecessors in the trust, to satisfy the debts or obligations existing against the estate. How. Stat. §§ 5884, 5885. The bill contains no such averment.

The decree overruling the demurrer must be reversed and the bill dismissed with costs.

The other Justices concurred.

WILLIAM H. STEVENS v. JOHN H. OAKS.

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Joint and several note—Extension—Release of surety.

1. Extension of a note for a consideration and without the consent of a surety thereon releases the surety if the creditor knew the fact of suretyship.
2. The form of a note in being several as well as joint does not exclude proof that one of the signers is a surety only, who is bound by the obligation in the form he adopted.
3. Facts adverse to a plaintiff and not denied by him while on the witness-stand cannot be treated as in controversy.

Error to Montcalm. (V. H. Smith, J.) Oct. 23.—Oct. 28.

ASSUMPSIT. Plaintiff brings error. Affirmed.

Palmer & Lyon and *J. C. Shields* for appellant.

N. J. Brown and *Mitchel & McGarry* for appellees. A surety is discharged by granting his principal an extension of time: 1 Pars. N. & B. 241; *Miller v. Stewart* 9 Wheat.

680; *Fellows v. Prentiss* 3 Den. 512; *Brigham v. Wentworth* 11 Cush. 123; *Wilson v. Lloyd* L. R. 16 Eq. Cas. 60; *Okie v. Spencer* 2 Whart. 253; *Smith v. Shelden* 35 Mich. 49; *Heffron v. Hanaford* 40 Mich. 307; *Ward v. Stout* 32 Ill. 399; a sole maker of a note may be a surety: Brandt on Suretyship 825; it may be shown by parol that one signed a note as surety: *Wilson v. Green* 25 Vt. 450; *Mariners' Bank v. Abbott* 28 Me. 280; *Bank v. Hoge* 6 Ohio 17; *Grafton Bank v. Kent* 4 N. H. 221; *Harris v. Brooks* 21 Pick. 195; *Carpenter v. King* 9 Met. 511.

CAMPBELL, J. Defendant was sued upon a note which he signed as joint maker with his brother C. S. Oaks in 1872. The note is in form joint and several. The defense was that defendant signed as a mere surety, and that C. S. Oaks was the principal debtor and had been given time by an extension to which defendant was not a party.

The testimony was uncontradicted that the money was lent to C. S. Oaks, and that the note was extended for a valuable consideration. There was nothing left for the jury unless there was some conflict. Plaintiff appeared as a witness and only testified that it was understood defendant was to be a joint maker. He did not contradict the transactions of loan or extension, or the fact that C. S. Oaks was the principal debtor.

The note took the form which plaintiff said it was to take, and in one respect a more favorable one for him, by being several as well as joint. But the form of the obligation does not prevent a showing that one of the parties was a surety. He was bound by the obligation in the form which he adopted. But it is elementary law that a creditor who knows of the fact of suretyship must not violate the rights of the surety. That plaintiff knew the nature of the transaction was shown and not denied. Having taken the stand and not denied it, the jury could not regard it as matter of controversy.

Upon the undisputed facts defendant was discharged, and no theories of law could lead to a different result.

The judgment must be affirmed.

The other Justices concurred.

AUDITOR GENERAL v. IOSCO CIRCUIT JUDGE.

Taxation—Injunction against tax sale.

1. The tax-law of 1885 (Act 153, sec. 107) in forbidding the injunction of assessment proceedings thereunder does not apply to proceedings for the sale of lands for taxes assessed and levied before the enactment of that law.

2. Injunction lies to restrain the sale for taxes of lands illegally assessed; as where the lands belonged to a non-resident and were assessed at three times their value and disproportionately with the lands of residents.

Mandamus. Submitted Oct. 27. Denied Oct. 28.

Attorney General *Moses Taggart* for relator.

William S. Tennant for respondent.

BY THE COURT. One John C. Brown filed his bill of complaint in the circuit court for the county of Iosco, in chancery, alleging that he was the owner of certain lands, describing them, in said county, and averring that these lands were fraudulently assessed for the taxes of 1883, and that under section 90 of the Tax Law of 1885 he was authorized to file said bill of complaint; and further, that "the particular defects mentioned in said bill were that the supervisors had acted fraudulently, and without jurisdiction, and had not legally imposed the tax; that the board of supervisors had made no proper direction in compliance with section 24 of said tax law in spreading these lands upon the tax roll; that the taxes were invalid for the reason that the law of 1882 had been repealed since the spreading of the tax, so as to deprive complainant of a day in court for the hearing and legal determination of said taxes, and by the act of 1885 he is deprived of legal right to have such hearing; that the complainant is liable to be deprived of the possession and use of said lands, and will become liable to the State for cutting any timber thereon, and that the law is unconstitutional and void;

alleges an assessment of from three to five dollars an acre for the year 1883; that these lands, in 1883, were classed as stump lands, and all the valuable timber had long before been cut and removed; alleges that the supervisor in making the assessment made no personal inspection or examination, but assessed the land much higher in proportion to assessments of the resident lands, and copied the same from the former assessment rolls; alleges that the just and legal valuation of said lands is not over one dollar an acre; that they are assessed at three dollars, their cash value; alleges that interest has been added at the rate of one per cent. for each month; that sixty cents for each description of land has been added for alleged costs; and that the proceeding to a sale is a cloud upon his title; and prays that the county treasurer and the Auditor General may be restrained from such sale, and that the court may decree that said taxes are illegal, and said land not subject to a sale."

Upon the filing of said bill a temporary injunction was granted by the respondent, Judge Tuttle, restraining the county treasurer and the Auditor General, the relator, who were made parties defendant, from making a sale of said lands for said taxes of 1883. Afterwards said circuit judge refused on motion to vacate the order granting such injunction. Application was thereupon made to this Court, and an order granted that the circuit judge show cause why a writ of mandamus should not issue to compel the vacation of this order. The respondent answered, and the matter is now before us upon the petition and answer.

It is claimed by relator that the Tax Law of 1885, under which he and the county treasurer were proceeding to sell the lands for the delinquent taxes of 1883, as authorized by said act, contains a provision absolutely forbidding the issue of injunction to restrain such sale, as follows: "No injunction shall issue to stay proceedings for the assessment or collection of taxes under this act."

The respondent claims that this clause has no application to this case, and that, in so far as it attempts to take from the circuit courts in chancery their power to grant proper

relief in cases within their jurisdiction, it is in violation of the Constitution of this State. His counsel here also assert that inasmuch as the complainant, Brown, under the law of 1882, under which the taxes against his lands were assessed, had the right to appear in the circuit court in chancery, and defend against these taxes before a decree of sale could be made, and that by the repeal of that law he has lost that privilege, therefore the Legislature has no power to deprive him of all remedy which, by the ordinary power of chancery he has and ought to have; that his land cannot be sold without affording him a day in court equal to what he was awaiting and had a right to expect under the old law.

The complainant, in our opinion, made out a proper case for relief in his bill, and without the supposed intervention of this section or clause of the statute, was entitled clearly to the injunction granted.

Without passing upon the authority of the Legislature to take away from the circuit court in chancery the power to grant proper relief in a case where, without such relief, as here, the complainant would have a cloud and incumbrance placed upon his title to a large amount of lands, without any day in court to protect or defend against it, we think it could not have been the design of the Legislature that this clause forbidding the issue of any injunction should apply to the sale of lands for taxes assessed and levied before the enactment of the present law, and that consequently the prohibition therein contained does not apply in this case.

The writ is therefore denied.

LOUIS BRESLER AND CHARLES E. BRESLER v. SARAH M. PITTS ET AL.

Boundaries—Cloud on title—Adverse possession—Forfeiture.

1. The settlement of boundaries that are disputed and difficult of ascertainment is not on that account within the jurisdiction of a court of equity.

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2. A boundary stated in a deed as "a line forty feet above the border of the river at high-water mark" is not ambiguous, and if disputed is to be fixed like any other fact, by testimony and an examination of the ground.

3. A cloud upon title cannot be created by the owner of the title and exist by his grant. And rights that may accrue to him from the grantor's continued occupancy after deeding the property, are not to be enforced in equity if the bill does not aver such possession as by lapse of time or otherwise would legally extinguish defendant's claim.

4. Where a deed contains a covenant to convey certain swamp land when defendant shall have drained it, but does not fix the time within which to do so, neither the grantor nor person claiming under him can take proceedings to forfeit such contract, or compel specific performance until they have put defendants in default after reasonable demand that they shall fulfill the condition.

Appeal from Wayne. (Full Court.) Oct. 15.—Nov. 4.

BILL to clear title, etc. Complainants appeal. Affirmed.

D. C. Holbrook for complainants.

Henry M. Duffield and *Isaac Marston* for defendants.

CAMPBELL, J. Complainants, claiming to be owners of so much of the St. Amour farm above Detroit, as is not owned by defendants as heirs of Samuel Pitts, deceased, filed their bill—*first*, to settle the boundaries of their estate; *second*, to forfeit a contract for the conveyance of a part of the farm lying in a swamp; and *third*, to extinguish a right of way. The bill was dismissed for want of equity.

In May 1855 Eugene St. Amour, being the owner of a farm in Grosse Pointe, Wayne county, fronting on Detroit river, sold and conveyed to Samuel Pitts the front so as to include all between a line forty feet above the border of the river at high-water mark, and the channel of the river. This was conveyed unconditionally, as was also "a right of way four rods wide through the center of said claim to Jefferson avenue, or the road which makes a continuation of said avenue through said claim." The same deed contains the following provision: "The said parties of the first part do further covenant and agree with said Pitts, his heirs and

assigns, to convey and assure to him, his heirs and assigns, all the portion of said claim which is now swamp, and which lies below and southwest of a line drawn through the center of said claim from the Detroit river to said Jefferson avenue road, which conveyance is to be made as soon as said Pitts, his heirs, executors, administrators or assigns, shall have so drained said swamp on both sides of said line as to make it capable of producing grass."

Complainants set forth their own right in fee to all except the first parcel beginning forty feet from the river bank and extending to the channel, as derived "by the foreclosure of mortgages executed by said St. Amour and wife, and through several conveyances from and under him." There is no information as to the dates of any of these titles.

The bill then claims that the location of the forty feet line is uncertain and difficult of determination and that the parties dispute their boundaries.

Also that neither Pitts nor his heirs ever reclaimed the swamp, and it and the strip for a highway have always remained in possession of St. Amour and his grantees, adversely; that drains have been made by the drain commissioner and assessed on the land between Jefferson avenue and the river, and paid by complainants; "that said drains made by said commissioner were worthless and of no benefit to said land, and your orators allege the fact to be that said swamp (so called) cannot be reclaimed by drains nor in any other way, as they believe."

The prayer is for a forfeiture of the contract, and an extinguishment of the right of way, and settlement of boundaries.

There is no jurisdiction in a court of equity to settle boundaries merely because disputed and difficult of ascertainment. The line fixed in the deed is one adopted by the parties themselves, and the place of high-water mark must be determined by testimony in any controversy that may be raised about it. There is no ambiguity about it. It is to be fixed, like any other fact, by examination of the ground. All streams, whether subject or not to much variation, are

liable to some, and this boundary reaches the highest water-mark which is not reached by some sudden and transient cause, as then capable of determination.

It is a new idea in equity jurisprudence to have grantors seek a forfeiture of their own grant, on account of their own disregard of their obligations. Without considering how far the continued occupancy of the grantor will be adverse to his own grant of a right of way, it is very certain that if he has any such right, it must be enforced in some other manner. But in regard to this, as well as to the swamp land, the bill shows on its face that the swamp through which the way runs is not capable of actual occupancy for any purpose as dry land, and apparently negatives any such adverse possession as would cut off legal rights. It does not appear when complainants went into occupancy of any of the estate or got title to it, and no such possession is averred as would legally extinguish any claim of defendants, by lapse of time or otherwise, so as to make it clear that complainants are in the right. That cannot be called a cloud upon a title which is created by the owner of the title and exists by his grant.

The same is to some extent true concerning the swamp land. Complainants by their own showing had full notice of defendants' rights, which were all created by the deed of the front. It is possible a bill might lie to compel the performance of the drainage or the surrender of the contract right. But, whatever may be defendants' rights to specific performance, inasmuch as no time is fixed for the work, neither complainants nor their grantors could move actively until they had in some way put defendants in default after reasonable demand to proceed. If the allegations in the bill are true, neither party could have suffered from the delay, in not reclaiming what they say is not reclaimable.

The bill makes out no equity and was properly dismissed.

The other Justices concurred.

ADDISON P. BREWER v. THE MICHIGAN SALT ASSOCIATION ET AL.

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Bill against corporation for disclosure and contribution—Liability of stockholders—Parties—General demurrer.

1. A judgment not only fixes the extent of liability but the party or parties liable; and if such party is a corporation, it is not merely individual members thereof that are held.
2. Corporate property is liable for debts of the corporation, and so long as it can be traced, it may be followed into the hands of members in the manner provided by the organic law and the by-laws of the corporation.
3. Stockholders in a corporation are not entitled, upon its dissolution, to any of its property, until its debts are paid; and they are estopped from denying that they are liable therefor to the extent of their interest.
4. Demurrer to a bill against a corporation admits its allegation that there is no other creditor but complainant.
5. Whether a bill against a corporation can be demurred to generally on the ground that it does not show that all the stockholders are brought into court—Q. And if it can, it is a sufficient answer that the bill alleges the fraudulent concealment of the records of the corporation and complainant's consequent inability to learn the names of all who should be made parties.
6. General demurrer to a bill against a corporation will not lie for the failure to bring in all the stockholders as defendants if the bill purports to be filed against all and presents a sufficient excuse for not naming some of them.
7. A decree in a suit against a corporation may be made against those stockholders only over whom the court has acquired jurisdiction, if the bill shows on its face that the rest are beyond it.
8. One who has recovered judgment against a corporation can maintain a bill against it for discovery and contribution on showing that he is its only creditor; that it was solvent when dissolved; that execution has been returned unsatisfied and that the stockholders have the assets in their possession and refuse to apply them on the execution.

Appeal from Saginaw. (Gage, J.) Oct. 15.—Nov. 4.

BILL for discovery, etc. Defendants appeal. Affirmed.

W. S. Tennant and *Benton Hanchett* for complainant. Stockholders are accountable in equity to creditors of the corporation to the extent of corporate property distributed amongst them that ought to have been applied to the debt: Ang. & Am. Corp. §§ 599–604; *Upton v. Trebilcock* 91 U. S. 47; *Sanger v. Upton* id. 60.

Tarsney & Weadock for defendants.

SHERWOOD, J. The bill in this case is filed for discovery and relief. The defendants interposed a general demurrer. A hearing was had in the Saginaw circuit before Judge Gage, and the demurrer was overruled with costs, and defendants appeal to this Court.

The defendant was a corporation duly organized under the laws of this State. The association was formed for "the manufacture of and dealing in salt, and to engage in the transportation of its products to market." In 1878 the complainant let the defendant have a large quantity of salt, for a portion of which it refused to make payment, and on the 30th day of September, 1881, complainant recovered a judgment therefor against the association to the amount of $1561.67 damages and $43 costs. This judgment was affirmed on appeal to this Court on the 25th day of January, 1882. *Brewer v. Michigan Salt Ass'n* 47 Mich. 526.

The bill of complaint, in addition to the above facts, alleges that execution was issued upon the judgment, February 7, 1882, and returned nulla bona, May 3, 1882, and that the judgment remains unpaid; that the capital stock of the company was $20,000, divided into 800 shares of $25 each, and that there was actually paid in at the time of the organization two dollars per share; that the company was organized in 1876, and that the articles of association provided for the existence of the corporation for the period of five years; that the association continued in business until March, 1881, and then dissolved by limitation, and it was then the owner of property, including the capital stock paid in, of the value of $20,000; that the offices of the company were located in Bay City and East Saginaw; that the offices of the associ-

ation were managed and conducted by a board of directors chosen by the stockholders. The corporation and members of the association in 1878 are made defendants, and the bill further alleges that the members made parties were such at the time of dissolution, and that they severally received a portion of the funds distributed on the dissolution of the association. Complainant further states that this defendant commenced its business in 1876 by buying and selling salt, and dealing in salt generally throughout the entire Saginaw valley, and handled nearly all the salt manufactured in Saginaw and Bay counties, and the territory adjacent thereto; that the articles of association provided that any manufacturer of salt might become a member by signing the articles of association; that there should be paid an annual dividend of twelve per cent. to each stockholder on the amount paid in, and this, with the incidental costs and expenses, was charged to the salt handled, and a dividend of the proceeds of the sale was then made; that the complainant was a manufacturer of salt, but was not a member of the association at the time of its dissolution; that this property and capital stock was fraudulently sold and divided among said stockholders; that these moneys so divided among the defendants should have been paid and applied first to the satisfaction of these judgments; that all other debts of said association were paid, and this paid-in capital stock and surplus earned and property of said association was a trust fund for the benefit of the complainant, as a creditor of said association, and the said defendants took the same subject to the payment of the complainant's judgment; that in March, 1881, upon the dissolution of the association, the officers thereof paid each of the defendant stockholders the amount of his capital stock paid in, and his share of the surplus funds, and of the proceeds of the sale of the property, without making provision for payment of the complainant's claim, and unjustly defrauded him of all means of enforcing his claim against said association; that these acts of the officers were done with the full knowledge and consent of the stockholders, who unlawfully distributed among themselves all the funds and property of the associ-

ation. The bill then prays for discovery of the names of all the stockholders, and amount of stock held by each; that the officers give information as to what has become of the books of said association; that they disclose what amount was paid each defendant as his share upon the final dissolution of said association; for a decree that complainant has an equity in these funds, and that they were pledged for the payment of the complainant's claims and demands; that each of said defendants may be decreed to pay such sum as shall be just and equitable in proportion to the amount of his stock in said association.

We do not think the demurrer in this case can be sustained, neither do we think it ought to be. The bill is not properly a creditor's bill, but more in the nature of a bill for contribution. The suit hereinbefore referred to determined the liability of the defendant to the plaintiff and the extent of the same. The allegations in the bill show that by the articles of association any manufacturer of salt in this State was entitled to become a member of the association by signing its articles of association on its books, and designating the number of shares taken, which might not exceed two shares of the capital stock for every barrel of the average daily capacity of his manufactory, on a fair estimate. Said articles of association and the by-laws provided that there should be paid an annual dividend of twelve per cent. to each stockholder on the amount paid in, payable on the 15th days of July and January of each year, which, together with all losses sustained, and all costs and expenses incurred in handling and selling, together with the inspector's fees, should be charged up as expenses to the salt handled before a dividend of the proceeds of sale was made.

In 1878 the complainant was not only a manufacturer of salt, but a member of the salt association, and one of its stockholders, owning one share of its stock; and it was while he was such member that he sold to the defendant company the salt for the value of which the said judgment was rendered, and which became destroyed and lost to the company. Complainant, however, ceased to be a member of the

association soon thereafter, and before the 1st day of January, 1879.

It is insisted by the defendant that the bill should have been filed against those stockholders only who were such during the six months ending December 31, 1878; that they only received the proceeds of the sales during the six months that the loss occurred, and that they only should pay the judgment. The judgment not only fixes the liability and its extent, but also the party or parties who are liable for its payment. The corporation was found to be such party, and not any particular member or members thereof. The property of the corporation was the fund from which the complainant was entitled to have his judgment paid, and so long as it can be traced it is liable for the debts, in the hands of the members of the association, in such manner as is provided by the statute and by-laws of the company. No stockholder is entitled to any of the property of the company until its debts are paid, and he is estopped from denying his liability to the amount of the interest which he has received from the company until such indebtedness is paid, and defendant's theory to the contrary is untenable. This point is fully discussed in 47 Mich. 526, hereinbefore referred to, and it is unnecessary to repeat the reasons therein given for the conclusions reached, which are conclusive upon the point.

It is further claimed that the bill should have been filed in behalf of all the creditors. There is no force in this, because the bill avers there are no other creditors, and that is taken as admitted by the demurrer.

It is also claimed that the bill does not show that all the stockholders are brought before the court. The bill does show that the defendants were members of the association in 1878, at the time the indebtedness of the complainant arose, and also when the judgment in favor of complainant was rendered, and down to the time of the dissolution of the corporation. It also appears by the bill that they received a portion of the assets, and that the books of the corporation have been fraudulently concealed by the officers for the purpose of avoiding liability of the stockholders, and discovery

and relief are asked upon that ground. The statement of facts set out in the bill, showing why other persons, if any, are not made parties, and that it is by and through the ignorance of complainant, occasioned by the fraudulent concealment and acts of the officers of the company, is a sufficient answer to the defendant's general demurrer on this point, if indeed a general demurrer will lie at all in such case. Story's Eq. Pl. 543; Jennison's Ch. Pr. 59; Van Santvoord's Eq. Pr. 193; *De Witt ads. Swift* 3 How. Pr. 280; *Scofield v. Van Syckle* 23 How. Pr. 97; *Getty v. Hudson River R. Co.* 8 How. Pr. 177; Barb. Ch. Pr. 106. When stockholders are out of the jurisdiction of the court, and the fact appears upon the face of the bill, a decree may be made against those over whom the court has acquired jurisdiction, and where a bill is filed against all the stockholders, and some are not brought in, if good valid reasons are given for not bringing in some of them, the defect cannot be taken advantage of by general demurrer. Thompson on the Liability of Stockholders §§ 353, 357; *Erickson v. Nesmith* 46 N. H. 371; *Wood v. Dummer* 3 Mas. 308; *Pierce v. Milwaukee Const. Co.* 38 Wis. 253.

In this case the bill states the complainant is the only creditor of this corporation; that the same was solvent at the time of its dissolution; and its stockholders have in their possession all the funds and assets, and they refuse to apply any portion thereof to the payment of complainant's debt, and that execution has been returned unsatisfied. This shows the complainant entitled to the relief he prays, and the bill is not subject to the demurrer interposed by defendant.

The decree of the circuit court must be affirmed with costs. Defendant will be allowed to make answer, and the record will be remanded for further proceedings in the case.

The other Justices concurred.

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MARY McARTHUR, ADM'X v. CITY OF SAGINAW.

Municipal liability for condition of street.

1. Municipal discretion as to how much of a street shall be set aside for the actual highway, and how much for the sidewalk, trees, gutters, etc., cannot be reviewed judicially or passed upon by a jury so long as no distinct legal duty has been violated.
2. The liability of a city for an injury caused by the condition of a street is purely statutory; and the purpose of the statute is to limit the responsibility to reasonable care.
3. The act "for the collection of damages sustained by reason of defective public highways, streets," etc., covers such defects only as are due to want of repair, and has nothing to do with the presence in the street of building material or other objects that do not affect its condition in that particular.
4. The unauthorized or excessive use of a portion of the public highway by an abutting owner in putting lumber or material thereon is a matter that falls within the cognizance of the police power, and it has nothing to do with the duty to make or repair highways.
5. A man was thrown out of his buggy and killed in consequence of striking a pile of lumber that projected over the street to the traveled part of the way but not over the latter. *Held*, that his administratrix could not recover against the municipality for his death as for an injury caused by failing to keep the street in repair and safe for travel.

Error to Saginaw. (Gage, J.) Oct. 16.—Nov. 4.

CASE. Defendant brings error. Reversed.

Frank E. Emerick, *Benton Hanchett* and *Albert Trask* for appellant A town is not responsible for injuries caused by defects in a street outside the traveled portion thereof: *Perkins v. Fayette* 68 Me. 152; *Kelley v. Fond du Lac* 31 Wis. 479; *Bassett v. St. Joseph* 53 Mo. 290; *Brown v. Glasgow* 57 Mo. 156; there is no common-law liability: *Moulton v. Sanford* 51 Me. 127; *Brooks v. Acton* 117 Mass. 204; nor will the town be liable if the injured person is in any way to blame: *Farnum v. Concord* 2 N. H. 392; *Clark v. Barrington* 41 N. H. 44; *Tucker v. Henniker* id. 317; *Winship v. Enfield* 42 N. H. 197; *Tuttle v. Farmington* 58

N. H. 13; *Noyes v. Morristown* 1 Vt. 353; *Rice v. Montpelier* 19 Vt. 470; *Bovee v. Danville* 53 Vt. 183; *Folsom v. Underhill* 36 Vt. 580; *Daniels v. Saybrook* 34 Conn. 377; *Hull v. Kansas City* 54 Mo. 598; *Hey v. Philadelphia* 81 Penn. St. 44.

Tarsney & Weadock, for appellee, cited as to liability, *Hunt v. Pownal* 9 Vt. 411; *Baldwin v. Turnpike Co.* 40 Conn. 238; *Sherwood v. Hamilton* 32 U. C. (Q. B.) 410.

CAMPBELL, J. Plaintiff sued defendant for damage resulting from the death of Angus McArthur, claimed to have been caused by neglect to keep a city street in proper condition. On the 5th of December, 1883, deceased came across a bridge over the Saginaw river into Mackinaw street which is a continuation of the same way, and after crossing the rails of a railway which jolted his buggy so as to throw the seat out of place, his horse ran the buggy against a pile of lumber on the left side of the way, and deceased was thrown out and killed. The principal questions in the case related to whether defendant was guilty of any such neglect of duty as to render it culpable and responsible for the injury, and also whether deceased did not contribute by his own carelessness to the fatal result.

The case relied on by plaintiff was that deceased drove a spirited horse, but one fairly suitable for time and occasion, across the bridge and on the street, where he was frightened by an engine not very far away on the railroad, and that while he was moving rapidly forward, the pile of lumber was so far advanced into the street as to obstruct the free passage, and thus cause the collision.

It appeared by the proofs that the street in question was from one outside boundary to the other about four rods, or sixty-six feet, which is the standard for general highways. Thirty-one feet in the center had been graded and kept in order for travel, and was in good order at the time of the injury. The sides of the road were naturally low and had not been raised as the center graded portion had been. A sidewalk was laid from twelve to eighteen inches from the

side of the street about six feet wide. Between that and the raised grade there was a ditch or gutter, and the lumber pile in question belonged to a factory abutting on the street, and reached above the ditch to the border of the graded part of the street. The jury found that the clear portion of the street was thirty-one feet wide, which covered, according to all the testimony, the entire graded portion.

The jury undoubtedly understood from the rulings of the court, and the questions laid before them, that it was for them to decide how much of the street should be kept in condition for general travel, and they found that the entire street ought to be clear of obstructions, and it must be presumed they based their verdict for plaintiff on that idea. This was a palpable error, for there can be no doubt of the right of every city to determine what part of the nominal highway shall be devoted to the various purposes of passage, and upon such a subject the municipal discretion must prevail. It is common and entirely proper to set apart various parts of the space to sidewalks, gutters, trees and other suitable uses, and the plan adopted for such work is beyond judicial review, unless some distinct legal duty has been imposed and violated. *Larkin v. Saginaw County* 11 Mich. 88; *Lansing v. Toolan* 37 Mich. 152; *Toolan v. Lansing* 38 Mich. 315; *Detroit v. Beckman* 34 Mich. 125. In both of the latter cases the accident out of which liability was claimed to have arisen was caused by the narrowness of culverts or planking, which left a ditch beside the covering open, and liable to be fallen into. In *Brevoort v. Detroit* 24 Mich. 322, it was held that a city might leave no room for sidewalks if it saw fit, and also that it might terminate a given piece of paving before it reached a cross-street. Both of these would tend to produce inconvenience to travel, but it must rest with the city to determine for itself how far to extend its improvements. It is one of those discretionary powers necessary to good government, and the danger of abuse is not considered great enough to authorize its restriction.

Very few cities have a wider space than was left here

for the traveled track of their streets. They are governed by considerations of expense and of private convenience in adjoining abutters, who in case of paving are generally made to bear the burden, and whose right to occupy the portion of the street not needed for the public, is generally favored to some extent, so far as the public convenience allows.

The lumber-pile in the present case was not in the nature of an encroachment or defect, but was such an object as would, if unlawfully there, be an obstruction to the use of the way, if unlawful at all. *Grand Rapids v. Hughes* 15 Mich. 54. So far as it prevented access to the premises of the owners, it was an evil that concerned them more directly than the public, and in the present case the deceased was not seeking access. It was not in the traveled track as improved by the city. If the city is liable in this action for negligence in leaving it there, that negligence consists in a failure to exercise its police power, in not having it removed, and not for failure to provide a sufficiently wide space for travel. If the city had put the lumber there and left it, some other considerations might be presented.

The liability of cities for injuries suffered in their streets is statutory. Our Legislature has recognized this principle, and has not made them liable except under declared conditions. And in order to remove any possible doubt on the subject, the recent legislation, somewhat amending the details of the old law, has declared in so many words that no common-law liability shall exist. Pub. Acts 1885, pp. 289, 291. The legislation has all been adopted in view of the decisions previously made on the subject, and is not open to serious ambiguity. The recent amendments have substituted the word "reasonable" in some cases for the word "good," and have indicated a purpose to prevent any responsibility for more vigilance than reasonable care requires.

The statute, as found in the former volumes, and included in How. Stat. §§ 1442–1446, indicates by its title its general scope. It is "An Act for the collection of damages sustained by reason of defective public highways, streets, bridges, cross-walks, and culverts." Section 1, which is the section

governing this case, gives damages for personal injuries "by reason of neglect to keep such public highways or streets, and all bridges, cross-walks and culverts on the same in good repair, and in a condition reasonably safe and fit for travel." Section 4 imposes the duty "to keep them in good repair, so that they shall be safe and convenient for public travel at all times," etc. And to do this it is provided that when the means now provided by law are not sufficient to enable the municipality to keep them "*in good repair*," authority shall exist to levy such additional sum, not exceeding five mills on the dollar, as will enable them to keep such streets, etc., "in good repair at all times."

We held in *Agnew v. Corunna* 55 Mich. 428, that the statutory liability was confined to such defects in streets as arose from their being out of repair, and did not cover objects forming no part of the streets, and not affecting their condition as ways properly kept in repair. We adhere to the opinion there expressed. The whole tenor of the statute is confined to the duties of cities and towns to construct their roads and repair them when out of order. The duty is the same in regard to all of these corporations. But it is manifest that their powers and means of preventing private parties from doing what may interfere with the safety or convenience of passers-by are not at all uniform or co-extensive. These private acts may consist of temporary as well as permanent nuisances, and may cause damage by fright as well as by physical violence, and neither cities nor towns could effectually prevent them in all cases without ruinous expense and very large means. But it is always possible, at moderate cost, to keep in repair such streets as are worked at all, and that work must be done by the municipality itself in most cases, and in all cases may be, if neglected, by others. As suggested in *Agnew v. Corunna*, it is constantly permitted to abutters on streets to occupy portions of the street for longer or shorter intervals with lumber and materials. How far this may safely be done without injury to the traveling facilities of the public must be largely a matter of discretion with the city. The unauthorized or excessive use of such

privileges, when what is done does not create what is properly a defective way, is an abuse to be rectified under the police powers of the public, and does not belong to the making or repairing of ways. There is no more legal necessity for holding cities liable for the failure to enforce their police laws in favor of travelers, than in favor of many other citizens who suffer from nuisances or wrongs. The Legislature seldom imposes responsibility to individuals for that kind of municipal negligence or misconduct.

The case before us, upon the allegations, as well as proofs, makes out no corporate liability, and as it is clear that no recovery can be had, the minor questions need not be considered.

The judgment must be reversed and new trial granted, with costs of both courts.

CHAMPLIN and SHERWOOD, JJ. concurred.

MORSE, C. J. I agree with my brethren in the conclusion reached by them in this case mainly for two reasons: *First.* I think the undisputed facts show contributory negligence on the part of the plaintiff's intestate in driving in such a place a horse known to him to be wild and vicious and often unmanageable—a dangerous and unsafe animal—one that good horsemen could do nothing with when in the vicinity and hearing of escaping steam. The facts show that he had been repeatedly warned that the horse was liable to run away and replied that he thought he could manage him, thus knowingly taking the risk of the very danger that was the primary cause of his death. *Second.* That the facts and the finding of the jury in their special verdict show the street, at the place where the lumber was piled and the accident happened, to have been clear and open for the width of thirty-one feet, which, to my mind, made it reasonably safe and fit for travel, notwithstanding the encroachment of the lumber-pile.

I cannot, however, join in the proposition that a lumber-pile or any other obstacle placed in the street by the city or

by other persons, abutters or otherwise, may not be a defect in the highway under the statute. It is made the duty of cities as well as townships to keep all public highways and streets in good repair, so that they shall be safe and convenient at all times for public travel. Anything which prevents or seriously endangers public travel is a defect in the highway. A pile of lumber extending across the street, entirely blocking the way or leaving only room for one vehicle to pass, would be as much a defect as an excavation in the bed of the road would be. The highway is wanting in that safety and fitness which the law requires for the facilities of the traveling public, and is therefore defective. I cannot agree either in the idea that it makes a difference in the liability of the city if the obstacles in the street are put there without the authority or consent of the city. If abutters on the street, or other persons, put lumber or anything else in the street so as to impede necessary travel therein to such an extent as to make it dangerous to the public, and such obstructions remain there long enough to give the city notice of their presence, and an injury should occur thereby, the city, in my opinion, would be equally liable as if the obstacles were placed there by its consent. The case of *Agnew v. Corunna* 55 Mich. 428, relates to an injury caused by a horse becoming frightened at a stone lying between the traveled part of the highway and the gutter, which had been there three or four days. This was considered by the Court not a defect in the highway; and under the circumstances of the case it was not. But this decision cannot be made the foundation for the broad doctrine laid down in the opinion of the majority of the Court in the case at bar. I do not deny the right of cities to allow temporary deposits in the streets of lumber, timber, stones and other building materials for the convenience of those erecting or repairing buildings; but at the same time passage-way must be left for the traveling public, whose rights are superior in the streets to those who are building alongside of them; and the streets cannot be left, either by night or by day, in such a condition as to be unsafe and unfit for travel to accommodate anybody.

Neither do I believe that the question how far, how much and how long abutters can safely occupy the streets of a city with lumber, stone, coal, boxes, bales or other merchandise with injury to the facilities of the traveling public is a matter largely within the discretion of the city authorities, or that the unauthorized or excessive use of the privilege of so obstructing the streets is an abuse to be rectified under the police powers of the public, and does not belong to the making or repairing of ways. To my mind, a necessary portion of the street or highway, sufficient to allow the free passage of vehicles, must be left clear and open, and if by reason of obstructions placed in the street by any one and there allowed to remain by the city after notice, the street is so narrowed or closed as to cause injury without the fault of one rightfully traveling therein, the city, in my opinion, is liable for the damage occasioned thereby, under the statute providing that streets and highways shall be kept in a condition reasonably safe and fit for travel.

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JOSEPH HOUSEMAN AND MICHAEL O'BRIEN v. ROBERT M. MONTGOMERY, CIRCUIT JUDGE FOR KENT COUNTY.

Drain taxes—Branches of government—Writ of prohibition.

1. How. Stat. § 1730 is invalid in so far as it seeks to authorize the enforcement of a drain tax that is void for want of jurisdiction to levy it, or to impose upon a court such administrative duties as the appointment of surveyors to examine the premises assessed for the purpose of enabling the court to re-levy the tax.

2. The Legislature cannot validate acts that are void for jurisdictional defects.

3. The three branches of government are to be kept as distinct as possible; and legislation is invalid that attempts to confer on one powers that under the Constitution belong to another.

4. Prohibition issues to restrain a court of equity from proceeding with the exercise of power conferred upon it by an invalid act.

Motion for writ of prohibition. Submitted October 20. Granted November 4.

Maher & Felker for the writ.

M. H. Walker for respondent.

CHAMPLIN, J. The township drain commissioner of the township of Lowell, in 1878 commenced proceedings for the construction of what he designated the "Mud Lake Ditch," and an assessment of $170 as the expense of constructing a part of the ditch apportioned to the lands owned by the relators was placed upon the tax-roll of that township for the year 1880. If the tax was legal, it was a lien upon the land, and the relators filed their bill of complaint against the township drain commissioner and others to quiet their title to the land upon which the assessment was made. They based their right to relief upon the ground of the non-compliance with the law authorizing the levying of a drain tax by the officers of the township, and alleged several jurisdictional defects in the proceedings. The case came on for hearing upon the pleadings and proofs, and on the 14th day of September, 1885, the court made and entered a decree therein as follows:

"This cause having been brought on to be heard upon pleadings and proofs as to the defendant Jeremiah Lusk, and the bill of complaint taken as confessed as to the other defendants, was argued by counsel for complainants and said Jeremiah Lusk, and the same having been duly considered by the court, and it appearing to the court that there was manifest error in said proceedings taken to levy the drain tax assessed upon the southwest quarter of the northeast quarter of section thirty-five, in town six north, range nine west, in the year 1880, it is ordered, adjudged and decreed, and this court, by virtue of the power and authority therein vested, doth order, adjudge and decree, that the said so-called drain tax, and the proceedings of the township drain commissioner for the township of Lowell, undertaken and had in the year 1878, which are mentioned and set forth in said bill of complaint, be set aside and held for naught, and that the complainant may have leave to show wherein they have been injured by the irregularities and errors in said proceedings

complained of in said bill of complaint. And it is further ordered and adjudged that either party to this suit may apply to the court at a future day, within ninety days from this date, for the appointment of some person or persons to examine or survey the premises, or examine and survey the same and the ditch mentioned in said bill of complaint, with a view to ascertaining what, if any, portion of the expenses of the construction thereof is a proper charge against said lands of complainant, to the end that on the final hearing of this cause such decree as shall be just may be entered."

No authority exists for making such decree as the above, unless it is authorized by How. Stat. § 1730, being section 40 of Act No. 269 of the Session Laws of 1881, which reads as follows:

"The collection of no tax or assessment levied, or ordered to be levied, to pay for the location and construction of any drain laid out and constructed under this act, shall be perpetually enjoined or declared absolutely void, in consequence of any error of any officer or board in the location and establishment thereof, nor by reason of any error or informality appearing in the record of the proceedings by which any drain shall have been located and established, nor for want of proper release or condemnation of right of way. But the court in which any proceeding is now pending, or may hereafter be brought, to reverse or to declare void the proceedings by which any drain has been located or established, or to enjoin the tax levied to pay for the labor and costs and expenses thereof, shall, if there be manifest error in said proceedings, set the same aside and allow the plaintiff in the action to come in and show wherein he has been injured thereby. The court shall, on application of either party, appoint such person or persons to examine the premises, or to survey the same, or both, as may be deemed necessary; and the court shall, on final hearing, make such an order in the premises as shall be just and equitable, and may order such tax to remain on the roll for collection, or order the same to be relevied, or may perpetually enjoin the same, or any part thereof, or if the same shall have been paid under protest, shall order the whole, or such part thereof, as may be just and equitable, to be refunded, the costs of said proceedings to be apportioned among the parties as justice may require."

The suit in this case was not brought to enjoin the collection of the tax, but to obtain a decree declaring void the proceedings by which the drain was located and established, and the tax levied to pay for the costs and expense thereof. In so far as this statute attempts to authorize a tax or other burthen to be imposed and enforced, based upon proceedings which are void for want of jurisdiction in the officers levying the tax, it cannot be maintained. It is not competent for the Legislature to validate acts which are utterly void for jurisdictional defects, for the reason that the Constitution guarantees to every one the possession and enjoyment of his property, unless deprived thereof by due process of law.

Aside from the difficulties apparent upon the face of the statute in enforcing its provisions with uniformity, its introduction of extraneous matters and new and undefined issues in the suit, its want of prescribed method of procedure, its absence of safeguards to preserve the rights of parties,—the Constitution presents insuperable obstacles to its validity. The duties which it imposes upon the court are not judicial in their nature, but belong to the administrative branch of the government. The sending out surveyors or other persons to make examination or surveys to re-levy taxes in place of invalid ones, are each and all acts which do not pertain to the judicial branch of the government.

The design of the Constitution is that each of the three branches of the government shall be kept, so far as practicable, separate, and that one of the departments shall not exercise the powers confided by that instrument to either of the others. Any legislation, therefore, authorizing an invasion of this design, and conferring upon the judiciary the exercise of powers belonging to either of the others, cannot be regarded as valid.

A writ of prohibition must issue to the circuit court in chancery, restraining it from further proceeding upon that portion of the decree which orders and adjudges that either party to that suit may apply to the court at a future day, within ninety days from that date, for the appointment of some person or persons to examine or survey the premises,

or examine and survey the same, and the ditch mentioned in said bill of complaint, with a view of ascertaining what, if any, portion of the expenses of the construction thereof is a proper charge against the lands of complainant.

The other Justices concurred.

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The People v. James Gibson.

Burglary—Separate transactions—Impeachment.

1. An interval between two successive entrances of the same house on the same night by the same burglar does not prevent proof of what took place at the second visit in a prosecution for the crime; the two breakings constitute one continuous burglary, even though it began to be light before the burglar left the house the second time. But even if the second entrance were a separate transaction the fact could be shown by way of accounting for the whereabouts of respondent during the night.

2. A respondent swearing to an alibi was cross-examined as to what he saw of an alleged procession in the town where he claimed to have been. *Held* proper to show by others what the facts were as to the procession as bearing on the truth of his statements.

3. A judge's favorable comments upon the character of witnesses, though scarcely proper, are not clearly erroneous if borne out by undisputed evidence.

Error to Saginaw. (Gage, J.) October 22.—November 4.

Information for burglary. Respondent brings error. Affirmed.

Attorney General *Moses Taggart* for the People. Though burglary is an offense that must be committed in the darkness of night (Bish. Stat. Cr. § 276; Rosc. Crim. Ev. 345; 1 Hale P. C. 560; *Rex v. Tandy* 1 C. & P. 297; *People v. Griffin* 19 Cal. 578; *State v. Bancroft* 10 N. H. 105), and the breaking must be done by night, the entire crime is not confined to one night: Tiff. Cr. Law 617; 2 Whart. Cr. L.

§ 1592; anything connected with the main crime is res gestæ to prove it: 1 Greenl. Ev. § 108; Whart. Am. Cr. L. § 828; Bish. Cr. Pro. § 493; *People v. Mead* 50 Mich. 230; *People v. Marble* 38 Mich. 121; *People v. Doyle* 21 Mich. 221; *Com. v. Briggs* 7 Pick. 177; *Weed v. People* 56 N. Y. 628; *Coleman v. People* 58 N. Y. 555; *Heath v. Com.* 1 Rob. (Va.) 735; *Burr v. Com.* 4 Grat. 534; *Haskins v. People* 16 N. Y. 344.

John Hurst and *Trask, Grout & Smith* for respondent appellant.

MORSE, C. J. The defendant was convicted of burglary in the circuit court for the county of Saginaw. The evidence on the part of the prosecution, being principally that of one Alexander Frey, corroborated by his wife, was to the effect that on the night of July 4th, 1883, the defendant proposed to said Frey, at whose house he was stopping, to go to the dwelling-house of one John Byrne, in Lakefield, Saginaw county, and go through it; that about ten o'clock in the evening they proceeded to Byrne's house, and defendant took out a pane of glass and entered, and handed out to Frey about thirty pounds of pork, which was taken to Frey's house; that between three and four o'clock in the morning defendant proposed to go and take the remainder of the property of Byrne at his house, and by threats and commands forced Frey, who was under great fear, to go with him; that when he took the pork the first time he put the pane of glass back. When they arrived at the house the second time he took out the same pane again and entered the house as before, taking out and carrying away a large number of articles. Frey testified that when they took the things this last time it was daylight. At the close of Frey's testimony the defendant's counsel moved to strike out of the case all the evidence relating to the last breaking, as it was shown to be a separate and distinct offense, and also for the reason that it occurred by daylight. The court denied the motion, which is assigned as error. The judge also instructed the jury in this connection: "I charge you that if this house was broken and entered in the night-time by some person, and with intent to steal, and a small portion

of the property carried away, and then the party returned during the night-time and abstracted other portions of the property, that it was a continuance of the burglary;" and then proceeded to give a true definition of what was meant by night-time in the law; which portion of the charge above quoted was excepted to by defendant's counsel.

We think the two acts of taking property out of the house, and entering the house for that purpose, were in law but one transaction. It took place in one evening, and the mere fact that there was an interval between the taking of the pork and the other articles would not constitute two distinct and separate offenses. It would make no difference if it was daylight when the last things were taken out; for if the first breaking was in the night-time, and the second entry also in the night-time, the taking out of the things after daylight would not change the character of the entry. And taking into consideration the evidence of Mrs. Frey, there was sufficient proof to go to the jury that the "daylight" referred to by Mr. Frey was not the daylight of the law,—the light caused by the coming or rising sun. Even if the last breaking could be regarded as an offense separate and distinct from the first, it was, nevertheless, competent evidence. The whereabouts of the accused the whole of this evening was a legitimate subject of inquiry, especially when connected so closely as to time and place as these transactions were,—in fact, a continuous transaction passing from the house of Frey to that of Byrne and back, though there was a rest between the two trips, both of which had the same object and were taken in the same company. It was in fact and in law, however, one continuous burglary. 2 Whart. Crim. Law §§ 1592, 1593; *People v. Mead* 50 Mich. 228.

The defendant was sworn as a witness in his own behalf, and testified that he went to Saginaw City, a distance of twenty miles, on the morning of the 4th of July, and missed the train by which he intended returning home; that he stayed and witnessed the fire-works until near midnight, and then walked home, reaching there about half-past five or six o'clock on the morning of July 5th; that he was not at Byrne's

house at either time stated by Frey, and had no part in the burglary. On cross-examination he was asked if he saw the procession at Saginaw City, and replied that he did, but took but little notice of it. When asked to describe the procession he said he saw a German company of men and another company, but could not tell how they were dressed. Thought he saw a wagon fixed up with a lot of little children in it, but could describe nothing else that he saw.

In rebuttal, Albert Trask and other witnesses were permitted, under objection by defendant's counsel, to describe the procession at Saginaw City on that day as they saw it. This is also assigned as error. We can see no objection to the admission of this testimony. If the defendant had testified to seeing a procession there as he did, and there had been no procession, it would have been competent for the prosecution to show this in rebuttal; and it was equally competent, in our opinion, to show what the procession was composed of, as bearing more or less upon the truth of his statement that he was there and saw it. If the description of other witnesses agreed with defendant's it would certainly do him no harm, and if it disagreed radically, it would be proper for the jury to consider it as a circumstance bearing upon the question whether he saw it as he had testified. It was offered to show that a large number of societies and organizations, as well as wagons and carriages, were in the procession, and to show that if defendant had been in the city at the time he claimed he was and saw the procession, he could have given a better description of it. It was competent for this purpose. If it fell short of showing this, as defendant's counsel claim, we fail to see how it could have hurt defendant's cause.

In his charge to the jury the court said, speaking of Mrs. Frey as a witness: "The character of the witness is important to be taken into consideration in determining the truth of the testimony. So far as the testimony of Mrs. Frey is concerned, she is the mother of four children. There appears nothing against her character in this case except the statement of the defendant. Whatever may appear against her in this

case, so far as her character is concerned, are matters that the defendant himself has brought before the court and jury."

In speaking in the same connection of the evidence of Frey the court also said: "Now, with Mr. Frey, the other witness on the stand, there is nothing before the jury that I remember of, so far as his character or conduct heretofore is concerned, except that he is a man somewhat shiftless, and has not succeeded in making any property. I don't know that that can be laid up against him; but some of the testimony shows that he is a shiftless man to some extent. Excepting that, and his own statement that he was an accomplice in this crime, is about all we have of the history of Mr. Frey. He appears to be a man who is at work now for Mr. Merrill, and has been at work there since. We know nothing against him, as I have stated."

Both of these statements of the court were excepted to. While it would have been more in accordance with correct practice for the court to have omitted these remarks, yet from the record there is no dispute, and can be none, but they were both correct statements as to the evidence affecting the character of the two witnesses, and we are not able to say that the comments of the circuit judge were such as to call for a reversal of the judgment upon that ground alone.

The judgment of the court below is affirmed.

The other Justices concurred.

The People v. Thomas Kennedy.

Delay in sentence—Jury fees as costs.

1. A fact set up in an affidavit that has been made part of the record is taken to be true on review if no issue has been raised on the affidavit.

2. The right to pronounce sentence, if once lost, is not revived by the request of the convict's counsel for farther delay to enable him to prepare a case for review.

3. A trial judge can suspend sentence for a reasonable time for a proper purpose, such as to enable defendant to move for a new trial or take exceptions to the Supreme Court, or to enable the judge to inform himself as to what sentence he ought to inflict.

4. Where a convict's bail has been extended from time to time by successive orders suspending sentence and directing him to appear at a stated time to receive it, his sureties are released if court should not be in session at such time, and the convict himself is under no farther obligation to present himself.

5. A prisoner on bail awaiting sentence is on the same footing, so far as imprisonment goes, as if he were in confinement without bail; and if his sentence is delayed from time to time without his request until the full period of imprisonment to which he could be sentenced has expired, the court then loses jurisdiction to pronounce it and he is entitled to his liberty.

6. The jurors' per diem in a criminal case cannot be added to the fine and costs.

Error to Genesee. (Newton, J.) Oct. 22.—Nov. 4.

Complaint for selling liquor to habitual drunkard. Respondent brings error. Reversed.

Attorney General *Moses Taggart* for the People. It is discretionary to postpone sentence a reasonable time after conviction: Bish. Cr. Pro. § 880; *People v. Reilly* 53 Mich. 262; *Weaver v. People* 33 Mich. 297.

Lee & Aiken for respondent.

MORSE, C. J. The defendant was convicted before a justice of the peace of violating section 2 of Act No. 259 of the Session Laws of 1881, by selling intoxicating liquor to one Charles Neff, a person in the habit of getting intoxicated. The justice sentenced him to ten days' imprisonment in the county jail, and that he pay a fine of $25 and the costs of prosecution, assessed at $76.54, and in default of the payment of said fine and costs he should be further imprisoned, not exceeding ninety days in all. From this defendant appealed to the circuit court for Genesee county. Upon his trial there he was again convicted on the 28th day of November, 1883. On the 3d day of December following defendant was brought before the bar of the court for sen-

tence, at which time, on the motion of the court, sentence was deferred until the first day of the next term of court. On the 29th day of February, 1884, which was not on the first day of term, defendant was again brought into court, and the sentence deferred until March 10, 1884. There is no record of any court proceedings in March, but the affidavit of defendant, hereafter mentioned, shows there was no session on the 10th.

The next proceeding we find is May 26, 1884, when it appears from the journal entry of that date that on motion of the prosecuting attorney defendant was again brought before the court for sentence. His attorneys objected, alleging as their ground of exception that he should have been sentenced at the November term of 1883, and that he could not then be legally sentenced, which objection was overruled and the ruling excepted to by defendant's counsel. A desire being expressed by them to take the case to the Supreme Court, and a request made for a delay of sentence, it was again deferred until the first day of the next term, being August 18, 1884, and twenty days were given defendant in which to prepare and settle his bill of exceptions. It was also ordered that he enter into a recognizance in the sum of $500, with two sureties, to appear on the first day of next term and prosecute his bill of exceptions in the Supreme Court to effect. On the 18th day of August the defendant not appearing in court, and not having prepared or settled any bill of exceptions, on motion of the prosecuting attorney it was ordered that an attachment issue to bring him into court for sentence. The writ of attachment was issued on that day in accordance with said order, which was returned September 2, 1884, with the following indorsement:

"*State of Michigan, Genesee Co.,—ss.:* I do hereby return that after diligent search and inquiry I am unable to find the within-named Thomas Kennedy in my bailiwick.

EUGENE PARSELL, Sheriff."

Nothing further appears in the record until September 22, 1884, when an order was entered that sentence having been deferred until that term of court, and Kennedy not having

appeared, it was further deferred until the first day of the next term, and the court adjourned without day. The next step in this rather peculiar course of justice occurred on the 6th day of December, 1884, which was not the first day of term, when it was ordered by the court, after reciting the fact of conviction and other proceedings, "that said respondent appear on the first day of the next term of this court for sentence, and that sentence herein be, and the same is hereby, deferred until said time." Thereupon the court adjourned without day. The action of the court in relation to the defendant again slept until the 4th day of March, 1885, which was not the first day of term, when an order was made reciting that defendant had failed to appear according to the terms of the last order, and that attachment issue at once for the apprehension of said Kennedy, and that the sheriff "have him forthwith by his body before the court to receive that which shall then and there be enjoined upon him." The attachment was issued, and defendant brought into court by virtue of it the next day.

Defendant made a showing by affidavit setting forth that he was convicted in justice's court September 13, 1883, filed his appeal in the circuit October 8, 1883, and the subsequent proceedings until March 10, 1884; that on that day he appeared at the court-house in accordance with the order of February 29th, and was informed by the clerk that court was not in session, and thereupon went home. He did not voluntarily appear in court again until May 26, 1884, when he was present as a witness to testify in a civil cause. He objected to the jurisdiction of the court to pass sentence upon him, and prayed to be discharged. The court refused to discharge him from custody, and sentenced him to ten days in the county jail, and that he pay $25 fine and costs, amounting to $145.54. In default of payment of fine and costs at the end of the ten days, he was to be further confined until they were paid, the whole period of imprisonment not to exceed ninety days. In the items of costs as taxed against the defendant was $24 for twelve jurymen one day each.

No issue being raised upon the affidavit of defendant, and it being made a part of the record, it appears, therefore, that no court was held on the 10th day of March, 1884; that the defendant was there for sentence; and that no further notice was taken by the court of his case until May 26, 1884, when, being present as a witness, the court undertook to assume jurisdiction over him and to pass sentence. If the court had lost the right to sentence, the fact that his attorneys requested delay in passing it, when they had objected to his power to sentence, so as to make a case for review in this court, could not confer upon the circuit judge any new power to act in the premises.

It appears that until the 10th day of March, 1884, the defendant was held to appear for sentence under the recognizance he gave on appeal from justice's court. The orders made by the court, December 3, 1883, and February 29, 1884, both continued by express terms the recognizance then given. There is no doubt that the circuit court has power to defer sentence for a reasonable period for any proper purpose, such as allowing time for defendant to make a motion for new trial or take exceptions to the Supreme Court, or for the circuit judge to inform himself relative to the proper sentence to pass upon the defendant.

In this case the order of the court made on the 3d day of December, 1884, was reasonable and proper, and perhaps the circuit judge had the right and power during the next term, although he did not act upon the matter the first day thereof, to again defer sentence until the 10th day of March. But when the defendant appeared on that day in obedience to the order of February 29th, and found no court in session, his bondsmen were not only released, but we think the defendant was absolved from any further attendance upon the court. When he was convicted on the 28th day of November, 1883, if sentence had been at once imposed upon him, the utmost length of his imprisonment on account of not paying fine and costs, namely, ninety days, would have expired on or before the day the second order deferring sentence was made. If the defendant, for want of bail, had been in the county

jail, it is obvious that the circuit judge could not, upon his own motion, and without apparent reason, have deferred sentence until the 26th day of May, 1884, and then imposed upon defendant the full penalty of the law. The defendant, even after conviction, has some rights that a court is bound to respect, and is entitled to have his liberty as soon as the limit of the law, reasonably administered, will permit. The principle in this case is the same as if the defendant had been in confinement, as he was under bonds and in the custody of the court; and the deferring of sentence was not asked by him or his counsel. We think the court lost jurisdiction on the 10th of March, 1884, and that the sentence passed upon the defendant a year afterwards was null and void.

We wish, however, to call attention to the imposition of costs in this case. We know of no authority in the circuit courts to add the per diem of jurymen to the fine and costs in a case like this. It costs a litigant in a civil cause only three dollars for a jury trial, and certainly it would be monstrous to establish a practice of punishing persons convicted of misdemeanors for demanding what the Constitution of the State gives them—a trial by jury.

The judgment of the circuit court is reversed and the defendant must be discharged.

The other Justices concurred.

Abraham Barmon v. Conrad Clippert.

Replevin by mortgagee—Collusion.

1. Where replevin against a sheriff holding under attachments is brought by one who claims by virtue of chattel mortgages and sales thereunder, it is a full defense to show that plaintiff acquired his rights with knowledge of the antecedent rights of the attaching creditors.

2. In replevin against an officer levying an attachment, the proceedings in the attachment suit are admissible even though one of the plaintiffs

was misnamed therein and in the judgment, if it is also shown that an amendment to correct this error has been allowed.

3. The manner of making sale under a chattel mortgage and the statements of the mortgager with reference to paying his debts, when called on before the sale to pay a claim, may be shown in defense to an action of replevin brought by a claimant under the mortgage, if they tend to show collusion and fraud between such claimant and the mortgager.

Error to Wayne. (Speed, J.) Oct. 22.—Nov. 4.

REPLEVIN. Plaintiff brings error. Affirmed.

Ormond F. Hunt and *Griffin & Warner* for appellant.

Julian G. Dickinson for appellee.

SHERWOOD, J. Barmon brought this action of replevin against the defendant Clippert, who was sheriff of the county of Wayne, to recover possession of a quantity of goods which he had taken and held upon a writ of attachment issued in a cause commenced in the Superior Court of the city of Detroit, wherein John Wyllie and John R. Wyllie were named as plaintiffs against Jacob Barmon, defendant. A mistake was made in stating the names of the plaintiffs in the proceedings. The name John Wyllie should have been Hannah Wyllie, and when the cause came on for trial, and the facts being made to appear, the court allowed the plaintiffs to amend the proceedings by inserting therein wherever necessary the right name. The cause was tried and judgment rendered in favor of plaintiff, but in the entry thereof John Wyllie's name appeared by mistake in the place of Hannah Wyllie. The defendant relied upon the attachment proceedings in the above-mentioned cause to justify his possession. The plaintiff claimed title to the property from three sources: *first*, as purchaser upon a sale made of a portion thereof upon certain chattel mortgages executed by Jacob Barmon; *second*, as purchaser from certain parties who were purchasers at said sale; *third*, as purchaser from third persons of the property not covered by the mortgages or affected thereby.

The plaintiff is the son of Jacob Barmon, and all the parties connected with the mortgage and the sale that was made seem to have been relatives of Jacob. We are informed by the record that it contains substantially all the evidence given in the case. There is, however, when it is carefully examined, so much obscurity as to the mortgages and their number, by whom they were given, the consideration for the same, and the proceedings had thereunder from which the plaintiff deduces his title to the property replevied, as to render the consideration of the right of the parties upon the exceptions taken exceedingly difficult. It appears Jacob Barmon owned a store numbered 44 on Michigan Grand avenue in the city of Detroit, and for several years carried on business therein; that for a number of years previous to January 1, 1882, the plaintiff was his clerk; that at the time the attachment of the defendant was levied there was a stock of merchandise in the store, consisting of crockery, clothing and other goods, for which Jacob was considerably indebted to attaching creditors, among whom were the Wyllies above named; that said goods were worth about $2500; that purchases of crockery were made by the plaintiff for Jacob, at East Liverpool in the state of Ohio, in September, 1882. Considerable of this amount was on a credit of thirty days. After the expiration of this credit the stock of Jacob Barmon was claimed by the plaintiff. It was in Jacob's store, and apparently under the same control and management as before. Payment of the indebtedness in Ohio was refused, and the attachment suit in question was commenced on the 3d day of January, 1883, to recover for two of the last-mentioned purchases—one made September 30, 1882, due October 3d, and the other due December 3, 1882—and a portion of the goods in the store was seized thereon January 3, 1883, as the property of Jacob.

It is claimed that before the attachment was levied the plaintiff obtained his alleged interest by virtue of the sales under the chattel mortgages, or from those who derived title to the property at such sale. No valid proofs were made as to the terms, conditions, considerations or contents of these

mortgages, if the same had been objected to upon the trial; and such as they were [they] must be regarded as of the most unsatisfactory character. Neither the original mortgages, nor copies thereof, were offered in evidence, and the proof of the sales made thereunder is equally unsatisfactory. What notice was given of such sale, what property was sold, and for what amount, and to whom, cannot be certainly ascertained; but that Jacob Barmon was indebted to some considerable extent at the time, and for the goods pretended to be sold under the mortgage, and which was well-known to plaintiff Barmon, quite sufficiently appears from the record. The sale and transfers relied upon were claimed to be fraudulent by the defendant as to the special interest he represented, and the case was tried upon the theory on the part of the defendant that as to such interest the chattel mortgages and the pretended sales made thereunder were fraudulent and void, and the case was submitted to the jury by the learned circuit judge upon that theory under a charge entirely unexceptionable; and we dismiss from further consideration the objections thereto contained in the record.

We discover no error in the amendment allowed to the proceedings in the case of the Wyllies against Jacob Barmon, and they were properly received in evidence on the trial of the cause now before us. Testimony was offered by the defendant to show how the sale of the goods was conducted under the chattel mortgages, and the manner of making the sales. This was objected to by counsel for plaintiff as incompetent and immaterial. The evidence was properly received on the question of fraud; but as the point made was not insisted upon on the hearing, we pass this assignment without further discussion. Alfred Wilcox, an attorney-at-law, was sworn, and testified that he had claims against Jacob Barmon to the amount of about $160 for collection before the mortgage sale, and he was asked, at the time he presented them for payment, what was said by Barmon with reference to paying his debts. This was objected to upon the ground of incompetency and immateriality. We think the question not subject to the objection. The circumstances of the case tended to

show collusive fraud between the son and father, and to establish this fact the testimony was quite proper. We discover no other objections needing consideration.

The judgment must be affirmed.

The other Justices concurred.

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THE NORTHWESTERN MANUFACTURING COMPANY v. FITZWILLIAM H. CHAMBERS, A CIRCUIT JUDGE FOR WAYNE COUNTY.

Constitutional law—Oleomargarine—Titles of statutes—Definitions—Judicial knowledge.

1. Act 186 of 1885 "to prevent deception in the manufacture and sale of dairy products, and to preserve the public health," is unconstitutional in going beyond the title (1) by making such manufacture and sale a crime; (2) by providing that the State shall purchase the manufacturing machinery; (3) by requiring the Board of State Auditors to allow the sum judicially decreed to be paid for such machinery, and thereby interfering with its constitutional prerogative to pass on any claims against the State.

2. The Legislature cannot extend the scope of the title of an act by so defining it in the body of the act as to make it cover more than the natural and proper meaning of the words will warrant.

3. Neither court nor Legislature can have judicial knowledge of the merits or defects of oleomargarine so as to be able to declare its hygienic value.

4. Whether the use and manufacture of oleomargarine can be prohibited by the Legislature—*Q.*

5. Courts deal with legal questions, and not with abstract principles of public economy.

MANDAMUS. Submitted Oct. 27.—Denied Nov. 4.

George W. Moore for relator.

George F. Robison and *F. A. Baker* for respondent.

CAMPBELL, J. Relator, being a corporation engaged in making oleomargarine and butterine in the city of Detroit, proceeded, on the taking effect of Act No. 186 of the Public Acts of 1885, to surrender to the sheriff of Wayne county its machinery and apparatus and outfit, and applied to respondent under section 9 of the statute, to have its value assessed by a jury, for the purpose of getting pay for it from the State. The judge refused the application, on the ground that he did not consider the act valid. Application is made to us for a mandamus to compel him to proceed with the assessment. We intimated on the argument that we did not see our way clear to granting such a writ. The question depends on the legal efficacy of the statute.

Its title is "An act to prevent deception in the manufacture and sale of dairy products, and to preserve the public health." The first section punishes as guilty of a misdemeanor any person who shall manufacture, sell, or ship "into this State oleomargarine or butterine or any articles in semblance of butter, and not the legitimate product of the dairy, and not made exclusively of milk or cream." Whether this would exclude butter made with salt, we do not find it necessary on this hearing to determine.

The second and third sections make it punishable as a misdemeanor, with heavy punishments not differing essentially from those in the first section, if any one shall render or manufacture out of "any animal fat, or animal or vegetable oils, not produced from unadulterated milk or cream from the same, any article or product in imitation or semblance of, or designed to take the place of natural butter," or "mix, compound with, or add to, milk, cream, or butter, any acids or other deleterious substance, or any animal fats, or animal or vegetable oils, not produced from milk or cream, with design or intent to render, make, or produce any article or substance, or any human food, in imitation or semblance of natural butter," or sell, keep or offer for sale any such article, whether made here or elsewhere.

The fourth section begins with similar restrictions against doing any of these things with intent to sell them as genuine

butter, but proceeds to make the possession of any of them conclusive evidence of such a design. The fifth and sixth contain some auxiliary provisions. The seventh seems to be designed to be a vindication of the statute and its purpose, and is in these words: "This act, and each section thereof, is declared to be enacted to prevent deception in the sale of dairy products, and to preserve the public health, which is endangered by the manufacture, sale, or use of the articles or substances herein regulated or prohibited."

The eighth section repeals all laws inconsistent with this. The ninth section provides that all persons and companies having money or property invested in machinery, apparatus or stock used in connection with the manufacture of oleomargarine or any butter substitute, may surrender the property (except land and buildings) to the sheriff, whereupon an inventory is to be made, and the owners are to commence a suit against the State in the circuit court of the county for its value, to be assessed by jury. The prosecuting attorney or Attorney General may appear and defend. The jury are to assess the value on evidence, and judgment is to be rendered against the State, and execution issued against the State, to be satisfied, as far as possible, by sale of the property, and the balance is required to be allowed by the State Auditors, who are required to certify it to the Auditor General, who is required to issue his warrant on the Treasurer, and the Treasurer is required to pay it.

We are not called upon or qualified by any judicial knowledge which we possess to determine the merits or defects of the well-known substances which this statute was intended to suppress. We cannot, and the Legislature cannot, decide with any authority whether they are of hygienic value or not. That they may be lawfully made and lawfully used, unless there is some valid law to the contrary, is beyond doubt. Whether the Legislature can absolutely prevent their use or manufacture would be an interesting inquiry if this record presented it. But in our opinion it does not present it. The purpose of the statute, so far as it is lawful, must be determined by its title, and it is not competent to

use one title and explain in the body of the act that it means something else. The constitutional rule requiring the title to contain the object of the act would be a farce if there were any power in the Legislature to give new meanings to language. Section 7 is nothing more nor less than such an attempt at stretching words into an unnatural sense, and it is nugatory.

From first to last this statute is confined to what is an absolute and unqualified prohibition as a crime of any making or disposition of the articles within the State, as well as an attempted prohibition against persons in other states or foreign countries from making shipments hither. And section 9 is an attempt to make the State pay for the plant of any persons engaged in the manufacture, by subjecting it to a summary suit in a local court, subjecting its property to execution, and compelling the only constitutional body authorized to allow claims against the State to become the mere register of the circuit court's orders and transmit them to the Auditor General without inquiry. In this respect the statute is certainly remarkable.

It is plain that without this section the rest of the law could not have been passed. It must all stand or fall together. That such a peculiar provision should lurk under such a title as that of this act could never be expected by any one reading the title, and it is hardly credible that it could have been so understood by the great body of legislators. But foreign as it is, it is not much more so than the rest of the act.

The title covers nothing but deception in the "manufacture and sale of dairy products." If the addition of the words "and to preserve the public health" was meant to include anything further, it would render the title double and thus avoid the whole statute for duplicity. It could only stand as indicating the reason for preventing the deception mentioned, and would, in that point of view, rather narrow than enlarge the purpose, by confining it to unwholesome articles, which all of these articles cannot possibly be.

All that could be done under such a title would be to prohibit

and prevent the sale of such articles under false pretenses, as being pure dairy products. Such a prohibition would be no more than adding a new specified deception to the list of punishable false pretenses. And such a law would reach all the mischief aimed at by the title to this statute, and probably all of the mischief that really exists. There is no difficulty in reaching frauds and the use of unsound and dangerous products in other ways. But, whatever authority the law-making power possesses, the Constitution will not permit Legislature or citizens to be misled by embodying in any statute provisions which are not indicated by its title, to which all have a right to look for guidance in their searches after the law.

The peculiar phraseology of this act would seem to indicate that it was drawn up somewhere else, and it may possibly have been borrowed from some state where there is no requirement that titles shall be veracious indexes to legislation. Our own legislative bodies have not been trained in that way, and such is not our law.

It would be of no use to enter upon any discussion of the principles of public economy which were somewhat dwelt on upon the presentation of the case. Our proper functions confine us to legal questions.

The mandamus is refused.

The other Justices concurred.

THE COLUMBUS SEWER PIPE CO. v. AUGUST GANSER, CHAS. BRUNNER AND JOSEPH CUSSON.

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Commercial guarantee continuous or limited—Construction—Intention of sureties—Depositions.

1. Where it is doubtful whether a mercantile guaranty was meant to be continuing or limited, it is proper to show by a surety what was said, when it was executed, as to the time it should run, if such showing does not contradict its terms but aids in its interpretation.

2. Contracts are to be construed in the light of the circumstances under which they were made and the subject matter to which they relate.

3. A witness whose deposition has been admitted without objection may nevertheless be examined if present; waiver of the right to object to the deposition will not exclude his testimony.

4. Where the traveling salesman of a corporation has power to make a contract in its name, take payments thereon, receive a bond for its fulfillment and settle with the other party to the contract, his agency is sufficiently established to charge the corporation with notice of what was said and done in respect to liability on the bond at the time of the settlement.

5. A bond reciting that the principal "has arranged and is about to purchase on credit" certain goods, and declaring it to be void if he shall pay "for all goods purchased, or that he may hereafter purchase of [the obligee] according to the terms of purchase," otherwise to be "in full force and effect for the amount of his said indebtedness, not exceeding three thousand dollars" was *construed* as a commercial guaranty limited to the amount of a single purchase, or at most to what was necessary for the completion of a particular transaction to which the sureties understood the guaranty to relate. And they should have been allowed to show what credit was to be given, and what were the terms of the purchase as understood by them at the time the bond was given.

6. A guarantor is not liable beyond the express terms of his contract; but in the case of commercial guarantees drawn by artless persons, unlearned in the law, the terms are not to be construed technically to the disadvantage of the sureties and contrary to their intent.

Error to Bay. (Green, J.) Oct. 28.—Nov. 4.

ASSUMPSIT. Defendants bring error. Reversed.

A. McDonell for appellants. Where the time for which a bond is to run is uncertain the courts construe it to be a reasonable time: *Cremer v. Higginson* 1 Mas. 335; *White v. Reed* 15 Conn. 457; parol testimony is admissible to apply the instrument to the subject matter: *Coleman v. Post* 10 Mich. 422; *Bennett v. Beidler* 16 Mich. 150; *Bowker v. Johnson* 17 Mich. 42; *Kimball v. Myers* 21 Mich. 276; *Hyler v. Nolan* 45 Mich. 357; *Lee v. Wisner* 38 Mich. 87; and contemplated circumstances may be shown: *White Sewing Mach. Co. v. Mullins* 41 Mich. 341; notice to an agent of anything connected with the business in which he is employed is notice to the principal: *Astor v. Wells* 4 Wheat. 466; *Bracken v. Miller* 4 W. & S. 102; *Reed's Appeal* 34

Penn. St. 207; *Jackson v. Sharp* 9 Johns. 162; Wade on Notice § 672.

Hatch & Cooley for appellee. If a guarantor wishes to limit his obligations to a single transaction he should so express himself: *Tootle v. Elgutter* 14 Neb. 158; *Hatch v. Hobbs* 12 Gray 447; *Rapelye v. Bailey* 5 Conn. 149; *Bentz Estate* 14 Phil. 258; *Young v. Brown* 53 Wis. 333; *Pratt v. Matthews* 24 Hun 386; *Bishop v. Alcott* 21 Hun 253; authority to sell for money does not authorize a barter (*Trudo v. Anderson* 10 Mich. 357; *Kent v. Bornstein* 12 Allen 342; *Victor Sewing Mach. Co. v. Heller* 44 Wis. 265); nor a sale on credit (*Wiltshire v. Sims* 1 Camp. 258); nor does authority to take orders include receiving payment, or to sell at one place, selling at another (*Catlin v. Bell* 4 Camp. 183; *Kornemann v. Monaghan* 24 Mich. 36); nor to buy for cash, a purchase on credit: *Stubbing v. Heintz* 1 Peak N. P. 47; nor to collect a debt, an extension of time: *Hutchings v. Munger* 41 N. Y. 158; see *Bowen v. Sch. Dist.* 36 Mich. 149; *Stilwell v. Mut. L. Ins. Co.* 72 N. Y. 385; *Diversy v. Kellogg* 44 Ill. 114; Ewell's Evans on Agency 164.

SHERWOOD, J. This is an action of assumpsit brought by plaintiff to recover an amount claimed to be due to the company upon a certain bond executed by defendants to the plaintiff, on the 24th day of May, 1882, in which defendants Brunner and Cusson were sureties, the bond being a mercantile guaranty to secure to the plaintiff the purchase price of sewer-pipe purchased by defendant Ganser, and which reads as follows:

"Know all men by these presents, that we, August Ganser, Joseph Cusson and Charles Brunner, of Bay City, and Bay county, Michigan, are held and firmly bound unto the Columbus Sewer-pipe Company, a corporation duly organized under the laws of Ohio, of Columbus, Franklin county, Ohio, in the sum of three thousand ($3000) dollars, for the payment of which well and truly to be made we hereby jointly and severally bind ourselves. Signed, sealed and dated this 24th day of May, A. D. 1882.

The condition of this obligation is such that, whereas the said August Ganser has arranged and is about to purchase on credit sewer-pipe of said Columbus Sewer-pipe Company: now, if the said August Ganser shall well and truly pay said

Columbus Sewer-pipe Company for all goods purchased, or that he may hereafter purchase, of them, according to the terms of purchase, then this obligation to be void, otherwise in full force and effect for the amount of his said indebtedness not exceeding three thousand dollars."

The declaration contains a special count upon the bond, also the common counts. The defendant, one of the sureties, appeared and pleaded the general issue. The record shows a trial by jury was had in the Bay circuit, and a judgment was rendered in favor of the plaintiff for $1773.52 damages. Defendant brings error.

The plaintiff claims the bond sued upon contains a continuing guaranty, subject to termination by notice from sureties. Counsel for defendant, on the other hand, insist that the same was limited to the purchases then made, or soon thereafter to be made, for the purposes of the work then about to be undertaken by Ganser, which was the purchase price for a sufficient amount of pipe necessary to the completion of a sewer in First street, in Bay City, and that the obligation of the sureties was therefore not a continuing one. The bond not being specific as to the length of time the liability of the sureties should continue, or as to the amount of material they intended to give their obligation for, the defendant, for the purpose of aiding the court in giving the proper construction to their contract in these particulars, proposed to show by Mr. Brunner when he was upon the stand as a witness the circumstances under which the sureties signed the bond, and for that purpose asked the witness the following question: "When you signed that bond what, if anything, was said as to the time that the bond was to run?" This was objected to by plaintiff's counsel as incompetent and immaterial. Counsel for defendant then stated to the court: "I offer to show that at the time the bond was executed it was done with the express understanding between the parties that it was to be good for the sewer pipe which was to be furnished for the First street sewer only. I propose to show that that was the condition upon which the bond was executed and delivered. I want to show

the time for which it was to run." The court ruled, "That must be determined from the bond itself and the subsequent circumstances," and sustained the objection.

We think the court erred in this ruling. The testimony was competent for the purpose offered. Their responsibility was given to the plaintiff to secure it in a limited amount to aid Ganser in the purchase of materials necessary to the completion of a certain work, and if this were true it certainly would have aided the court and jury, not only in ascertaining the time the bond would run, but also the extent of the sureties' liability thereon, without in any manner changing or modifying the terms or condition of the bond. All contracts are to be construed in the light of the circumstances under which they are made, and this is no infringement of the rule that parol contemporaneous evidence is inadmissible to contradict or vary the terms of a written instrument. Showing the circumstances under which the contract is made, and the subject-matter to which it relates, does no more than aid the court and jury to better understand the true sense in which the words are used and understood by the parties. If this were not permissible, great injustice would frequently be done after the most diligent effort and best consideration that possibly could be given to the subject. There was no error in allowing the witness Sturgeon to be sworn and examined after his deposition had been read by consent of defendants' counsel. If the deposition, under the circumstances, had been objected to at the proper time the objection would have been good. The waiver of that right furnished, however, no ground for excluding the witness if present when his testimony was needed. Ganser settled up with Sturgeon for all his indebtedness to the company to May 20, 1883, and paid the company in full; and it was conceded at the circuit that at the time of the settlement no liability of the defendant Brunner existed upon the bond for anything that had been purchased up to that date, and it further appears that the liability claimed arose after that date, and not for anything purchased for First street sewer. It is unnecessary to discuss the exception taken to the charge

of the court relating to the implied notice given to Sturgeon of Brunner's non-liability for further purchases made of the plaintiff by Ganser, although we think the treatment of that subject as presented in the charge was not without damaging effect to the interest of defendants before the jury. It contained and submitted facts to be passed upon not contained in the evidence, and required them to find too much to constitute notice that Brunner terminated his liability upon the bond. The bond declared upon was made on the 24th day of May, 1882. The bond was required, and the business relating thereto and connected therewith was all done by one Charles Sturgeon, who was an agent for the plaintiff in this State. The plaintiff was a foreign corporation existing under the laws of the state of Ohio. The record shows Sturgeon was its agent and traveling salesman. He not only made the company's contract with the defendant Ganser, but took payments thereon. On the 20th day of May, 1883, he made a settlement with Ganser, and the latter paid to Sturgeon his entire indebtedness to the company. And it was conceded in the court below that all liability that had been incurred up to that time was fully settled; that if any pipe was contracted for after that time it was not for First street sewer; and it is claimed by defendants, and we think correctly, that the agency of Sturgeon thus established was sufficient to authorize them to regard him as the authorized representative of the company in what was done and said at the time of the settlement in the presence of Sturgeon, and that it was bound by his acts and omissions.

The important question in the case is raised by the defendants' fourth assignment of error, wherein the learned circuit judge gave his construction of the contract between the parties. Upon this subject he charged the jury as follows: "Now I give you gentlemen, as the legal construction of this instrument, that this was a continuing obligation of these parties to be responsible to this company, not exceeding three thousand dollars, for any indebtedness that might exist for sewer-pipe purchased on the credit of Ganser until it should be revoked,—until their obligation should be revoked

by some notice to the company that they would be no longer responsible." We are not able to agree with this construction. A guarantor is not liable beyond the express terms of his contract. *Dustin v. Hodgen* 47 Ill. 125; *Omaha Nat. Bank v. First Nat. Bank* 59 Ill. 428. This guaranty belongs to the class known as commercial guaranties, which are frequently given without much care as to the language used, as they are usually written by business rather than legal men. Technical nicety should not, therefore, be applied in their construction. A wide latitude should be allowed in their interpretation, and in discovering the intention of the parties. The rights of sureties are always favored in the law, and persons standing in that relation in this class of obligations will not be held, unless an intention to bind themselves is clearly manifested. Their intentions are alone to govern when once ascertained, and when there is difficulty in giving a satisfactory interpretation of the language used it is the duty of the court to allow every circumstance that can be legitimately brought to bear upon the question to be made use of in discovering the real purpose of the parties. The language used in the bond is not entirely free from doubt and uncertainty. A discussion of the authorities upon the point would aid but little in the solution of the questions involved, they are so conflicting. Similar questions, or the same, perhaps, under similar circumstances, have been several times before the Supreme Court of this State. See *Farmers' & Mechanics' Bank v. Kercheval* 2 Mich. 505; *Gard v. Stevens* 12 Mich. 292; *Jeudevine v. Rose* 36 Mich. 54; *Crittenden v. Fiske* 46 Mich. 70. And while no general rule can be adopted which will apply to every case, and the construction to be given in each must necessarily depend largely upon varying circumstances, still we think we may safely say that "such effect must be given to the instrument as will best accord with the intention of the parties as manifested by its terms taken in connection with the subject-matter and the surrounding circumstances. 2 Pars. Cont. 21, note; *Boston Hat Manuf'g Co. v. Messinger* 2 Pick. 228; *Dobbin v. Brad-*

ley 17 Wend. 424; *Lombard v. Fiske* 24 Me. 64; *Garrett v. Wood* 3 Kan. 232.

Applying this rule to the case before us, we are unable to hold the guaranty in question a continuing one. The amount for which it was given is clearly limited. The fact that moneys guarantied to the plaintiff were to be for the purchase price of sewer-pipe, and the amount of pipe then contemplated by the parties to be used would necessarily limit the extent of the indebtedness to be incurred by Ganser, and which was intended by the parties to be secured by the guaranty made; and when the defendants obligated themselves to "pay for all goods purchased, or that he [Ganser] may hereafter purchase, according to the terms of purchase," we think that no more than a single purchase was then contemplated by the parties; or if more than one purchase was in their minds, or anticipated by either of them, the amount of the several purchases was to be no more than was necessary for the completion of the contract for the building of First-street sewer. This, we think, is a reasonable deduction from the language used by the parties in the instrument, read in the light of the circumstances under which it was made, appearing in the record, and in the admissible testimony offered in the case. It will be noticed that the bond states that Ganser had arranged for the credit, and was about to make the purchase at the time the guaranty of the sureties was executed; but what credit was to be given, and the terms of the purchase, as understood by the parties at that time, were excluded from the jury. This testimony, undoubtedly, would have relieved the question of construction of the bond from all embarrassment, and as we have before said, should have gone to the jury.

For this, and the other errors noticed, the

Judgment must be reversed and a new trial granted.

MORSE, C. J., and CAMPBELL, J. concurred.

CHAMPLIN, J. When the minds of parties entering into a contract have met and the obligations assumed are evidenced by writing which is free from ambiguity, the intent of the

parties, whether sureties or not, must be gathered from the instrument itself. Such a contract cannot be varied or altered by parol evidence, or by proof of surrounding circumstances. It is only when the contract is open to interpretation, and the true meaning obscure or uncertain, that the law favors sureties by giving to such contract a construction most favorable to them. There is no ambiguity in the bond declared on in this case. To my mind it plainly appears from the face of the writing that the undertaking was a continuing guaranty for all indebtedness arising from purchases thereafter made upon credit to the extent of $3000, and there is nothing in the writing that limits the credit to be given and guarantied to a single purchase of $3000, or that shows any intent that the liability of the guarantors should cease when that amount in value of sewer-pipe had been purchased upon credit. The guaranty is of the *amount of the indebtedness not exceeding* $3000. I think the circuit judge was right upon this question. The sureties had a right under their contract to terminate their liability at any time as to any future sales, and I think it competent for them to give such notice to an agent of plaintiffs who had authority to sell pipe to their principal.

For rejecting the testimony offered to prove notice to the agent I concur in a reversal.

MARY J. HAMMOND, ADM'X v. JOHN PAXTON, SARAH S. PAXTON, CHAS. TOLL AND WILLIAM C. STERLING.

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Lis pendens—Transfer from one suit to another—Abandonment of suit—Notice by possession.

1. A notice lis pendens affects those only who afterwards and pending suit seek to obtain interests, as purchasers or incumbrancers, in the property it refers to; and one who has begun suit to establish an equitable lien thereon upon the basis of previous dealings with defendant does not himself become thereby a purchaser or incumbrancer

within the protection of the recording laws as against any rights acquired before the notice is filed.

2. A notice lis pendens is ineffective as against a mortgagee whose mortgage antedated the notice though it was not recorded until after the notice was filed.

3. The operation of a lis pendens as notice lasts, if the suit is not abandoned, until it is closed by final decree, provided it is prosecuted with reasonable diligence and in good faith; otherwise a purchaser who has no actual notice is not affected by it.

4 The purpose of a notice lis pendens is to prevent defendant from so alienating the property in dispute as to affect complainant's rights and to bind it wherever it may be when decree is entered.

5. A suit is abandoned if before its completion another seeking the same relief is instituted and carried to decree in its place; and the effect of a lis pendens filed on the institution of the first suit is not transferred to the other.

6. The possession and use of land by a firm is not notice to purchasers that the land is partnership assets where the record title shows that the partners are tenants-in-common owning undivided half interests therein. It is consistent with individual ownership as tenants-in-common, and will not even put purchasers upon inquiry.

7. A decree dismissing a bill of complaint can only be made by the court; it cannot be entered as of course upon default in making answer.

Appeal from Monroe. (Joslyn, J.) Oct. 28-29.—Nov. 4.

FORECLOSURE bill. Complainant appeals. Reversed.

Ira R. Grosvenor for complainant.

Gouverneur Morris for defendant Toll.

CHAMPLIN, J. The bill of complaint was filed in this case to foreclose a mortgage executed by the defendants John Paxton and Sarah S. Paxton to secure the payment of a promissory note given by John Paxton to Charles W. Hammond for borrowed money. The note and mortgage bear date the 15th day of April, 1873, and the mortgage was recorded on the 3d day of May, 1873, and covered the undivided one-half of two parcels of land in Monroe county, Michigan: one parcel known as the Jefferson S. Bond farm, containing $49\frac{31}{100}$ acres lying in the town of Raisinville; the other,

known as the "dock property," in the city of Monroe. Toll and Sterling were made parties to the bill as subsequent purchasers or incumbrancers. Sterling claims title to a small portion by deed from Toll, and he claims title through a receiver's deed, bearing date the 28th day of June, A. D. 1878. The bill was filed July 12, 1884. For several years prior to the time the mortgage was executed, Toll and Paxton had been in partnership in the business of mining or quarrying sand suitable for use in the manufacture of glass, and in preparing the same for sale, and in selling the same. For the purpose of carrying on such business they purchased the parcels of land above mentioned, and received conveyances thereof running to them jointly. On the 24th of March, 1873, Toll filed his bill of complaint in the circuit court of Monroe county in chancery, setting forth the formation of the partnership, the carrying on of the business, and claiming that the parcels of land aforesaid were purchased for partnership purposes and were partnership assets; that the firm was largely indebted, and asking a dissolution, accounting, and winding up of the concern; and that the real estate might be considered as personalty, and subjected to the payment of the firm indebtedness. On the same day a paper, which defendant Toll claims was a notice of lis pendens, was filed in the register's office, entitled in the suit. In this notice no land is described other than by reference to certain deeds, giving the names of the parties thereto, the dates, and when and where recorded. This notice was not signed by any person, but was endorsed with the names of the counsel and solicitors of the complainant. Subpœna to appear was duly issued and served upon the defendant Paxton, who caused his appearance to be entered by his solicitor on the 24th of March, 1873, and an order requiring complainant to serve a copy of the bill in fifteen days. Proof was filed on the 9th day of April of the entry of appearance, and service of notice thereof, and of said order on complainant's solicitors, on the 24th of March, 1873, and of the failure to comply with the terms of the order; and a decree was entered by defendant's solicitor on the same day dismissing the bill of complaint for want of prosecution.

On the 18th day of April, 1873, Toll filed in the same court another bill of complaint, containing the same statements and charges as the former bill, and praying the same relief. On the same day he filed in the register's office a notice of lis pendens, containing the same description of lands by reference to recorded deeds as the other lis pendens signed by the defendant's solicitors. Subpœna to appear and answer was issued and served, and Paxton appeared and answered. On the 6th day of May, 1873, Toll made a motion in the suit which had been dismissed, based upon affidavit, to open the default and set aside the interlocutory order dismissing the bill of complaint, but it does not appear that this motion was ever argued or decided. Such proceedings were had in the second suit that a decree was entered declaring the lands in question to be partnership assets, and ordering a sale thereof for the payment of debts, which was done under the authority of the court, through its receiver, and defendant Toll became the purchaser, and upon the title thus acquired he contests the validity of the mortgage. No charge is made by Toll that the complainant's testator was guilty of any fraud in loaning the money secured thereby to Paxton, or in taking the mortgage security therefor. But he claims that Charles W. Hammond, the mortgagee, was chargeable with notice that the lands upon which he took the security were partnership assets, and as such subject to the firm debts; and that this notice was both actual and constructive. The mortgagee is sought to be affected by constructive notice by reason of the lis pendens in the first suit.

The reasoning by counsel for defendant Toll is that the order dismissing the bill of complaint did not have the effect of a decree dismissing the bill; that a bill of complaint can only be dismissed out of court by a decree of the court actually pronounced and entered, and that the interlocutory order was ineffectual for that purpose, and therefore the suit was pending at the time of the execution of the mortgage, and the lis pendens was notice to the mortgagee of the facts claimed in the bill of complaint that these lands were partnership property. Or, if he is mistaken in this position, he claims

that the suit begun on the 18th of April, and notice of lis pendens filed that day, take precedence of a mortgage not recorded until the 3d day of May. The latter position cannot be maintained. The complainant in the copartnership suit did not occupy the position of a purchaser or encumbrancer of the property within the meaning of the recording laws. His object was to have an equitable lien declared which arose antecedently out of the relation of the parties to a partnership contract. He did not, at the time of filing his bill of complaint, become a purchaser or encumbrancer for value. The notice filed at that time only affected those who should obtain interests in the property after the filing of the notice during the pendency of the suit. Hammond's interest was acquired by the execution and delivery of the mortgage three days previous to that time, and consequently he was unaffected by this notice of lis pendens.

It is claimed by the complainant in the present suit brought to foreclose the mortgage, that the notice of lis pendens filed on March 24, 1873, at the time of filing the first bill of complaint, was insufficient for two reasons: 1st. In not being signed by the complainant or his solicitors; and 2d. In not containing a description of lands to be affected thereby.

The statute provides that to render the filing of a bill constructive notice to a purchaser of any real estate, the complainant shall file for record a notice of the pendency of such suit in chancery, setting forth the title of the cause and the general object thereof, together with a description of the lands to be affected thereby. How. Stat. § 6619. The view we take of the consequences arising from the disposition of the first suit renders it unnecessary to pass upon the alleged defects in the notice filed; but, assuming it to be sufficient, we shall proceed to consider its office and effect as constructive notice in this case.

The decree dismissing the bill of complaint for want of prosecution was irregularly entered. A decree of this kind can only be made by the court. It follows that the first suit was pending at the time the mortgage was executed. But the question remains, how far the pendency of that suit is

notice that affects the rights of the mortgagee, under the facts of this case. The effect of the suit, and the filing of the requisite notice under the statute upon purchaser or mortgagors pendente lite, continues through the entire time of its pendency, and ends when the suit is actually ended by a final decree. In order to thus affect such purchaser or encumbrancer with constructive notice the suit must be prosecuted with all reasonable diligence and in good faith and without unnecessary delay, and a neglect to do so will relieve a purchaser without actual notice from the effect of the lis pendens. *Murray v. Ballou* 1 Johns. Ch. 566; *Herrington v. McCollum* 73 Ill. 476; *Petree v. Bell* 2 Bush 58; *Clarkson v. Morgan* 6 B. Mon. 441; *Watson v. Wilson* 2 Dana 406; *Price v. McDonald* 1 Md. 403; *Gibler v. Trimble* 14 Ohio 323; *Trimble v. Boothby* 14 Ohio 109. The object of the notice is to prevent the party to the litigation from alienating the property in dispute so as to affect the rights of his opponent, and to bind the property, in whosoever hands it may be, with the decree when made in the cause. Hence if the suit be abandoned, or no decree made therein, the purchaser is not affected by the filing of the notice. In this case the suit was wholly abandoned. Its object was superseded by the institution of a new suit for the purpose of obtaining the identical relief prayed for in the former suit; and no effort has been made to prosecute such suit any further since the 6th day of May, 1873. The new suit has gone to a decree, and execution has been had thereof. Under these facts it is clear that the notice filed on the 24th of March, 1873, has long since ceased to be of any efficacy as notice, and the mortgagee's rights are no longer affected thereby.

The other claim of the defendant is that the mortgagor had actual notice of the fact that the real estate was partnership property, and therefore the equity of the creditors is superior to his. The evidence relied upon to prove actual notice was that the firm quarried and used the sand upon the lands first above described, and were when the first bill of complaint was filed in the actual possession thereof, and such possession continued down to the time of the execution of

the mortgage. And this possession is relied upon as notice of the fact that the land so possessed and used was partnership property. The record title, however, disclosed that Paxton and Toll were tenants-in-common of the real estate, each owning an undivided half interest therein; and the question arises whether or not the possession and use of the real estate thus owned is not as consistent with the individual ownership of each as tenant-in-common as that it is firm property. We think it is, and that a person dealing with the individual partner had a right to rely upon the record title, and there was nothing in the fact that the firm was hauling sand from these lands which indicated that they belonged to the firm, or that was sufficient to put a purchaser upon inquiry.

It is common knowledge that partnerships are found in the possession and use of real estate, of which they either have no title, or hold the same as tenants-in-common, and that such real estate forms no part of the assets of such firms. Two or more persons may be the owners of a stone quarry, and hold undivided interests in the title thereof, and there is nothing inconsistent with such ownership for these persons to form a copartnership in quarrying and marketing the stone without putting the real estate into the partnership at all. Unless there was something in the record which indicated that the land was held by the firm as partnership property, or that the property was purchased jointly with partnership funds, a purchaser in good faith for value ought to be protected. In this case there was nothing upon the records in the office of the register of deeds to indicate or suggest that the land belonged to the partnership, and the record before us, although showing that the land was conveyed to defendants jointly, does not show that the purchase was made with partnership funds. What was said in *Reynolds v. Ruckman* 35 Mich. 80, is applicable to this case, and decisive of the point in dispute.

The decree of the circuit court is reversed with costs, and the usual decree must be entered for the foreclosure of the mortgage, as prayed for in the bill.

The other Justices concurred.

Francis A. Blackmar v. Clark Cornwell.

Accounts—Credits.

A corporation gave sundry notes to a firm, both supposing that the corporation was indebted to the firm. The firm indorsed the notes, and negotiated them to strangers. The corporation made an assignment, and as it failed to pay the notes at maturity, the firm took them up. *Held*, that in an adjustment of accounts between the firm and corporation these notes should have been credited to the firm, leaving the accounts standing as if the notes had not been made. They were not proper charges against the firm until paid by the corporation.

Error to Wayne. (Full Court.) Oct. 29.—Nov. 4.

Assumpsit. Defendant brings error. Affirmed.

Cutcheon, Crane & Stellwagen for appellant.

George Gartner and *Henry M. Campbell* for appellee.

Morse, C. J. On the 9th day of November, 1882, the defendant executed and delivered to the plaintiff an agreement, of which the following is a copy:

"I have this day received of F. A. Blackmar a note signed by himself and John B. Price, constituting the firm of F. A. Blackmar & Co., for the sum of $20,000, which note is secured by a mortgage, and is payable to the order of Cornelius Cornwell. I agree to take said note and mortgage, and obtain from Cornelius Cornwell the sum of fifteen thousand dollars, and his receipt for five thousand dollars, as payment on such note, and when obtained I am to pay Cornwell, Price & Co. the amount due them of F. A. Blackmar, and of the firm of F. A. Blackmar & Co., on adjustment of accounts as shown on the books of Cornwell, Price & Co. and said F. A. Blackmar and F. A. Blackmar & Co.; the balance of said fifteen thousand dollars, after such payments, is by me to be paid to said F. A. Blackmar; also said receipt is to be handed to said Blackmar. Should said sum of money not be by me obtained on said note and mortgage within ten days, the same are to be returned to said F. A. Blackmar.

Clark Cornwell.

Dated Detroit, November 9, 1882."

The defendant received the $15,000, and with the plaintiff set about the adjustment of the accounts mentioned in the agreement. After working at the books a short time, a disagreement arose between them, and they proceeded no further with the matter. On the 17th day of November, in the same year, the defendant paid the whole sum of $15,000 over to Cornwell, Price & Co., who credited $3000 of the same to F. A. Blackmar & Co., and the balance ($12,000) to F. A. Blackmar. Not long after, the plaintiff asked defendant why he did not pay the money over to Cornwell, Price & Co., and pay the balance to plaintiff after these accounts were paid. Defendant replied that he had already paid the whole sum to them, and that there was nothing coming to plaintiff. November 27th, 1882, Cornwell, Price & Co. made a common-law assignment of all their property for the benefit of their creditors; Cornwell, Price & Co. being the corporate name of a corporation duly organized under the laws of this State. December 14th, 1882, the plaintiff commenced this action in assumpsit against the defendant by summons, and afterwards declaring on the common counts for $15,000, and filing a bill of particulars which defined the plaintiff's cause of action to be for moneys received by defendant of Cornelius Cornwell for the use and benefit of plaintiff, and interest thereon. Defendant pleaded the general issue. The case involved a long accounting, and was, by consent, referred to a referee. The referee made and reported his finding of facts in the case, and also his conclusions of law upon the same. Exceptions were taken to his findings of law, and sustained in part by the circuit judge, who entered a judgment for plaintiff of $3988. The defendant brings error.

The only matter in controversy between the parties affected by the action of the circuit judge, or really in dispute between them, regards the disposition of ten promissory notes, amounting to $6718.86, in the accounting between them. These notes were given under the following circumstances as found by the referee. They were given by Cornwell, Price, & Co. to F. A. Blackmar & Co. under the supposition, at the date of each, that the corporation was indebted to F. A.

Blackmar & Co., and received under the same idea. When so given and received it was intended by all parties that the notes should be charged against F. A. Blackmar & Co. on the books of the corporation, and that, as each became due, it should be paid by Cornwell, Price & Co. The notes were so charged upon the books before the payment of the $15,000 by the defendant to Cornwell, Price & Co. The notes were indorsed by F. A. Blackmar & Co. after receiving them, and negotiated to third persons, who held them at the time of the assignment. The corporation failing to pay them as agreed at maturity, the plaintiff took them up, paying the face of them, except in the case of six of them, upon which he paid the face of the notes, less the dividend paid by the assignee of the corporation to the holders, said dividends amounting in all to $1533.84. The plaintiff claimed before the referee that as these notes were charged against F. A. Blackmar & Co. upon the books of Cornwell, Price & Co., and Cornwell, Price & Co. had not paid them at maturity, and his firm had to take them up, and received no benefit from them in the accounting, they should be also credited to F. A. Blackmar & Co., leaving the accounts standing as if the notes had never been made. The referee refused to do this, and found, as a conclusion of law, that there was nothing due the plaintiff. The circuit judge, upon hearing the exceptions, took a different view, and allowed the credit of these notes to plaintiff.

There was another note of $620.51 given and received under the same circumstances as the ten which plaintiff also claimed should have been credited, which was not allowed by the referee. It is not clear from the record, except the amount of judgment, what action the circuit judge took in relation to this note, but we see no reason why it should not have been credited to plaintiff with the others.

It is claimed by counsel for defendant that plaintiff could not be credited with these notes in this action because he did not take any of them up until after commencement of suit; but it must be remembered that these notes were not proper charges against F. A. Blackmar & Co. until paid by Cornwell, Price & Co.; that plaintiff, when attempting to adjust

the accounts on the books with defendant, insisted that his firm should not be charged with them; that whether the notes were still, at the time this agreement was made, in the hands of F. A. Blackmar & Co., or had been negotiated by them as indorsers, to allow them to stand charged in favor of Cornwell, Price & Co., without a corresponding credit to F. A. Blackmar & Co., would be simply putting the amount of them into the pocket of the corporation without any benefit to Blackmar & Co., which was not evidently the intention of any of the parties when they were issued by the corporation and received by plaintiff's firm.

The referee found the whole credits of Cornwell, Price & Co. against F. A. Blackmar and F. A. Blackmar & Co. to be the sum of	$95,576 26
The charges of Blackmar and Blackmar & Co. allowed by him against Cornwell, P. & Co.,	76,587 96
Leaving balance due C., P. & Co., -	$18,991 30
Applying the - - - - -	15,000 00
Left still a debt of - - -	$3,991 30

The circuit judge found a balance in favor of the plaintiff of $3,348.07, and adding interest from November 19, 1882, to date of judgment, August 11th, 1885, made the sum of $3988.

It is evident from this finding that he allowed the plaintiff, in addition to the ten notes, the note of $620.51 heretofore spoken of, as follows:

Cornwell, Price & Co. credits, - -	$95,576 26
Blackmar, and F. A. B. & Co., - -	76,587 96
Balance, - - - -	$18,991 30
Deduct ten notes, - - - -	6,718 86
Balance, - - - -	$12,272 44
Deduct note, - - - -	620 51
	$11,651 93
Credit F. A. B., - - - -	15,000 00
Balance in favor plaintiff, - -	$3,348 07

We think this correct under the finding of facts by the referee, excepting that inasmuch as the plaintiff has had the benefit of the dividends paid upon six of these notes by the assignee of Cornwell, Price & Co., the defendant should be allowed a credit of the amount of the same, to wit, $1533.84, leaving to plaintiff the sum of $1814.23, with interest from November 19, 1882, to date.

Judgment will therefore be entered in this Court in favor of the plaintiff, and against the defendant, for the sum of two thousand one hundred and eighty-nine dollars and ninety-one cents ($2189.91), with costs of the court below to plaintiff, and costs of this Court to defendant.

The other Justices concurred.

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JAS. CILLEY AND LAFAYETTE HATCH v. BARNEY VAN PATTEN.

Mutual assignment among plaintiffs—Set-off.

1. Evidence of the mutual assignment of interests among several plaintiffs for the purpose of bringing joint suit, is inadmissible in an action on the common counts, such assignment not being averred in the declaration.

2. One partner paid firm debts from his private funds at the other's request on the latter's promise to repay half the amount, with interest. *Held*, that after the dissolution of the firm he could offset so much against an independant claim for which his former partner sued him at law; and he could do this though a suit in chancery was pending for a partnership accounting.

Error to Ottawa. (Arnold, J.) Oct. 29.—Nov. 4.

ASSUMPSIT. Defendant brings error. Reversed.

C. C. Howell for appellant. A partner who has contributed funds which another should have contributed can bring assumpsit for them before the partnership affairs are settled: *Kinney v. Robison* 52 Mich. 392; *Wright v. Eastman* 44

Me. 220; *Williams v. Henshaw* 11 Pick. 84; *Collamer v. Foster* 26 Vt. 758; 1 Pars. Cont. (5th ed.) 164.

Geo. A. Farr for appellee. One partner cannot sue another at law for anything received on partnership account, while partnership matters remain unadjusted: (5 Wait's A. & D. 149; *Holmes v. Higgins* 1 B. & C. 76; *Smith v. Allen* 18 Johns. 245; *Crottes v. Frigerio* 18 La. Ann. 283; *Francisco v. Fitch* 25 Barb. 130; *Martin v. Morin* 25 Mo. 360; *Hammond v. Hammond* 20 Ga. 556; *Smith v. Smith* 33 Mich. 557; *Wiggin v. Cumings* 8 Allen 353; *Burns v. Nottingham* 60 Ill. 531; Pars. Partn. (2d. ed.) 282; *Drew v. Terson* 22 Wis. 651); unless for breaches of contract not requiring an adjustment for the purpose of fixing damages: *Ridgway v. Grant* 17 Ill. 117; *Wright v. Jacobs* 61 Mo. 19; *Wiggin v. Goodwin* 63 Me. 389; but see *Wheeler v. Arnold* 30 Mich. 304; *Mitchell v. Wells* 54 Mich. 127; *Gauger v. Pautz* 45 Wis. 449; *Sprout v. Crowley* 30 Wis. 187; *Glover v. Tuck* 24 Wend. 158; *Paine v. Thacher* 25 Wend. 452; *Townsend v. Goewey* 19 Wend. 424.

SHERWOOD, J. This suit was commenced in justice's court. The declaration contained a special count, wherein the plaintiffs alleged a failure of the defendant to perform a certain contract, by the terms of which the defendant, who was owner of a vessel running between various ports on Lake Michigan, agreed to carry for plaintiffs a cargo of wood when requested from Port Sheldon to the city of Racine in the state of Wisconsin, in the month of August, 1880, and in consequence of the failure so to do, after request made, the plaintiff's property became wholly lost and destroyed. The common counts in assumpsit were added. The defendant pleaded the general issue, and gave notice of set-off in the sum of $300. No bill of items on either side was filed or demanded. The plaintiffs obtained judgment before the justice for $300. The defendant appealed to the circuit court, when the cause was again tried, with the same result as before the justice; and the case comes into this Court on error.

On the trial the plaintiffs seem to have abandoned the special count, and sought to make their case under the common counts. The plaintiff Hatch was permitted to testify that he, as an

individual, worked for defendant, in the summer of 1878, sixty-seven days, and that it was worth two dollars per day. Plaintiff Cilley also gave evidence showing that he individually performed services for the defendant amounting to $179. Plaintiffs both testified, under objection and exception, that each had assigned to the other an interest in and to their several accounts for the sole purpose of this joint action, and for no other consideration, which said assignments were received in evidence. There are no averments in the declaration, or notice in any manner to the defendant, that an assigned account or claim of any description would come in question in this suit.

In the case of *Blackwood v. Brown* 32 Mich. 107, Mr. Justice Marston uses this language, citing *Draper v. Fletcher* 26 Mich. 154, in approval: "Previous to the passage of our statute authorizing the assignee of certain choses in action not negotiable to sue and recover the same in his own name, the assignee would have had to sue in the name of the nominal, for the use of the real owner. While at present under that statute the assignee may sue in his own name, yet *he must still allege in his declaration an assignment, and prove the same upon the trial, to entitle him to recover.*" See also *Rose v. Jackson* 40 Mich. 34. We think the rule stated is a reasonable one, and often has the effect to prevent surprise, as in the present case. This evidence was not admissible under the plaintiff's declaration.

The defendant's counsel, under his notice of set-off, offered to prove that during the years 1878, 1879 and 1880, Van Patten and Hatch were partners together in the lumber business at Port Sheldon, and during 1878 the business did not pay current expenses, and debts were pressing the firm. Mr. Hatch had no money or property with which to pay or meet these firm obligations, and he then and there agreed with and promised Mr. Van Patten that if he would pay these firm debts from his own private funds, he (Hatch) would repay to Van Patten one half of the amount of the debts so paid by him, with interest at seven per cent. per annum: that under such an arrangement Mr. Van Patten then paid $335

of firm obligations, and thus enabled the business to proceed. These facts defendant was not permitted to show as an offset to Mr. Hatch's claim for his individual services.

This was error. The testimony was excluded, as appears by the record, on the ground that it was partnership matter, and that a suit between Van Patten and Hatch was then pending in chancery for a partnership accounting. These grounds are untenable under the rulings of this Court.

The judgment must be reversed and a new trial granted

The other Justices concurred.

ADOLPH KROLIK ET AL. v. CHAS. S. BULKLEY, ELLA M. BULKLEY, CHAS. ROOT AND WM. H. STRONG.

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Creditor's bill—Accounting—Jurisdiction as to lands.

1. A judgment creditor's bill alleging the issue of execution and its return unsatisfied and the disposal of a large part of defendants' goods, may properly call for an accounting for the money received therefor, and is maintainable, *it seems*, though it asks that encumbrances be set aside without establishing the existence of a lien on the property.
2. A bill in aid of execution cannot affect lands in other counties than that in which it is filed. How. Stat. § 6612.
3. The dismissal of a judgment creditor's bill may be without prejudice where the sole ground of dismissal is that lands sought to be reached by it were beyond the jurisdiction of the court.

Appeal from Wayne. (Jennison, J.) Oct. 29.— Nov. 4.

CREDITOR'S bill. Defendants appeal. Reversed.

Griffin & Warner for complainants.

Meddaugh, Driggs & Harmon for defendants.

CHAMPLIN, J. Defendants Ella M. Bulkley, Charles Root and William H. Strong appealed from a decretal order over-

ruling a general demurrer interposed by them to complainants' bill of complaint, which was filed in January, 1885. The bill alleges that in April, 1884, judgments were rendered in the circuit court for the county of Clinton, against Charles S. Bulkley in favor of complainants amounting in the aggregate to $1314.16; that on the 21st day of May, executions were issued on these judgments, and that, on the 19th day of July, the sheriff returned on these executions that the said Bulkley had no goods or chattels, lands, tenements, real estate or chattels real in said Clinton county, whereof he could cause to be made the damages or costs mentioned in the writs, or any part thereof.

The bill further alleges that these several judgments remain unpaid and in full force, and that the said Bulkley has equitable interests, things in action, money, debts due him, etc., which cannot be reached by execution.

The allegations of the bill up to this point, are those of a judgment creditor's bill against Chas. S. Bulkley, and are in usual form.

The bill further alleges that on the 7th day of March, 1883, said Chas. S. Bulkley, gave to Chas. Root & Co. a chattel mortgage on his entire stock in trade (he being a general country merchant), in Ovid, Clinton County, for the sum of $4025, subject to a prior chattel mortgage for $1500; that this mortgage to Chas. Root & Co., was not filed until August 3d thereafter, and that in the meantime, complainants became creditors of Bulkley, without knowledge of any mortgage or debt to Chas. Root & Co., and upon the faith that said stock was unincumbered, and without knowledge that Bulkley was in failing or embarrassed circumstances, and that Chas. Root & Co. purposely withheld said mortgage from record, for the purpose of concealing the actual financial condition of said Bulkley and permitting him to maintain a fictitious financial standing before the public generally and the complainants in particular.

The bill further alleges that on the 8th day of August, 1883, said Bulkley gave to Chas. Root & Co., another mortgage on said stock of goods, for $6630.90 which sum was

made up of the amount of the first mortgage to Chas. Root & Co., and a lien by way of attachment and chattel mortgage to De Camp, Upton & Co., of Ovid, for about $2700, which Chas. Root & Co. were required to take up and pay to protect their mortgage interest; that the only consideration of the second mortgage was the $2700 aforesaid and the indebtedness secured by the first mortgage; that the two mortgages were allowed to remain on file as a false cover of the goods; that sometime subsequent to the mortgage of August 8th, but at what date complainants are unable to state, Root & Co. took possession of the property covered by the mortgage, under and by virtue of the mortgage, and by virtue of some further or other arrangement between said Bulkley and Root & Co., the character of which complainants are unable to state, and have since continued in possession by and through themselves, or Chas. S. and Ella M. Bulkley, or one of them; and have sold the property, or a large part thereof, and have applied the proceeds on the mortgage indebtedness hereinbefore specified; that said Root & Co. still have possession of the property, or such as has not been sold, and claim the right to continue in possession, and sell; and that such claim on the part of Root & Co. hinders, delays and obstructs complainants in the collection of their demand.

That to further secure the said indebtedness of $6630.90, Chas. S. Bulkley and Ella M. Bulkley, his wife, gave a real estate mortgage or mortgages to Chas. Root & Co., upon the store then occupied by said Bulkley and wife in Ovid, and also upon the house and lot they occupied. With respect to this store it is alleged that although standing in the name of Ella M. Bulkley, it was bought and paid for out of the proceeds of her husband's business, and from money which should have been applied to the payment of his debts, and that by withdrawal of the funds from the business and the investment in said store, the mercantile indebtedness was largely incurred, and the said Bulkley thereby became embarrassed and unable to pay his debts, and that the title to said store is held in fraud of creditors; that said Bulkley and wife

have resided and carried on the business of a general country merchant at Ovid, for several years past; that said Ella M. subsequently became invested with the title and apparent ownership of said store,—a description of which complainants are unable to give; that it is of the value of about $5000, and was paid for out of the proceeds of the store; that she paid no consideration therefor, and that a trust therein results in favor of creditors.

The bill prays that the mortgages to Chas. Root & Co. be set aside, and that they may be required to account for all money received thereon, or that the court declare what priority upon the stock of goods they are entitled to, and if entitled to any, and any part of said mortgages are valid and binding and have priority over the claims of complainants, that Chas. Root & Co. be required to account to them for the amounts due to them; that if the store property be decreed to be held in trust for creditors, that the mortgage to Chas. Root & Co. thereon be deferred to complainants' claims, or that said Chas. Root & Co. be required to first resort to any mortgage they may have upon such store property or otherwise; that Chas. Root & Co. be decreed to pay to complainants such sums as they may have received on said mortgages and which may be equitably due complainants, and that as against Ella M. Bulkley the store property be decreed to be held in fraud of complainants, and a trust therein in their favor be decreed, and that she be decreed to pay complainants the entire sums of money or indebtedness which may be found to exist from her to said Chas. S. Bulkley, or held by her for his use and benefit. In support of the demurrer the defendants urge that the complainants cannot attack these incumbrances without first obtaining a lien upon the property. That while equity has jurisdiction of frauds, it does not collect debts. That the stock of goods in question was and is subject to levy; and without a levy equity will not interfere. But the bill shows the issue and return of the executions unsatisfied, and it further shows that a large part of the goods have been sold and disposed of, and as to these the complainants under the statements contained in

their bill have the right to a decree requiring the defendants to account.

The statute requires all actions of a local nature to be brought in the county where the cause of action arises. Bills in equity which affect interests in real estate are required to be filed in the county where the lands or some portion of them are situated. How. Stat. § 6612. The bill in this case seeks to affect the interests of Mrs. Bulkley in lands located in Clinton county. As to such lands, the circuit court for the county of Wayne has no jurisdiction.

The demurrer on behalf of the defendant Ella M. Bulkley will be sustained, and the bill of complaint dismissed as to her without prejudice with costs. As to the other defendants it is sufficient at this time to say that the bill, which the demurrer admits to be true, states a case which would entitle the complainant to some relief, and is not therefore devoid of equity.

The demurrer for want of equity as to these defendants was rightly overruled by the court below, and the decree entered there is affirmed as to the defendants Charles Root and William H. Strong, with costs. Leave is granted them to answer if they desire to do so in twenty days after notice to their solicitors that the record is remanded to the court below. Let a decree be entered accordingly and the record remanded for further proceedings.

The other Justices concurred.

CHARLES R. CURTIS v. STEPHEN H. NORTON.

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Injunction—Interference with mill-power—Sale of mill—Maps.

1. Injunction lies at the suit of one who has purchased a mill on the foreclosure of a mortgage thereon, to restrain the former owner from meddling with the dam and race to complainant's injury, if they are the only source of supply and remain on the latter's premises.

2. The sale of a mill and of the power therefor presumably includes the actual appurtenances as between the parties, if not as to strangers.

3. Maps or plans ought to be furnished in the record where the case is unintelligible without.

Appeal from Cass. (A. J. Smith, J.) Oct. 29.—Nov. 4.

INJUNCTION bill. Complainant appeals. Affirmed.

O. W. Coolidge for complainant.

F. J. Atwell for defendant.

CAMPBELL, J. Complainant is owner of a mill at Pokagon in Cass county, the title to which is traced through mortgage foreclosures back to defendant, who owned it in 1869. In that year, and before he mortgaged to Mr. Paine, complainant's grantor, defendant, placed his dam on a piece of land which is not included in the mill lands as specifically described, and this dam and the race connected with it furnished the water to the mill. Complainant bought in 1883 when defendant was in possession. After defendant went out, he let out the water from his dam, and the bill in this case was filed to enjoin him against meddling with it to complainant's detriment. The court below granted the relief prayed, and defendant appealed.

The case comes up in an unsatisfactory shape, with nothing in the printed record from which we can understand the precise positions of the premises in question and those near by. But enough appears to show that defendant is interfering with the only supply which was adequate for the mill and connected with it. Presumptively the sale of a mill and power will include the actual appurtenances, as between the parties, if not as to strangers. We see nothing in the case as printed to satisfy us that the circuit judge, whose familiarity with the neighborhood probably accounts for the omission to furnish maps and plans to us who are not familiar with it, did not come to a correct conclusion on the facts and law of the case. It is not likely that any one understood

that complainant was buying a practically useless mill, or one which could not be run without a new race and dam.

We think the decree should be affirmed with costs.

The other Justices concurred.

ELKANAH D. RICHMOND AND EDWARD R. HARRIS v. WILLIAM F. ATKINSON.

Labor and materials—Hearsay—Evidence of value—Bill of particulars—Models—Visitation by jury.

1. In an action for labor and materials furnished, a plaintiff was asked "How about the time?" and was allowed to answer "It was correct as given by my foreman." Another plaintiff who testified on the subject stated that he knew nothing about it except what the workmen had told him. It did not appear who the foreman was, and no excuse was given for not producing his testimony or that of the workmen. *Held*, that the evidence was hearsay and inadmissible.

2. In an action on the common counts for the value of labor and materials it is error to admit testimony that the prices set down in the bill of particulars are the same as are charged other people; this has no tendency to prove value.

3. A plaintiff cannot be permitted to testify that his bill of particulars is a correct statement after he has testified that it does not refresh his memory as to items to which he cannot testify without it, and of which he has no personal knowledge.

4. A model may properly be exhibited to the jury in a case involving questions of construction, if there is testimony that it correctly represents distances and dimensions; its correctness, if disputed, is a question for the jury.

5. It is within a court's discretion to refuse to allow a jury to visit the premises where a job of building was done, the value of which is contested.

Error to the Superior Court of Detroit. (Chipman, J.) October 30.—November 4.

ASSUMPSIT. Defendant brings error. Reversed.

Atkinson & Atkinson for appellant.

Geo. W. Bates for appellees.

MORSE, C. J. Plaintiffs brought suit against defendant, declaring on the common counts and filing a bill of particulars charging defendant with various materials and labor of men in enlarging and repairing a house. Defendant pleaded the general issue with notice that under such issue he would prove that the workmanship was poor and the materials used of an inferior quality, and claiming damages in recoupment.

One of the plaintiffs (Richmond) testified that he kept the books of the plaintiffs, and put upon them such items of labor and materials as were reported to him by his men; that personally he knew nothing of the items charged, except that he was on the job once a week to get the men's time. The following question was asked the witness in relation to the bill of particulars. *Question.* "How about the time?" Under objection he answered: "It was correct, as given by my foreman." It does not appear who the foreman was. No testimony was given by the plaintiffs or offered, except that of this witness and the plaintiff Harris who gave evidence that he knew nothing of the time except what the men reported to him. No excuse whatever was given for the absence of the foreman on the trial, or any reason why his testimony or that of the men who worked on the job could not be procured. As quite a large portion of the judgment against defendant was for the labor of these men, of which these two witnesses knew nothing but hearsay, the allowance of this question and answer was error. The plaintiffs ought to have been able to furnish better proof than this of the labor items. Richmond also testified under objection that the charges for work and materials upon the bill of particulars were the prices they charged other people. There was also error in this. No testimony was given as to what the work was reasonably worth, and the fact that plaintiff charged defendant the same as he did others has no ten-

dency to prove the same. Harris, when on the stand, testified that he was the purchaser of all the materials, but could not testify as to the amount of work except as it was reported to him by the men at the time. He testified that the items on the bill of particulars did not refresh his memory as to those items, which he could not testify to without it, yet he was permitted, under objection of defendant's counsel, to answer the following question: "I ask you to state whether the bill of particulars is not a correct statement of your account against Mr. Atkinson." *Answer.* "It is." This was also error. He could not be allowed to swear at wholesale to a bill of items being a correct statement, when he had admitted that he had no personal knowledge of a portion of them.

In *Hudnutt v. Comstock* 50 Mich. 601, and *Cameron v. Blackman* 39 Mich. 108, the witnesses were allowed to refer to and read items in a bill of particulars because they testified to a complete recollection and knowledge of the facts when their memories were refreshed by the items. And in *Cool v. Snover* 38 Mich. 563, the witness testified that the bill was a correct list of the articles personally sold by him to the defendant. In these cases the evidence was proper, but here the witness was allowed to swear that the bill as a whole was a correct statement, when he confessedly had no knowledge whatever except hearsay of the labor items, and looking at the bill could and did in no manner aid him in his memory or knowledge of the time charged for work therein.

As regards the exhibition of the model upon the trial, by means of which the plaintiff Harris undertook to show that he could not properly bridge the joist, we think no error was committed in allowing the use of it to illustrate the situation to the jury. The defendant denied the correctness of the model, but Harris testified that it was a correct representation as to distance, and dimensions of the floor that was actually put in, and it was for the jury to settle that question. Nor do we think the court erred in refusing to allow the jury to visit the premises and inspect the work.

The statute makes it discretionary with the trial judge, and we do not think the discretion was abused.

For the errors above noted the judgment of the court below must be

Reversed, with costs of this Court, and a new trial granted.

The other Justices concurred.

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ENOS PUTNAM v. CITY OF GRAND RAPIDS AND THE ELECTRIC LIGHT & POWER COMPANY.

Injunction by tax-payers to restrain enforcement of municipal contracts-Street lighting—Current liabilities of citizens.

1. Owners of taxable property can maintain a bill to enjoin the municipality in which it lies from executing a contract if its effect would be to increase their burdens by way of taxation to an amount sufficient to bring the case within the jurisdiction of equity.

2. Complainants may properly join in an injunction bill where their grievance, though not joint, is common, and the cause thereof and the relief they seek is the same.

3. Courts cannot stand between the public and their regularly elected authorities unless the latter exceed their powers; so long as they do not, the people must bear the consequences of their folly or choose wiser representatives; the discretion necessarily vested in a public functionary cannot be reviewed.

4. Equity cannot interfere with municipal contracts on the ground merely that they are impolitic or unwise, but it may if they violate the municipal charter.

5. Charter provisions empowering the common council to regulate the lighting of public lamps and to employ a suitable person to superintend them do not confine the management of the lighting apparatus, or of any part of it, to the city government, nor exclude the use of gas or electricity controlled from a central point. Such provisions are neither exhaustive nor imperative.

6. Charter provisions prohibiting the creation of municipal liabilities in any one year exceeding the amount to be raised by tax and providing that payments on a municipal contract shall be made from sums raised by tax for the year for which such contract is made, have the

effect of forbidding the creation of future responsibility for annual current expenses.

7. Towers for electric lights are not "local improvements" any more than lamp-posts are, so long, at least, as the system of lighting is not owned by the municipality.

Appeal from the Superior Court of Grand Rapids. (Parrish, J.) October 30.—November 4.

INJUNCTION bill. Defendants appeal. Affirmed.

Smiley & Earle for complainants, as to the right of a tax-payer to file the bill in this case, cited *Curtenius v. Hoyt* 37 Mich. 583; *Callam v. City of Saginaw* 50 Mich. 7; Dill. Mun. Corp. §§ 914, 921; High on Inj. (2d ed.) §§1298–1300; *Crampton v. Zabriskie* 101 U. S. 601.

J. W. Ransom for the defendant City of Grand Rapids, and *Blair, Kingsley & Kleinhans* for defendant Electric Light Company. Individuals cannot maintain a bill to restrain the lawful authorities of a municipality from taking action, on the ground merely that it is in excess of corporate power: *Miller v. Grandy* 13 Mich. 548; *People v. Regents* 4 Mich. 98; *People v. State Prison Inspectors* id. 187; *Davis v. Mayor* 14 N. Y. 506; *Doolittle v. Broome County Supervisors* 18 N. Y. 155; *Roosevelt v. Draper* 23 N. Y. 318; *Hale v. Cushman* 6 Met. 425; legislative discretion is not to be interfered with by courts: *Torrent v. Muskegon* 47 Mich. 115; *Baker v. Boston* 12 Pick. 184; *Moses v. Risdon* 46 Ia. 251; and a municipality may therefore make contracts running for a series of years: *Indianapolis v. Ind. Gas Co.* 66 Ind. 396; *Lord v. Oconto* 47 Wis. 386; *Gale v. Kalamazoo* 23 Mich. 344; *Richmond Gas Co. v. Middletown* 59 N. Y. 233; *Western Sav. Fund Society v. Philadelphia* 31 Penn. St. 183, 189; *Langdon v. Mayor* 93 N. Y. 130; *Weston v. Syracuse* 17 N. Y. 110; *Grant v. Davenport* 36 Ia. 396; *Valparaiso v. Gardner* 97 Ind. 1; *East St. Louis v. Gas Co.* 98 Ill. 429; *Quincy v. Bull* 106 Ill. 337; *Vincennes v. Callender* 86 Ind. 484; *Neb. City v. Gas Co.* 9 Neb. 339.

CAMPBELL, J. The complainants, who are tax-payers in Grand Rapids, filed their bill to prevent the execution of a contract whereby the city was to make an arrangement with the Electric Light Company to have twenty-five towers put up

in various places and electric lights furnished for five years in the times and manner specified, at twenty-six thousand dollars a year, at the end of which period all the fixed property was to belong to the city, if desired.

The resolutions which authorized this were returned unapproved by the mayor to the common council, and passed over his veto, which was put on the ground of impolicy in making what he considered an experiment. It is not claimed that there is anything illegal in the amount of the appropriation, if otherwise lawful. The chief ground of objection is the creation of an undertaking extending over more than one year. The injunction was granted.

A preliminary objection was made by defendants, on the ground that complainants could not be allowed as private citizens to interfere with a matter of public concern. There are certainly many cases in which they could not legally represent the public and could have no private footing as complainants. But in the present case they appear as owners of taxable property each of whose burdens will probably exceed the sum required to give equity jurisdiction, if the contract stands. This private grievance has been heretofore considered sufficient to authorize them to interfere on their own account, and while their grievance is not joint, it is a common one for the redress of which, if grantable at all, there is no serious objection to their making common cause. Their allegations of the amount of their respective interests are not controverted, and bring them within the statute.

Some part of the bill is taken up with complaints of the impropriety of the arrangement proposed, and various objections are pointed out. These considerations have nothing to do with the legal aspect of the case. The question before us is one of power and not of wisdom, and we are bound to decide it on strictly legal grounds. If the charter would be violated by the proposed contract, the illegality involves such a grievance as may be dealt with in a court of equity, and the injunction must stand. If not, then the bill cannot be maintained.

Counsel for complainant did not on the argument dwell much upon such parts of the case as rest on assertions of the

impropriety of the contract as unwarranted by the true policy of the city. It is alleged to be more expensive than other modes of lighting, and in other ways impolitic and not desirable. But we find no charges of dishonest or fraudulent conduct.

There has been an idea in some places, as apparent from reported cases, that courts of equity can always stand between citizens and municipal authorities, to shield them from abuses and extravagant action. This is not one of the functions of courts. It is one of the incidents of popular government that the people must bear the consequences of the mistakes of their representatives. No court can save them from this experience. It is one of the means of teaching the necessity of choosing proper servants, and being vigilant to obtain reform from abuses. The discretion which is necessarily vested in public functionaries cannot be reviewed by any one else. If they go beyond the range of the discretion given them, and mischief happens or is likely to happen, a case arises for the interference of judicial authority to keep them within the lines bounding their agency. But their mistakes within those lines are beyond legal redress. Whether the present case authorizes it depends upon the effect of the city charter.

Although our legislation on municipal subjects has been unstable, yet every city charter is enacted and intended for permanence, and in view of both extended bounds and growing population. It usually leaves a wide range of discretion in the choice of ways and means of promoting public as well as private convenience. It does not require the community to be deprived of the comfort and convenience of new inventions and improvements, and it usually does not restrict it to any fixed ways. There have been many changes in methods of paving, lighting, building and furnishing water supplies and other needs of civilization. Many of these changes are experimental, and they are not all useful. But such as they are, they are made because they commend themselves to public confidence, or are supposed to do so, and unless restricted by some legal provision a large choice is given to the

corporation. The present controversy relates to a new method of lighting which has been allowed by the Legislature to be managed by corporations, and to have rights of occupancy in streets and other places, to place its lights and the apparatus for furnishing them the means of illumination by the necessary wires and fixtures. How. Stat. § 4191. The law has placed it on as favorable a footing as gas or oil lighting, and permitted the companies to contract with cities for easements and for public lighting. It is not claimed that the city of Grand Rapids cannot contract on some terms for electric lighting. The only claim tangibly presented by the bill is whether it can be done for more than one year, and whether it can be done without giving the management of the public lights to public officers.

The provisions of the charter in regard to the latter branch of the subject are found in subdivisions 25 and 36 of the 10th section of title 3, and section 11 of the same title. These, so far as they relate to this matter, are as follows:

"*Twenty-fifth.* To regulate the lighting of the streets and alleys, and the protection and safety of the public lamps, and to employ a suitable person to superintend the same, to prescribe his duties, and fix the compensation therefor.

Thirty-sixth. To provide for and regulate the lighting of public lamps and the erection of lamps and lamp-posts and suitable hitching-posts; to prohibit all practices, amusements and doings in said streets, having a tendency to frighten teams and horses, or dangerous to life or property; to remove or cause to be removed therefrom all wells and structures that may be liable to fall therein, so as to endanger life or property.

Section 11. The common council may by ordinance or otherwise ascertain, establish and settle the boundaries of all streets and alleys in said city, and prevent and remove all encumbrances and encroachments thereon, and exercise all other powers conferred upon them by this act in relation to highways, common or other schools, the prevention of fires, the levying of taxes, the supplying of the city with gas and water, and all other subjects of municipal regulation not herein expressly provided."

It is difficult to see how any of these provisions can be held to confine the city to such methods of lighting as would

require the lighting apparatus to be run by the city in whole or in part. There is nothing in either gas or electric lighting which would prevent putting some one in supervision of the matter so far as to see that the lighting is not neglected, and the apparatus is not injured. The functions of any city servant in looking after the mere lighting and extinguishment of gas would not be very important in themselves, as compared with the supply of gas. But it is manifest that these provisions are not intended to exhaust the subjects they refer to, or to be imperative. If they should be so construed there are many matters of daily necessity entirely omitted. Even gas is only referred to by a subsequent section, 11, which is not to be regarded as repugnant, but which, if omitted, would on such a theory of construction, confine the city to the use of lamps instead.

If there is any power to employ electric lighting,—and there can be no doubt of this, especially in view of the subsequent statute of 1881, which expressly requires cities to allow that light to be introduced, and permits its use for public lighting,—then it must be received in conformity with its nature, which so far at least requires the power which supplies electricity to be transmitted to many lights from one or more central stations, as gas is furnished. The statute contemplates that the companies may do this, and that cities may prefer it to erecting their own works. It would require a much larger inferential power under this charter to establish their own supply than to avail themselves of the supply at hand. No city could be administered upon the merely expressed powers of its charter, without the aid of some implications. The only power expressly given to the city of Detroit to light its streets is in the single clause—"to provide for and regulate the lighting of the said avenues, streets and public places, and the erection of lamps and lamp-posts therein." Ch. 7, § 117. But in *Attorney General v. City of Detroit* 55 Mich. 181, where the representative of the State filed a bill to prevent the completion of a contract for electric lighting, it was not suggested that the city was exceeding its chartered powers in this respect, which would

have been a good ground of complaint, but only that there was some technical irregularity, which, in the opinion of the court, did not concern the State at large, and could not be complained of by the Attorney General.

But the question how far a contract would be valid extending over several years, and requiring annual payments, is a more serious one. The authorities cited on the argument do not favor the idea that there can be no such general power, but they place the inability where it exists, upon charter provisions. If, however, there is any charter provision restraining such contracts, it must be enforced.

The fact that taxes must be raised annually and upon annual estimates is not of itself any objection, for that is usual everywhere, and such estimates often include liabilities for salaries, interest, and other charges which must be met, whether willingly or not, and for which the municipal body must provide. But it is not uncommon to confine cities in their current expenditures to current receipts, and to prevent the creation of future liabilities for purposes that may not seem wise in the future, however prudent they may seem in the present.

Section 20 of title 5 of the charter of Grand Rapids is as follows:

"It shall not be lawful for the common council (except as herein otherwise provided) to borrow money or authorize the creation of any liability or indebtedness against said city in any one year, exceeding in the aggregate the amount which by this act may be raised by tax for such year, and in case any sum or sums of money shall be borrowed by said common council in any one year, or the said common council or any officer thereof shall enter into any contracts for the payment of money binding upon said city, the same shall be paid out of the sums raised by tax for such year, if the payment thereof is not otherwise provided, and all sums of money borrowed by said city shall be applied to the purposes for which the same was borrowed, and for no other purpose whatsoever; but nothing in this act contained shall be construed to prohibit said common council from making assessments and levying and collecting taxes for the purpose of local improvements."

Aside from borrowing money on time and making local

improvements, it is difficult to see what contracts can often be required by a city, that do not relate to its ordinary business and liabilities. And it seems to us that the fair meaning of section 20 will not permit the creation of future responsibility for annual current expenses. The section seems plainly designed to express, although somewhat clumsily, the idea that contracts not otherwise provided for must contemplate fulfillment and payment by means raised the same year. In the Detroit charter it is required that the tax shall be actually laid in advance of the making of the contract, as was done in the electric light suit entitled *Attorney General v. City of Detroit,* before referred to. In *Garrison v. Chicago* 7 Biss. 480, a time contract was held void because no appropriation had been made in advance, as required by charter. Similar doctrine was laid down in other cases cited on the argument. It is entirely uncertain what any city's future means of payment will be, and a change of boundaries, or a great destruction of property or other casualty, might not only reduce the results of a two per cent. tax in Grand Rapids, but might also require such other and unforeseen outlays that the $26,000 a year provided for by this contract would cripple its resources for necessary uses.

This system of towers cannot, in our opinion, be included under the head of "*local improvements,*" for which there is an enlarged power of taxing and assessing. We must consider that phrase in connection with the rest of the charter. These towers are only means of using the electric light, and whatever might have been the case had the city set up its own engines and power, these towers by themselves are of no use, unless furnished with light, and are no more local improvements than lamp-posts and other fixtures.

We place our decision entirely on the restrictions of the charter, and not upon any general incapacity had the charter been silent. In the face of the charter provision the array of authorities allowing time contracts by cities, which is certainly very respectable, does not apply.

The decree must be affirmed.

The other Justices concurred.

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Louis J. Bedford v. Daniel J. Penny.

Good faith of purchaser—Recital of facts in request to charge—Knowledge and fraudulent intent—Abuses of trial.

1. Where the good faith of one who buys a stock of goods is in question in a contest between himself and an officer who has taken them under an attachment, the purchaser may properly testify that he bought them in good faith for what he considered a full consideration and with no other purpose than to get the stock at a fair price.

2. A request to charge which begins with a recital of facts as undisputed and closes with several propositions which the court is expected to charge "upon these undisputed facts" must be considered a single request; and if any part of the statement of facts is incorrect the whole request must fail and the judge is right in refusing to give it. Nor can he declare a given state of facts as to which there is any contest without usurping the province of the jury.

3. Actual participation by a purchaser in the fraudulent intent with which one makes a sale to defraud his creditors is not a necessary condition to its avoidance; if the purchaser is not a creditor it is enough that he knows what would put a prudent man upon inquiry as to the motive of the sale.

4. Where counsel, in summing up, appeal to a jury's prejudice against non-residents and make injurious remarks not justified by evidence, and exception is taken to this conduct, it is error if the trial judge omits to stop it and counteract its effect. So *held* where counsel said that attaching creditors adversely interested were hogs and wanted to gobble up all the property.

Error to St. Clair. (Stevens, J.) Oct. 29.—Nov. 11.

Replevin. Defendant brings error. Reversed.

Chadwick & Wood for appellant.

Stevenson & Phillips for appellee.

Morse, C. J. July 8, 1884, F. E. Starkweather & Co., who were engaged in the hardware trade at Port Huron, Michigan, sold their stock to the plaintiff. Pratt & Co., creditors of Starkweather & Co., attached the goods in question in this suit as the property of Starkweather & Co.,

claiming the sale to plaintiff to be fraudulent, as being made with the intent to hinder, delay or defraud their creditors in the collection of their debts. The plaintiff brought replevin for the property against the defendant who held it as deputy sheriff of St. Clair county under the attachment aforesaid. Plaintiff, previous to the sale of the goods and accounts of the Starkweather firm to him, had been a clerk in their store for about eight months, was familiar with the books, and knew the actual financial condition of the firm at the time of the sale. The firm was composed of Fred. E. Starkweather, William Curtis, and Benjamin Hillier. Curtis and Hillier attended to other business, and left the entire management of the firm matters to Starkweather. The business, under his management, did not prosper, and getting involved to a large extent, a week or ten days before the sale to plaintiff, Starkweather saw Curtis and Hillier, and explained to them the situation of affairs, and they, acting upon his statement, made the sale to plaintiff, asking Starkweather to sign the bill of sale, which he did without knowing the terms and conditions of the transfer. The theory of defendant upon the trial was that plaintiff, being a clerk of the firm, and knowing the shape of their affairs, had such knowledge of their financial embarrassment, that if the sale on their part was fraudulent as against their creditors, it was also fraudulent on the part of the plaintiff, he having sufficient knowledge of their intention to make the sale void, although he did not actually participate in the fraud. It was also claimed that the circumstances of the condition of the firm and their sale to plaintiff evidenced a fraudulent intent on the part of Starkweather & Co. against the rights of their creditors. The judgment in the court below was in favor of plaintiff, who claimed that the sale was in perfect good faith on his part. Error is assigned in that the plaintiff as a witness in his own behalf was allowed to state that he judged the stock to be worth $4000 at the time he purchased; that he had no other purpose or intention than to acquire the stock at a fair price; that he bought it and the accounts in good faith and at what he considered a fair and full consideration. We see no ob-

jection to this testimony. It was competent on the question of his good faith, which was directly in issue under former decisions of this Court.

At the close of the evidence the defendant's counsel prepared and presented to the court a statement of the facts which he claimed were undisputed in the case (such statement being of considerable length), and followed it with this clause, "upon these undisputed facts I charge you." After this came six propositions of law as applied to such facts. This method of presenting his points of law to the circuit judge was such that it became necessarily a single request to instruct the jury; and if in any way the statement of facts as presented was not correct, the whole of the instructions asked would fall with it. We do not think the circuit judge under the testimony in the case would have been justified in finding the facts as presented to him by defendant's counsel, as he would have been usurping the province of the jury in so doing in relation to one or two points at least. Therefore there was no error in refusing the requests of the defendant's counsel. Upon the question of fraudulent intent the court instructed the jury as follows:

"And you are instructed that it is the law that every conveyance of property that is made with the intent of hindering, delaying or defrauding creditors, as against persons hindered, delayed or defrauded, is void; but in order to constitute a sale fraudulent when it is shown that the party purchasing has parted with a valuable consideration, it is essential that it further should be made to appear that the person disposed of his property intending to defraud his creditors or to hinder or delay them in the collection of their debts; but in addition to this it must also be established that the one acquiring title has participated in such intention; further, notwithstanding it may have been shown that the plaintiff has parted with an adequate consideration for the goods in question, if it has been shown that he intended to hinder, delay or defraud the creditors of Starkweather & Co., the sale to him would be void as to such creditors, notwithstanding payment of such consideration. It is a question for you to determine from the evidence whether or not Starkweather & Co., in disposing of this stock, intended to defraud their creditors, and if so, did the plaintiff know the

purpose of such sale, and did he purchase with such knowledge, with the purpose of aiding such fraudulent intent, and if you are satisfied from the evidence that the sale was made from the firm of Starkweather & Co. to the plaintiff for the purpose of hindering, delaying or defrauding their creditors, and if you believe that the plaintiff knew of such design, and bought the goods in order to aid and assist them in carrying out such fraudulent object, the sale would be void as to the defendant's claim under the attachment in favor of Pratt & Co. and such should be your verdict, and this should be so, notwithstanding the plaintiff may have parted with his money or may be liable upon obligations still outstanding against him. Whether or not the firm of Starkweather & Co. disposed of the stock in question with the intent to defraud their creditors, and whether or not the plaintiff may or may not have participated in such fraudulent intent, if such intent has been shown, must be determined by you from the facts and circumstances that have been introduced in evidence; and if such facts and circumstances have been established so as to satisfy you that the plaintiff, as a reasonably prudent man, must have understood that the act of Starkweather & Co. in diposing of the stock to him was to hinder, delay, or defraud their creditors,—he should be held responsible for such knowledge and fraudulent intent, nothwithstanding the plaintiff may insist that he had no such object or purpose.

Now, gentlemen, in view of what has been said, if such be your conclusion that the sale from Starkweather & Co. to the plaintiff was made for the purpose of hindering, delaying, or defrauding their creditors, and that plaintiff knew or had good reason to know of such intent at the time of purchasing property, your verdict will be for the defendant, and in that event you should find that the defendant had a special lien on the property in question to the amount of the judgment of Pratt & Co., and the costs, in all $1763.75, and interest from the date of the rendition of such judgment.

If, on the other hand, it shall be your conclusion that the stock was sold to the plaintiff in good faith, without any fraudulent intent, or plaintiff didn't participate in any fraudulent intent that may have been shown on the part of Starkweather & Co., your verdict should be for the plaintiff."

To which defendant's counsel excepted, and now claims that it was not a proper charge to the jury, as it in effect

gave the jury to understand that the plaintiff must actually participate in the fraud in order to vitiate the sale. It seems to us that the charge was not so clear as it should have been, and might have misled the jury. Although the court does say in one part of the instructions that if the facts and circumstances "were such as to satisfy them that the plaintiff, as a reasonably prudent man, must have understood that the act of Starkweather & Co., in disposing of the stock to him, was to hinder, delay or defraud their creditors, he should be held responsible for such knowledge and fraudulent intent, notwithstanding he may insist that he had no such object or purpose," yet the whole tenor seems to be that in order to make the sale void as to him he must have *participated* in the fraudulent intent. Plaintiff was not a creditor of the firm, but a purchaser, and the court should have clearly pointed out the distinction, and given the jury to understand, in unmistakable language, that knowledge on the part of plaintiff of facts sufficient to put an ordinarily prudent man on inquiry is all that is required, and that participation in the fraud was not necessary. *Willey v. Snyder* 34 Mich. 60; *Hough v. Dickinson* ante p. 89.

Another error is manifest in the permitting of the counsel for the plaintiff in his argument to the jury to go outside of the evidence in the cause and appeal to the prejudices of a jury against non-residents. Great latitude must necessarily be allowed counsel in argument as to illustration and amplification in dwelling upon the facts, and much can be excused in the counsel for the zeal and excitement of speech in his client's behalf. But the circuit judge is supposed to be wanting in this zeal and excitement, and when his attention is called, as it was repeatedly in this cause, to unauthorized and uncalled for statements by counsel in summing up, he should at once take all proper efforts to stop any further abuse, and to correct, if possible, the injury already done. In this case it appears he did neither. We think the statements made by the plaintiff's counsel to the jury that Starkweather & Co. turned every cent over to their creditors, and invited them from all over the county to come

to Port Huron, and that Pratt & Co. were hogs in attempting to secure their claim, and wanted to gobble all there was of the property, as unwarranted by the testimony, and should not have been allowed without some rebuke to him, or some explanation to the jury, upon the part of the court. It is the duty of the circuit judge to see to it that both plaintiff and defendant have a trial of their rights as free from bias and prejudice as possible.

In omitting to stop counsel, and in neglecting to counteract the effect of the evil caused by his remarks, after exception taken by defendant's counsel, the court erred. A new trial must be granted, and the judgment of the court below

Reversed with costs.

The other Justices concurred.

WILLIAM HALDANE v. MARTIN L. SWEET.

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Execution for deficiency on foreclosure.

A foreclosure decree fixes the amount due on the obligation and security, and is a final adjudication on that point; and no objections can be made to the issue of execution for a deficiency unless they arose after confirmation of the foreclosure sale and recognize the decree and go to its discharge.

Appeal from Kent. (Montgomery, J.) Oct. 30.—Nov. 11.

FORECLOSURE bill. Defendant appeals. Affirmed.

Norris & Uhl for appellant.

Blair, Kingsley & Kleinhans for appellee.

SHERWOOD, J. This case is an appeal from an order made by the circuit court in chancery for the county of Kent, allowing an execution to issue for the collection of a deficiency arising upon a sale made of mortgaged premises under a decree of foreclosure. The proceedings in the case to decree were

before us at the October term, 1884, and were by this Court duly affirmed. The mortgage was given for the purchase money of the incumbered property, which was conveyed to the defendant by complainant by full covenant warranty deed, the consideration being $21,000. The defendant in the foreclosure suit answered the complainant's bill, and filed a cross-bill, praying that the purchase of the property and sale thereof to the defendant might be set aside or rescinded on the grounds—*first*, that the defendant's purchase of the property was made under duress; *second*, that the title to the mortgaged premises at the time of the purchase was defective. The circuit court made the usual decree on foreclosure and dismissed the cross-bill, and decreed that the defendant was personally liable for the entire amount due upon the mortgage and notes, and that he should be required to pay the deficiency which, as reported by the commissioner making sale under the decree, amounted at that time to the sum of $11,091.43. The sale was duly confirmed by the circuit court.

The petition for the order appealed from was based upon the prior proceedings in the case, which show that no objections or exceptions to said sale or to said report were ever taken, and that the order of confirmation became absolute, and no cause was ever shown to the contrary. The defendant appeared and made answer to the complainant's petition for the order in question, and claims therein his right to make the following defenses: *first*, that the mortgaged premises are misdescribed in his deed thereof executed by complainant to him; *second*, that at the time said deed was made they were subject to an easement, it being an alley across a portion thereof, which had been acquired by user; *third*, that the complainant in fact had no title, but was merely a mortgagee in possession, with his mortgage debt paid by the receipt of rents and profits; *fourth*, that the rear part of the premises were vacant, and possession thereof was not given to the defendant, but was in the constructive possession of other persons having a paramount title. The defendant further claims that such being the situation of the title when he purchased the mortgaged property and received his deed therefor and

gave the mortgage, the covenants of the complainant's deed were broken as soon as the same was delivered, and inasmuch as the proceedings to enforce payment of a deficiency after a foreclosure and sale of the land are substantially a substitute for an action at law for the same purpose, justice and equity alike require that he should be permitted to make the defense he now claims, and especially should he be allowed so to do in this case, as the deficiency arose in consequence of the defects claimed in the title; the property selling for less than half its actual value.

The circuit judge overruled the defense offered, and directed that execution issue for the amount found due and unsatisfied upon the decree. This direction was proper, and must be sustained. The defenses now set up to defeat the relief prayed in the complainant's petition were urged on the hearing when the original decree in this case was made, and again in this Court on the appeal, and were overruled, and they cannot be renewed on this petition. This Court held that if defendant had any claim upon the covenants in his deed, he should be left to his suit thereon, and we see no occasion for holding differently now. *Haldane v. Sweet* 55 Mich. 196. All the defenses now urged existed before the suit in this case was commenced, and were known to the defendant and set out in his cross-bill. If the claims now made were available in reduction of the complainant's demands, he should have secured their application before decree. The decree necessarily involved the determination of the amount due on the notes and mortgage and must be regarded as a final adjudication of that matter. *Hazen v. Reed* 30 Mich. 331; *Wales v. Lyon* 2 Mich. 276. In this class of cases, where the defendant contests the right of complainant to an execution, "the grounds of contest must not be inconsistent with the decree, but must be such as recognize the decree and go to its discharge." Those only can be urged which have arisen after confirmation of the sales. *Ransom v. Sutherland* 46 Mich. 489.

The order made by the circuit judge must be affirmed with costs.

The other Justices concurred.

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Herbert H. Hoyt v. Alphonso J. Southard.

Ejectment—Parties—Adverse occupancy.

1. In ejectment any person in actual occupancy of the premises, and claiming adversely to plaintiff, must be made defendant (How. Stat. § 7791) and the fact that plaintiff has previously recovered against such person makes no difference so long as it does not appear but that the latter is entitled to a new trial. How. Stat. § 7822.
2. Ejectment will lie where defendants' claim of title consists in his having recorded a tax-deed which he has obtained on the premises, unless before suit brought he has notified the holder of the original title that he disclaims any interest and takes steps to disaffirm the apparent claim asserted by such record.

Error to Emmet. (Ramsdell, J.) Nov. 3.—Nov. 11.

Ejectment. Defendant brings error. Reversed.

Jas. J. Brown and *Benj. T. Halstead* for appellant.

Herbert H. Hoyt for appellee.

Morse, C. J. This is an action in ejectment. On the trial below the plaintiff, without objection, introduced certain deeds showing a chain of title from the United States to himself; also, for the purpose of showing that defendant claimed an interest in the premises, produced and offered in evidence a tax deed from the Auditor General to defendant conveying the lands in controversy with other lands on a sale of lands for delinquent taxes of 1880; said deed dated January 9, 1883, and recorded in register's office for the county of Emmet, January 24, 1883; and then rested his case. The defendant then testified substantially, in his own behalf, that he never claimed and did not then claim any interest in the lands in suit, and had never been in possession of them; never notified any person of any claim of title on his part; that it was claimed and occupied by one William J. Clarke, and a part had been also occupied by George W. Seger; had forgotten having a tax title upon it until suit was

brought; then turned the declaration in the case over to his attorney with instructions to look after it; supposed he placed the deed on record; and also that he was attorney for William J. Clarke in a former suit about the same land.

William J. Clarke, being sworn for defendant, testified that he was in actual possession of the land in controversy, claiming title thereto when the suit was commenced; that his claim of title was the same as before and at the trial of the ejectment suit for the same land between the plaintiff, Herbert H. Hoyt, and himself and George W. Seger as defendants; was living in the township where this land was assessed in 1880, and had sufficient personal property then in his possession out of which the taxes assessed on this land could have been collected.

Plaintiff then introduced proof tending to show the tax deed invalid, and also the files, records and judgment entry in an action of ejectment, wherein Herbert H. Hoyt was plaintiff, and William J. Clarke and George W. Seger, defendants, in the circuit court for the county of Emmet, from which it appeared that the lands therein considered were the same as those involved in the present suit; and that upon the first trial, as appears of record, on the 24th day of August, 1883, the said Hoyt obtained judgment against said Clarke and Seger for the possession of the land, and costs, and that sixty days were granted defendants to settle bill of exceptions.

No further proceedings were shown. Said record, files and judgment entry were received in evidence under the objection of defendant's counsel that they were incompetent and immaterial. The evidence here closed, and defendant's counsel requested the circuit judge to instruct the jury as follows: "(1.) If you find from the evidence that the only assertion of title to the premises made by defendant was the recording of the tax deed, other parties being in possession of same, then you will find for defendant. (2) If you find from the evidence that parties not parties defendant to this suit were in possession of the premises at the time the action was commenced, then you will find for defendant." The

court refused to give either of said requests, and instructed the jury to return a verdict for the plaintiff, which they did.

The undisputed facts in this case show that William J. Clarke was in the actual occupancy of the lands in dispute when suit was brought. The plaintiff could not maintain ejectment under the statute without making him a party, as it is shown he claims adversely to plaintiff. The fact of plaintiff having obtained a judgment against him for the land on one trial in August, 1883, can make no difference. He was in possession in November, 1883, when this suit was commenced, claiming the same title as on the trial. It does not appear that his rights in the premises were yet concluded.

It is contended by the plaintiff that, inasmuch as he has a judgment for the possession of the land as against Clarke, his rights were determined, and that under that judgment the sheriff could give possession to the plaintiff; and that the object of the statute requiring the actual occupant to be made a party defendant being only for the purpose of enabling the plaintiff to recover the actual possession, the fact of this former judgment, and his right to remove Clarke under it, is sufficient to excuse him from making Clarke a party defendant in this suit. A defendant, however, in ejectment is not concluded if he sees fit to take a second trial, and there is nothing in this record to show that Clarke has lost his right to such second trial. If no one had been in actual occupancy of the land when he commenced this suit, then the question might arise as to his right to maintain ejectment against the defendant. We think that the recording of a tax deed of this land, even if other lands were included in the same deed, would be sufficient claim of title to warrant the bringing of ejectment against the grantee named in such tax deed, unless he notified the person holding the original title of his disclaimer of any interest in the land before suit brought, and took the necessary steps to disaffirm the apparent claim of title that a recorded deed asserts.

As the case now stands, Clarke being shown in actual possession of the land under an adverse claim to plaintiff, a new trial must be granted, with costs to defendant, and the case

remanded to the circuit court for the county of Emmet for such further proceedings as the parties may desire to take in the premises.

The other Justices concurred.

SARAH A. RICHEY ET AL. v. CYRUS L. BROWN.

License by minor to remove timber—Trespass.

A minor son, occupying land as tenant-in-common with his mother and sister, has no right in himself, without their authority, to give, sell or otherwise transfer the timber on the land to a stranger or assent to his entry on the land to remove it. And for such entry the tenants-in-common can maintain trespass.

Error to Ionia. (V. H. Smith, J.) Nov. 3.—Nov. 11.

TRESPASS. Plaintiffs bring error. Reversed.

Webster & Millard for appellants.

Lemuel Clute for appellee.

SHERWOOD, J. The plaintiffs in this case live in the township of North Plains, in the county of Ionia. Sarah A. Richey is the widow of the late Thomas W. Richey who died in 1881, and the other defendants are their children; William H. and Carrie A., being minors, who join in the prosecution of this suit by their mother as next friend. In the year 1883 the plaintiffs all resided on a farm of forty acres of land, which they owned and occupied in common, the children living with their mother thereon. William took charge of the farm-work, and with the mother and sisters carried on the farming. Upon the farm was a quantity of valuable standing timber. The defendant owned a farm adjoining plaintiffs' land, and in January, 1883, without the knowledge of the mother or sisters, he went to the plaintiff William, who was then about seventeen or eighteen years

old, and obtained leave from him, and without any consideration whatever, to cut and carry away from the plaintiffs' land forty-two trees, principally oak and black ash, making logs about thirty feet long. Mrs. Richey and her daughters first learned of the defendant's doings in the premises just as he drove away with the last load of logs, and as soon thereafter as she could see him and his servants notified him to keep off the land and cease his trespasses. Neither of the plaintiffs except William knew of the cutting of the timber until after it was done, and never authorized any person to give their consent to the cutting or removal of any portion thereof, and very soon thereafter brought this suit to recover the plaintiffs' damages. The declaration is in trespass containing three counts. The plea was the general issue, with notice that the acts complained of were licensed by the plaintiff William H. Richey. A trial was had in the Ionia circuit before a jury, and the verdict was directed for the defendant by the circuit judge. This direction was excepted to by counsel for plaintiffs, and this exception raises the only question necessary to be considered here.

We think the circuit judge erred in his ruling. The young man from whom the defendant claims to have obtained permission to commit the wrongful acts complained of was a minor and tenant-in-common with his mother and sisters of the property, and without any authority from them, or right in himself, to make a gift or sale or other transfer of the timber to the defendant, or to give a valid assent to the entry of the defendant upon the premises for any such unlawful purpose. William's acts and doings in the premises were clearly prejudicial to his own rights and interests, and were void under all the authorities, and the testimony tends to show that advantage was taken even of the license which it it claimed he gave. Schouler's Dom. Rel. (3d ed.) § 403; *Adam v. Briggs Iron Co.* 7 Cush. 361, 368, 370; *Fonda v. Van Horne* 15 Wend. 631; Tyler on Infancy & Coverture (2d ed.) 43; 1 Story's Eq. Jur. § 241; Bing. on Infancy 9; *Keane v. Boycott* 2 H. Bl. 511; *U. S. v. Bainbridge* 1 Mas. 72; 2 Kent's Com. 193; 1 Bing. Real Prop. 139; *Oliver v. Wood-*

roffe 4 M. & W. 653; *Chandler v. McKinney* 6 Mich. 217; *Dunton v. Brown* 31 Mich. 182; *Soper v. Fry* 37 Mich. 236; *Barker v. Hamilton* 3 Col. 291.

The case shows the defendant's utter disregard of the rights of this widow and her children, which the law secures to them, and which it is the duty of the court to enforce and protect. Further discussion of the case would be without profit.

The judgment must be reversed and new trial granted.

CAMPBELL and CHAMPLIN, JJ. concurred. MORSE, C. J. did not sit.

MARY E. COOK v. SARAH JOHNSTON.

Conflagrations—Negligence—Expert evidence—Voluntary risks.

1. In an action for negligent injury caused by a fire the fire marshal's opinion as to its cause is inadmissible; it is not a question for expert testimony. Nor can he testify to what he heard said next day at the scene of the fire; such things are not res gestæ.
2. Putting ashes into a wooden barrel in violation of a municipal ordinance is not negligence per se; it is a question of fact whether it is negligent in a particular case.
3. Municipal ordinances are general and impose duties which in particular cases may not be important; their purpose is public and their violation is to be redressed by legal penalties.
4. One who voluntarily exposes himself to evident risks caused by another's negligence cannot recover against the latter for bodily injuries resulting from such exposure even though the exposure was for the purpose of saving property or the life of an animal.

Error to Wayne. (Jennison, J.) Nov. 4. Nov. 11.

CASE. Defendant brings error. Reversed.

E. T. Wood and *Willis G. Clarke* for appellant. Conduct in violation of a municipal ordinance is not negligence per se: *Knupfle v. Knickerbocker Ice Co.* 84 N. Y. 488;

Baker v. Pendergast 32 Ohio Stat. 494; *Kirby v. Boylston Market Ass'n* 14 Gray 252; *Heeney v. Sprague* 11 R. I. 456; an ordinance cannot create a nuisance: *C. R. I. & P. R. R. Co. v. Joliet* 79 Ill. 25; *Yates v. Milwaukee* 10 Wal. 505; and its violation incurs simply the penalty: *Brown v. Buffalo & State Line R. R. Co.* 22 N. Y. 191; the question whether it is perilous to put ashes into a barrel is not for experts: *Fowler v. Gilbert* 38 Mich. 296; *Higgins v. Dewey* 107 Mass. 494; *Luce v. Dorchester Ins. Co.* 105 Mass. 297; as to proximate cause of injury: *Sharp v. Powell* L. R. 7 C. P. 253; *Scheffer v. Railroad Co.* 105 U. S. 249.

Sylvester Larned for appellee.

CAMPBELL, J. Plaintiff recovered damages in the sum of $3000 for personal injuries claimed to have been caused by defendant's negligence whereby it is alleged a fire was set in a shed occupied by plaintiff. The facts as relied upon were that plaintiff's husband was a tenant of defendant, occupying a wing of her house at the corner of Sixteenth and Canfield streets in Detroit. Behind the house was a low shed divided into three parts by internal partitions from five to six feet high, of which defendant occupied the middle one, and plaintiff's husband the adjoining one at the north end. In the middle partition was a water-closet used by defendant and her tenants jointly. In this middle part, on the side furthest from Mr. Cook's, was an ash-barrel, which Mr. Cook described as a stout, iron-bound cask, such as is used for liquids. Plaintiff claims that the fire was caused by ashes in this barrel. She and her husband, as they testify, were awakened by the light of the fire burning through the top of this middle part, and as soon as they could they went into their own part and she undertook to get out their horse, that was lying down so that she could not easily loose the halter. While trying to do this the fire swept over the partition and burned her very severely, so as to nearly or quite disable her from doing her accustomed work.

Several questions arose on the trial, on which rulings were made which were complained of. We shall only notice those which seem to be of most importance.

Among other witnesses sworn was Mr. Baxter, the city fire marshal, who was allowed to testify not only to what he saw on the ground the next day, but also what opinion he had of the origin of the fire, and what he heard from various persons who were there.

This was improperly allowed. That officer's duties are important and he may properly enough make such inquiries as he deems necessary to aid his own judgment. But when the rights and liabilities of private persons are in question, he cannot affect them by his opinions or conclusions, however sagacious he may be. When he testifies, he is governed by the same rules as other witnesses, and cannot give either hearsay or opinions. What is said or done after a fire cannot be regarded as part of the res gestæ at the fire, and the sayings and doings of third parties could not usually be receivable. And as for the origin and cause of a fire, it cannot in such a case as this be any more difficult for the jury than for a witness to make deductions from the facts shown. There is no room for expert testimony, and his opinions were not receivable. This testimony was referred to in the charge of the judge, and is quite likely to have had much weight. There were several facts shown which were fairly claimed to have indicated the possibility, if not probability, of a different cause, and the jury should have been left to form their own conclusions, unaffected by any one's opinion. A similar question was decided by this Court in *Fowler v. Gilbert* 38 Mich. 296.

The court also charged the jury that a violation of the city ordinance requiring ashes to be kept in metallic or other incombustible vessels was negligence in law, for which defendant would be liable, and this was emphasized by the further statement that if this was not done she was not responsible in this case.

This doctrine is not maintainable as stated. The primary object of municipal ordinances is public and not private, and their violation is redressed by the legal penalties. *Taylor v. Lake Shore & M. S. R. R. Co.* 45 Mich. 74. City ordinances are necessarily made general, and impose duties which in a

given case may be of no special importance. It is quite possible that under certain circumstances, and in various surroundings, it is in no way dangerous to put ashes in wooden barrels, and it can never be dangerous to put cold ashes in them. It is certain that ash-barrels are and always have been more or less used. Whether the use of them is culpably negligent in a given case must usually be a question of fact to be determined by the jury on the facts, and not by the court.

The principal question in the case was upon the liability of defendant if the fire took from negligence for which she may have been chargeable for the damages on which recovery was had in this case.

The plaintiff showed by her testimony that she and her husband saw the ash-barrel daily and knew all about its position. It also appears by the showing of both that the shed, which was entirely open within from end to end, above the partitions, was burning so brightly as to wake them up, and continued burning when they entered to loose the horse and get out the buggy. The danger was before their eyes, and what happened by the sweeping down of the flames was as likely to happen as not. It is not very important by what name the action of plaintiff should be called. It was such a risk as she chose to take, to save her husband's property. But it was a plain and palpable risk nevertheless, and the injury would not have occurred unless for her voluntary act in assuming the exposure.

There is some conflict in the cases concerning what damages have been held not too remote for recovery. But it would be going beyond all reason to hold a person liable for bodily injuries suffered by another in voluntarily and deliberately entering a burning wooden shed not divided into detached parts, and reached by the flames while at work within it. The loss of presence of mind under such circumstances is one of the commonest and most likely incidents of incurring such an exposure. The act in which she was engaged may have been such as she may have thought proper and laudable, and worth some risk, but defendant's responsi-

bility cannot be created or increased by such independent and voluntary conduct of plaintiff in putting herself in harm's way.

We think that no recovery should have been had on the facts as shown by plaintiff herself, and that the case should not have gone to the jury.

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

The other Justices concurred.

ROBERT B. MONTGOMERY v. ALMERON MONTGOMERY.

Contract—Construction of "expenses and interest."

John and his sister-in-law Matilda owned land together, and Matilda and her husband mortgaged her share. On foreclosure sale Robert, who had advanced money to Matilda's husband, and bought her share, subject to the mortgage, bid it in, and John thereupon contracted to buy from him the undivided share he had thus obtained. The contract as drawn, provided that Robert should sell "in consideration of one thousand dollars over and above all expenses and interest," and John was to pay "the thousand dollars and all expenses and interest as aforesaid within six months from date." *Held*, that the term "expenses and interest" did not include what Robert had advanced to Matilda's husband; the consideration was a thousand dollars in addition to what it cost, with interest, to clear the title of the mortgage.

Appeal from Ingham. (Gridley, J.) Nov. 5.—Nov. 11.

SPECIFIC performance. Defendant appeals. Affirmed.

Huntington & Henderson for complainant.

Jno. M. Corbin and *Wm. K. Gibson* for defendant.

CAMPBELL, J. Complainant's bill filed in this cause is to compel a transfer to him by defendant of certain property in Ingham county, which was held under these circumstances. In May, 1881, John Montgomery, the father of complainant,

desiring to divide a portion of his property, including lands, among his children, conveyed to complainant and to the wife of his brother Albert Montgomery, the farm in question, reserving to himself a life-estate in the farm which he might or might not choose to occupy, as he saw fit. A week or two afterwards complainant and his brother's wife, Matilda Montgomery, mortgaged the farm to George G. Dunlap for $1600, payable with eight per cent. interest, May 21, 1883.

On May 16, 1882, defendant, who is a cousin, obtained from Albert and Matilda conveyances of a parcel of land in Eaton Rapids, and of the undivided half of the farm in question, subject to half of the Dunlap mortgage and the life-estate of John Montgomery. The consideration for this transaction was the settlement of various claims and advances on account of Albert Montgomery.

In 1882 Mr. Dunlap began a foreclosure in equity, for default in payment of interest, and got a decree of sale under which the land was advertised for sale to be made August 24, 1883.

Complainant made an arrangement with Charles Hunt to bid off the property and allow him time to redeem it. But shortly after, defendant proposed to do so himself, and to sell complainant his half of the property on time, and also allow redemption of the purchase price on foreclosure. That such an arrangement was agreed on is admitted. The only dispute is concerning the price which was to be paid beyond the mortgage, for defendant's half. Complainant and defendant agree that it was to be based on what defendant had paid Albert for it. Complainant claims the sum was fixed by defendant as $1000, which he had paid Albert. Defendant claims that he had paid a considerably larger sum than that, and that complainant was to pay him $1000 extra. The answer is not very definite as to the amount to be paid beyond $1000, but fixes it in one place at from $2600 to $3000, including his share in the Dunlap mortgage, and in another place seems to intimate that complainant was to pay besides the mortgage, $1000 as the advances to Albert, and a further price of $1000 in addition.

Complainant and defendant went to Mr. Kenney to have the contract drawn, and gave him directions. He drew it as a contract of purchase and sale, whereby the defendant was to sell "in consideration of one thousand dollars over and above all expenses and interest," and complainant was to pay "the thousand dollars and all expenses and interest as aforesaid within six months from date," and if paid was to have a conveyance of quitclaim.

The dispute is concerning what was meant by expenses and interest. Defendant claims it was to include the mortgage, and the sums which his own "interests" cost him—or, in other words, all his advances to Albert. Complainant claims it was to include only such moneys and expenses as defendant should incur in clearing the title of the mortgage, with interest.

As the question resolves itself into a question of fact, we need not discuss the testimony at length. The circuit judge who heard the cause accepted complainant's theory, and ordered defendant to convey on payment of $1000, in addition to the mortgage purchase and expenses and interest, and some further outlays and liabilities incurred for taxes and in buying up John Montgomery's life-estate. Complainant does not appeal, but defendant appealed generally.

Upon a full consideration of the testimony bearing upon the agreement, we have no doubt that it was just as complainant claims it to have been, and was clear and definite, including nothing beyond $1000 for whatever title defendant then had. The written agreement was definite so far as that interest was concerned. While not pointing out just what future expenses were to be incurred in completing the title, the moneys subsequently advanced being all included in the decree, it is certainly broad enough to secure all defendant's equities. We shall not, therefore, discuss the various questions which are no more than theoretical under the pleadings.

The decree must be affirmed.

The other Justices concurred.

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JACOB BAUMAN ET AL. v. ALEXANDER M. CAMPAU, THE CITY OF DETROIT ET AL.

Judicial authority over opening and closing of streets.

1. Courts cannot interfere with municipal control over the question as to what streets shall be opened and worked, and how and when. Nor has a court of equity the means or process for executing the decision of such questions.
2. Private citizens cannot dictate through the courts the line of public duty.
3. A small portion of a street that had been opened under an invalid statute was afterward discontinued so that travel was deflected from a straight line at its outlet, but the distance to be traveled was not substantially increased. The discontinued part had never been completed as a street, and was taken for business purposes and fenced in. Before this a curb had been run across it where its original outlet had been. *Held*, that private citizens could not maintain a bill to compel the re-opening of the street, especially if they raised no objection until several years after these changes were made, and showed no grievance more substantial than a mere side-tracking of the street without other inconveniences.
4. The proper municipal authorities can discontinue a portion of a street, if they could do so otherwise, in consideration of the opening of another street and outlet by a private citizen whose interests are affected in both cases.
5. The fact that a street is made less conspicuous by discontinuing a portion of it, is too shadowy a grievance, if depreciation in the value of property thereon is not shown, to sustain a bill in equity to require it to be opened again.

Appeal from Wayne. (Jennison, J.) Nov. 6.—Nov. 11.

BILL to compel opening of highway. Defendant Campau appeals. Reversed.

Fred. A. Baker for complainant.

Frederick T. Sibley and *John H. Bissell* for appellant. The exercise of legislative power cannot create a wrong in the eye of the law: *Detroit v. Beckman* 34 Mich. 125;

McCutcheon v. Homer 43 Mich. 483; *Burford v. Grand Rapids* 53 Mich. 98; nor can a failure in political duty give a right of action: *Henkel v. Detroit* 49 Mich. 249; see *Smith v. Boston* 7 Cush. 254; *Heller v. Railroad Co.* 28 Kan. 625; *Chicago v. U. Building Ass'n* 102 Ill. 379; *Coster v. Mayor of Albany* 43 N. Y. 414; *Fritz v. Hobson* 19 Am. L. Reg. (N. S.) 615.

CAMPBELL, J. Complainants, Bauman, Rush, Herzog and Mylius, owners of property on Preston street, which is an east and west street in Detroit, fifty feet wide, filed this bill to compel the city of Detroit to open what they claim to be a portion of said street about seventy-five feet long, lying between McDougall avenue, which is a north and south eighty feet wide street, and Gratiot avenue which runs north-easterly. Campau and the other defendants own the freehold, the former absolutely, and the others as his lessees. The lessees occupy the land in question as part of their planing-mill premises, and have done so since August, 1881, a little more than two years before this bill was filed.

The circuit court for Wayne county required the obstructions to be removed and the property opened for public use.

The street called Preston Street was in 1873 defined by the common council and attempted to be laid out from Mt. Elliott avenue, which was then the eastern boundary of the city, to Gratiot avenue, a distance of about two-fifths of a mile. These proceedings were had under a law which was declared by this Court to be void in *Paul v. Detroit* 32 Mich. 108. The jury, as is not unusual in such cases, made the damages and benefits correspond in taking the land, except a few trifling assessments which covered expenses. Mr. Campau had one dollar awarded to him for the strip running across his farm, known as the McDougall Farm, and $49 for damages to buildings. He was at this time absent from the country, and did not return until about five months after the proceedings had been confirmed. Immediately after his return, on learning what had been done, he applied to the council to vacate the proceedings and offered to open McDougall avenue and several other streets as the

board of public works should approve, leaving Preston street to continue eastwardly from McDougall avenue as projected, but substituting an outlet through McDougall avenue to Gratiot avenue for the outlet through Preston street as extended. This would make a slight deflection northward of the original proposed outlet of Preston street, but not substantially longer to Gratiot street. He gave up any claim to the money assessed by the jury, and the council having accepted his offer, and his new plan having been carried out, a formal resolution was passed vacating that end of Preston street and declaring that the necessity for it no longer existed, and that the new plan was preferable.

Before Mr. Campau's return the highway officers had done something towards plowing up and preparing the surface of the street, and it was subsequently traveled more or less, the testimony, however, not showing any considerable use, or any further working after Mr. Campau's arrangement was closed. Water-pipes were run across it from Gratiot street into Preston, and a hydrant made within the lines. But in 1878, on paving Gratiot street, the curb was continued unbroken across what would have been the terminus, and McDougall avenue was the only street recognized and took the bulk of the travel. The land in the vicinity, being level and open, was used more or less also.

The complainants do not show that they have suffered any tangible grievance by the change, except that of having lost an absolutely straight street terminus on Gratiot street, and been compelled to have one with a small deflection, cutting off the view of Preston street from Gratiot.

We do not think this bill can be sustained on any ground. The parties had notice, and there was plain action showing what the city authorities were doing when Gratiot street was so paved as to cut off the outlet and McDougall street was treated as the outlet. That was five years before this suit, and there is testimony indicating still earlier knowledge. They had further distinct notice in 1881 when the lessees Heck and Vieson fenced in the property and established their works there, which would be seriously interfered with

by disturbing their possession. There is no equity in such delay.

It is also evident that they have no legal rights beyond what would accrue from the acquiescence of the owners of the land through which Preston street runs, in its occupation as a street. The legal steps to condemn it were invalid. This acquiescence does not extend across McDougall street, and there was no reason why the city could not make such arrangements as it did with Mr. Campau, and substitute what was regarded as a better outlet, besides gaining other advantages in the acquisition of new streets across the McDougall farm.

But had there been any technical illegality (as we think there was not) in this municipal action, we are not able to discover what rights complainants would have to file this bill. It is based entirely on the ground that the city neglects its duty to open and work a public highway, and the only claim that they show—(and it is doubtful if the bill shows that)—is that as lot-owners on the street they suffer some private detriment from a public nuisance.

They show no facts which make out any such grievance as a court of equity can redress. So far as the facility of travel is concerned, it is absurd to imagine that it has been interfered with. Their outlet is easy and complete. All that they really complain of is that their street is less conspicuous than it would be if continuing in a straight line to Gratiot avenue. There is no proof that this has made their property less valuable. But it is not within the scope of the extraordinary powers of equity to deal with such a shadowy grievance, if they had a right, which in our opinion they have not, to set it up.

There is also a further vital objection to the frame of the bill. It attempts to invoke the aid of equity to interfere with the municipal control over the working of streets. It is not within the power of any court to determine what streets shall be opened and worked, or when or how it shall be done. A court of equity has no means or process to carry out any

such order. And private citizens cannot dictate to a city what shall be done in the line of public duty.

The case is without merits, and the decree below must be reversed and the bill dismissed with costs of both courts.

The other Justices concurred.

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Cornelius Cronin v. Board of Supervisors of Kalkaska County.

Mandamus—Documentary evidence.

1. A relator or respondent who relies on official records to establish his right must produce such records or certified copies thereof with his petition or answer; it is not enough to refer to the originals.
2. Costs of the motion were allowed respondent where relator had leave to withdraw his petition in order to attach to it the record evidence on which his claim was based.

Mandamus. Submitted Nov. 10. Denied Nov. 12.

Boyd & Totten for relator.

Perkins & Ellis for respondent.

Morse, C. J. Relator claims that as sheriff of Kalkaska county he had lawfully under his charge and confined as a prisoner in the common jail of said county one Benjamin Irving from May 26th, 1884, to and including September 3d, 1884; that by resolution of the board of supervisors he was entitled to one dollar per day for this time. He also sets up in his petition that the board of supervisors rejected his claim for board and care of said Irving arbitrarily, and without any investigation whatever, refusing to examine relator as to his claim, or to assign any reason why it was rejected. The respondent answered, admitting that the sheriff was entitled to one dollar per day for the board and care of all prisoners

legally detained in the county jail, and that the supervisors rejected his claim for the board and care of said Irving; but denied that said Irving was confined in said jail on the charge of attempting to commit rape, as the relator averred in his petition, for any of the time stated by relator, and further answered that said Irving was, on the 20th day of May, 1884, upon his plea of guilty in the circuit court for said county, sentenced to the Reform School at Lansing, and on the 22d day of May, 1884, the warrant of commitment was issued and delivered to relator to execute. This answer referred to the records and files of said circuit court in support of its statements, but did not exhibit said records or certified copies thereof to this Court. There lator filed a replication to such answer, and avers therein that for the time claimed he held said Irving by order of the circuit court for said county, but fails to state therein whether such order was in writing, nor does he set out the terms of the same. The parties express a desire for an issue of fact to be settled and sent down to the circuit court for trial, but in our opinion the case as it now stands is not in a proper condition for such an order.

The only point in issue seems to be: "Did the relator lawfully hold the said Irving in the county jail of Kalkaska county for the time claimed, or under such order of the circuit court as would entitle him to charge the county for his board and care?" In applications of this kind all record evidence relied upon by either relator or respondent should be brought before the Court as exhibits in the shape of certified copies, or authenticated in some way, rather than in bare recitals of its existence, with a mere reference thereto. The bearing and effect of records or other written instruments upon the point or points in issue is generally to be determined by the court instead of a jury. If the documentary evidence disclosed by the pleadings in this case were here, in all probability there would be no necessity of settling any issue to be determined elsewhere. The relator is at fault for not clearly setting forth in his petition the authority under which he detained Irving in jail as a prisoner, and in not attaching and bringing up with the same a copy of the order of the court,

if there is any record of such order, as there should be. If he had done so, we could have determined whether he was entitled to his writ. But as we wish to do no injustice to relator if he has a valid claim against respondent, he is given leave to withdraw his application and to move the court anew, if he so desires, setting forth with particularity and precision the facts and circumstances of the rejection of his claim by respondent, and of the detaining and keeping of said Irving in jail, for what cause and by what authority, with authenticated copies of all record or documentary evidence upon which he relies to sustain his application.

The respondent is entitled to the costs of this motion.

The other Justices concurred.

SPENCER O. FISHER ET AL. v. MARQUETTE CIRCUIT JUDGE.

Cross-replevin.

A motion to quash the writ of replevin in a cross-suit is not the proper procedure for getting rid of the cross-action. The second proceeding may be shown in bar of the first, or the defendant in the cross-writ can plead in abatement if he wishes to raise the question at the outset.

Mandamus. Submitted Nov. 3. Granted Nov. 18.

W. P. Healy and *Isaac Marston* for relator.

F. O. Clark for respondent.

CHAMPLIN, J. On September 16th, 1885, the relators Spencer O. Fisher, Albert A. Crane and Frederick Cole, copartners, doing business at Bay City, Michigan, under the firm name of West Bay City Manufacturing Company, commenced an action of replevin in the circuit court for Marquette county against Arthur Hill, William C. Busch, Eben N. Briggs and Edward R. McCarty, defendants, to recover

possession of 1,195,000 feet of pine saw-logs. The writ of replevin by which said suit was commenced was regular in form. Annexed to the writ was an affidavit, and before the writ was executed the plaintiffs delivered to the sheriff a bond of indemnity.

The writ was duly served on two of the defendants, Busch and Briggs; the other defendants, Hill and McCarty, not being found. The property specified in the writ was replevied from defendants and delivered to plaintiffs upon the execution of the required bond. On the 25th day of September, 1885, the defendant Busch appeared specially in the cause, and entered a special motion to supersede and quash the writ of replevin so issued in favor of Fisher, Crane and Cole, for the reason that a prior writ of replevin had been sued out and executed in favor of Busch as sole plaintiff against Fisher, one of the plaintiffs in this suit, and Nestor and Burtis for the same property.

The defendants alleged that the writ against them ought to be quashed, because it was a cross-writ of replevin. The motion was based upon the affidavits of Busch, which identified the plaintiff Fisher as the same person as the defendant Fisher in the first writ and the files and entries in the replevin suits. The circuit judge, on the hearing, became satisfied that the second suit was a cross-replevin, and therefore irregular, and entered an order quashing the writ. The relators ask for a mandamus to compel the circuit judge to vacate this order.

We do not feel called upon to review the conclusions of the circuit judge as to this being a case of cross-replevin, for whether it be so or not we are all agreed that the second writ cannot be superseded or quashed for that reason, on motion. It may be shown in bar of the first suit; or if the defendants in the second writ desire to raise the question at the outset, it can only be done by a plea in abatement. We have examined the authorities cited in support of the action of the circuit court, and it appears that the course pursued by him is not without precedent; but we are of opinion that the better practice is to raise the question by plea in abatement at this stage of the proceedings. In this way all the facts

are spread upon the record, and if any error should intervene, it can be remedied by the writ of error. This is all that need be said at this time.

The mandamus must issue as prayed.

The other Justices concurred.

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HERMAN ELLIOTT v. KALKASKA SUPERVISORS.

ALFRED PAQUETTE v. SAME.

GEORGE TRENCHALL v. SAME.

Small-pox—Expense of nursing.

The authority of a township board of health to guard against small-pox (How. Stat. § 1647), extends to making contracts for the nursing of patients and to destroying infected clothing. And when they have allowed the accounts for such services rendered and property destroyed, the Board of Supervisors must pass such accounts, and can be compelled by mandamus to do so; they cannot refuse on the ground that the patients were themselves able to pay, or that sundry tax-payers considered the charges extortionate.

Mandamus. Submitted Nov. 10. Granted Nov. 18.

McIntyre & Dunham for relators.

Perkins & Ellis for respondents.

CAMPBELL, J. Each of these relators presented claims allowed by the proper board of health, for services and other dues incurred under their duty to take measures to prevent the spread of small-pox. The supervisors allowed more or less of the accounts, but refused to allow the rest. In their answers they present various supposed excuses for the disallowance. None of them are such as they could lawfully rely upon.

Mr. Elliott's claim is for services as nurse in the pest-house, at four dollars a day,—allowed by the supervisors at

two dollars. There is a showing made, but contradicted, that the board of supervisors desired to have claimant given a fair chance for a full hearing. The objections which are shadowed forth are that some of the patients were probably able to pay for their own necessities, and that the charge was exorbitant. There is nothing whatever in the return to indicate that they had any evidence of such pecuniary ability, or that the charges were excessive. Instead of having an open and proper hearing in relator's presence and where he could be represented, the return shows they sent out a committee to make such private explorations as they saw fit, who reported the views of some large tax-payers on the subject. It is not remarkable that tax-payers should be desirous of evading county charges, but it would be contrary to good sense, as well as law, to allow a public body having legal responsibilities to attempt to shift them off by resting on the advice or wishes of those who have no such duties.

In this case it could make no difference what patients were in the pest-house. Relator Elliott was employed to act as a nurse there, and it in no way concerned him what was the pecuniary standing of its inmates. The board of health have the power and responsibility of providing such a house and nurses to attend it. It was held in *Rae v. Flint* 51 Mich. 526, that the public is primarily responsible for such expenditures, and that it would be contrary to public policy to endanger the public health by making it impracticable to employ help who would not be sure of their pay. The exigency of a pestilence will not wait for the convenience of parties, and measures must be prompt and effectual. The board of health must have power to make necessary contracts, and this involves all their terms. This was decided in the early case of *Bristow v. Supervisors of Macomb County* 3 Mich. 475. There was nothing in Elliott's claim which was open to inquiry before the supervisors, and they should have allowed it as presented. There is no possible issue left open.

Trenchall's claim was for care of certain small-pox patients under employment from the board of health, and for articles

destroyed to avoid infection. These items were within the discretion of that board under How. Stat. 1647, §§ 1648. The destruction of the infected property used in the care of the sick is so plain a necessity as to need no discussion. The return of defendants on this case is much like that in Elliott's case, and gives no reason for deferring action in ordering payment.

Paquette's case is not distinguishable in principle from Elliott's.

It is very much to be regretted that respondents have been so ill advised as to attempt to avoid the payment of these claims. The statutes designed to protect the community from infection are of the utmost importance, and persons cannot be compelled to risk their lives to take charge of patients, unless they choose to do so. Suitable and competent persons cannot be procured without fair remuneration. It would be dangerous in the extreme if such matters could be left open to the caprice of any public body, after the immediate danger is ended, where notions of thrift may interfere with those of humanity. The law has not left these matters open to any such risk, and it is the duty of courts to see that it is not disregarded.

The writs must all issue as prayed.

The other Justices concurred.

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HARRIET P. HACKLEY v. MUSKEGON CIRCUIT JUDGE.

CHAS. H. HACKLEY v. SAME.

Substitution of attorneys—Waiver of error.

1. A client is always entitled to be heard as to his representation before the court; and a change therein, made ex parte by one or all of the counsel, is a nullity if made without the client's concurrence or consent.

2. A client has a right to waive errors and exceptions and the right to

move for a new trial, and will be bound by such waiver unless it is made invalid by some cause pertaining to the client; it cannot be set aside by any one else.

Mandamus. Submitted Nov. 10. Granted Nov. 18.

W. P. Traphagen for relator Harriet P. Hackley.

Blair, Kingsley & Kleinhans for relator C. H. Hackley.

Francis W. Cook for respondent.

CAMPBELL, J. Both of these applications are for the purpose of obtaining writs of mandamus to compel the respondent to vacate an order made by him to strike from the files a waiver of errors signed by Harriet P. Hackley, in a proceeding begun by her in the probate court of Muskegon county, asking a temporary allowance during probate proceedings, and appealed to the Muskegon circuit. So far as necessary for the present hearing, the case is as follows:

Porter Hackley died in June, 1884, leaving a will. Proceedings were begun to procure its probate soon after. The relator Harriet P. Hackley claims to be his widow. This was and is denied by the other relator, who is executor. The will was probated in November, 1884, and the probate was affirmed in July, 1885.

After the probate of the will, and in the latter part of November, 1884, Harriet P. Hackley filed a petition in the Muskegon probate court claiming to be widow and asking an allowance from the estate. The probate court granted her $1131 for the past, and $29 a week for the future, pending the settlement of the estate. On appeal to the circuit court, the jury found she was not the widow, and the application was dismissed with costs on June 20, 1885. At the same time an order was made that she have sixty days to settle exceptions, or move for a new trial. This time would expire August 20, 1885, and was extended by two extensions to October 6, 1885, and since to November 15.

On the first day of October, 1885, Harriet P. Hackley executed and acknowledged and filed a written instrument

waiving all errors and exceptions, and the right to move for a new trial, and consenting that the verdict and judgment stand as final and conclusive.

On the 7th day of October, Charles C. Chamberlain in the name of Chamberlain & Traphagen, purporting to act in her name, but without her authority to do so, moved to strike this paper from the files, on the ground that it was a fraud on Chamberlain, who claimed to hold an assignment of Mrs. Hackley's rights in the estate of Porter Hackley of all beyond $25,000. This assignment is alleged in substance as made September 2, 1884. Although the affidavit of Mr. Chamberlain contains a great many charges and accusations, this is the only fact based on knowledge which in any way concerned relators, or which now concerns them. Counter-affidavits were filed, denying all the merits. The circuit court ordered the paper to be stricken from the files, giving until November 1st to all parties in interest "to take such steps in regard to the granting of such motion as they may be advised."

Charles H. Hackley moved on October 15, to vacate this order, which was refused. Harriet P. Hackley made a similar motion, setting up a good many very strong facts in regard to the course taken on the trial of the controversy and concerning the acts of Chamberlain. Her application was signed and sworn to personally by her, and the application was made in her behalf by William P. Traphagen appearing specially. The court declined to hear this application. It appears by the judge's return that he did so because on the 13th of October, an order was entered by Chamberlain in the name of Chamberlain & Traphagen, substituting himself as Mrs. Hackley's attorney in place of the firm.

Mr. Chamberlain's action in that regard, without the concurrence or consent of Mrs. Hackley, was a nullity, and the court had no right to refuse her a hearing on her own petition, under any circumstances. It is the duty of every court to hear parties in regard to their representation, and a change made ex parte by one or both attorneys could not preclude the client from a right to be heard on the matter. But in

the view we take of the case, inasmuch as both relators ask the same relief, we can dispose of the controversy as it stands.

The application for an allowance during the pendency of the controversy is made and granted for the sole benefit of the widow—if she be a widow—and is not payable to any one else. It is not intended to be assigned. In the present case it was not attempted to be assigned. The assignment set up by Chamberlain was made a considerable time before this application was presented, and covers her interest in the estate as alleged widow. It could not cover the future contingent grant—not then even asked for—of an allowance during the controversy. She had a right to waive it at any time, and the waiver would bind her unless invalidated by some reason peculiar to herself. It could not be avoided by any one else.

The only possible way in which Chamberlain can be prejudiced is by the finding of the jury that Mrs. Hackley was not the widow of Porter Hackley. We are not disposed to consider at this hearing what would be the effect of that finding if set up in any other controversy. We are now only concerned with the right of Mrs. Hackley to waive her own rights to this allowance. That she could do so we have no doubt, and the waiver was lawfully filed, and must have such effect as in law it may properly have. What that effect may be must be determined in some other way than by striking it from the files, and we shall not anticipate what course Mr. Chamberlain may have a right to take.

The mandamus must be granted, with costs for each relator against Chamberlain.

The other Justices concurred.

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Abel K. Crosby v. The Detroit, Grand Haven & Milwaukee Railway Company.

Railroad Companies—Negligence in maintaining fences.

1. A railroad company must be as watchful to keep its fences in repair as any prudent person would be in maintaining fences to protect his own property.

2. Negligence may sometimes be inferred from all the evidence taken together, even though the only direct evidence on the subject tends to negative it; and wherever the facts might support different inferences, it is a question for a jury.

3. Track repairers found at the close of the day that several rods of railway fencing, enclosing pasture land, had been burned, but they put off mending it until morning. Meanwhile a horse got upon the track during the night and was killed by a passing train. *Held*, that in an action against the company for the injury it was for the jury to say, in view of all the circumstances, whether defendant was negligent.

Error to Oakland. (Stickney, J.) Oct. 23.—Nov. 19.

Case. Defendant brings error. Affirmed.

W. H. Russell and *Geo. Jerome* for appellant, claimed that defendant was not obliged to use extraordinary efforts to make the needed repairs in the night-time, and there was therefore no question of negligence to submit to the jury: *Robinson v. Grand Trunk Ry. Co.* 32 Mich. 322; *Grand Rapids & Ind. R. R. v. Monroe* 47 Mich. 152; *Toledo, Canada Southern & Detroit Ry. v. Eder* 45 Mich. 329; *Stephenson v. Grand Trunk Ry. Co.* 34 Mich. 323; *Case v. St. Louis &c., Ry. Co.* 75 Mo. 668; *Clardy v. St. Louis &c., Ry. Co.* 73 Mo. 576; *Aylesworth v. Chicago R. R. Co.* 30 Iowa 459; *Vurco v. Chicago, M. & St. P. Ry. Co.* 11 Amer. & Eng. R. R. Cases 419; *Norris v. Androscoggin R. R. Co.* 39 Me. 274.

M. M. Burnham, Aaron Perry and *Thos. J. Davis* for appellee, cited *Hoppe, Adm'r v. Chicago, M. & St. P. Ry.* 61 Wis. 357; *Nelson v. Chicago, M. & St. P. Ry.* 60 Wis. 320.

MORSE, C. J. The plaintiff in this case brought suit before a justice of the peace, in the county of Oakland, to recover the value of a horse killed by one of the defendant's trains on the night of October 20, 1882, and recovered a judgment against defendant for the sum of $100 damages and costs of suit. The defendant appealed to the circuit court for the county of Oakland, and on the 11th of December, 1884, a judgment was again rendered against defendant for $100 damages and costs of suit.

During the day, from some cause not known, a fire destroyed about six rods of a board fence on the line of the railway adjoining plaintiff's pasture field, about one mile from the center of the village of Holly. In the morning when the section hands went by, the fence was in good condition. On their return from their work in the afternoon before sundown, the section-gang, consisting of the foreman and three others, stopped the hand-car and observed the gap in the fence, and went on to Holly without taking any steps to repair it. The next morning the first work done by them was to rebuild the fence. Sometime in the night the horse of plaintiff got on the track and was killed by defendant's train.

The plaintiff and his son testified that they saw the track-men stop opposite where the fence was burned that afternoon, but neither of them knew the fence was defective until next morning, when the track-men notified plaintiff that his horse was killed. Both also testified it was before sundown when they saw the section-men stop, and that it was three-quarters of a mile to the depot at Holly. Thomas Ryan, one of the track-men sworn on behalf of the plaintiff, testified that he had been in the employ of defendant under the section foreman, Ed. Dunn, that summer, and on the 20th day of October, 1882, was on the hand car in the afternoon returning to Holly from work. The men on the car, the foreman being one of them, stopped the car for a moment opposite the gap in the fence, and he noticed it. The foreman said nothing, but ordered the car to go ahead, and when they arrived at Holly, their day's work being done, he dismissed them. It was a nice day, and a nice evening also, and

it was not yet sundown when they stopped at the hole in the fence. It was three-quarters of a mile to Holly and took them about ten minutes to go one way. The field had been used by the plaintiff as a pasture that summer, and was so used that day. In his opinion, if the things had been right there, it would not have taken but a little while to repair the fence; but there was nothing at the gap to fix it with, and by the time they could have got the materials there it would have been pretty difficult to drive nails, as it would have been pretty dark. Defendant's counsel asked the court, under the proofs, to direct a verdict for the defendant, on the ground that the evidence showed no negligence in defendant.

It was admitted that the horse was killed by defendant's cars, and there was no question but that the fence was one that the company was bound to keep in repair under the statute. The court refused to so direct a verdict, and charged the jury substantially as follows on the question of negligence: The law governing this case gives the defendant railway company reasonable time to procure materials and repair the defective fence in the highway before they can become liable under the law for any damages accruing in consequence of the defect in the fence. In this case, if the jury finds from the facts that have been adduced that the defendant company had reasonable time, after notice of the defect in the fence in question, to have procured the necessary materials and repaired it by the use of ordinary diligence, and if the jury further find that the company did not use proper care and reasonable diligence in making the repairs, and they find that there was time, on the day in question when the same was discovered, to have procured the materials and made the necessary repairs before night, then the defendant company would be liable in the law for such damages as the jury find the plaintiff suffered in consequence of the defendant's neglect, if there was neglect. If the jury should find from the proof that there was not time before night on the day in question to procure the necessary materials and to repair the defective fence, and the jury should find that the company set about to repair the fence in a rea-

sonable time afterwards, or set about to procure the materials and repair the fence in a reasonable time after notice, then the defendant company will not be liable.

It is insisted that this was error; that from the evidence it clearly appears that the fence could not have been repaired before night set in; and that the defendant was under no obligation to use extraordinary efforts to make the needed repairs in the night-time. The court fairly left it to the jury to say whether or not, with reasonable diligence, the fence could have been repaired before night; and instructed them plainly that if it could not have been so repaired before night, the railroad company was not liable. Because the track-man Ryan testified that in his opinion it would have been pretty dark before they could have finished the repairing did not preclude the jury finding from the other evidence and circumstances in the case that it could have been done; and we are not prepared to say, in a case like the present, when the defect was discovered before sundown by the foreman of the track gang, that it was not the duty of these men to at once set about the business of getting materials and repairing the fence, even if it would have taken a few minutes after dark to complete the work. It seems to me that the charge of the court was even more favorable to the defendant than it could reasonably ask under the law.

The men whose duty it was to repair this fence discovered it before sundown upon a pleasant, fair-weather day, with a pleasant evening following. They knew that the field it separated from their track was a pasture for plaintiff's animals, and that they were in it that day and likely to remain there during the night. They knew that the trains of the company would pass over the track during the night, and that there was liability of some of plaintiff's stock straying upon the track and getting killed or injured. It was but ten minutes' ride to Holly, where, presumably, at the defendants' depot, were the necessary materials to close up the break in the fence. Yet they made no effort in any way to fix the fence until the next morning. They left the gap there and went on to Holly, where the foreman dismissed them. They did not even take

the trouble to notify the plaintiff or any of his family that the fence was down. Not until the horse was killed did any of them take any steps whatever to save the property of plaintiff from a danger that was evident. The same outlay of time expended in notifying him of the death of his horse would, the evening before, in all probability have prevented the loss.

This is not like the case of *Stephenson v. Grand Trunk Ry. Co.* 34 Mich. 323, where the foreman was not notified of the defect in the fence until eight o'clock of a December evening, after his men had been dismissed from their day's labor and gone to their homes, and the notice was brought to him by a person not connected with the railroad or the plaintiff. In this case the foreman saw the hole in the fence himself, while his men were with him, their day's work not yet ended, and under his control and subject to his orders; and yet, without any care whatever, but with the utmost indifference to the naturally to be expected consequences, he deliberately turned away, dismissed his men, and left the defect without even the warning that a common and ordinary regard for the rights of others would have prompted.

In the case of the *Illinois Central R. R. Co. v. Dickerson* 27 Ill. 55, it was held that it was not the duty of a railroad company to keep a patrol at night the whole length of their line to see that the fences were not broken down or burned up; but the court rightfully refused to reverse the judgment against the corporation, as it appeared that the foreman of the section gang, whose duty it was to keep the fence in repair, passed down the road about six o'clock the night the cattle were killed, and by the place where the fence was defective and through which the cattle escaped upon the track. The foreman testified that he did not think the fence was down when he passed by; he did not see it down, but it might have been. The plaintiff was allowed to save his judgment, because there was other evidence that the fence was down at that time, and the foreman evidently testified from general observation rather than to having his attention particularly directed to the place where the fence was claimed

to be defective. In other words, the plain inference of the reasoning of the court is, the jury, from the evidence, had a right to find the fence was down, and if so, the foreman not seeing it, this was in itself negligence.

A railroad corporation should be held to the same vigilance and activity in keeping a fence in repair as good business men engaged in any calling or industry where fences are required, would naturally exercise in the prudent care of their own property liable to be injured or destroyed by the breaking or burning of a fence. And the question whether an ordinarily prudent farmer, having crops inclosed from animals running outside, discovering such a break in his fence as this, at the time of the day these track-men found this gap, would not at once have set about repairing it, is, in my view of the law, a fair question to submit to a jury, if it is not absolutely certain that he would do so. I think no fair, unbiased panel of twelve men would answer such a question in the negative. And even if there is a fair chance of difference among candid, unprejudiced men upon any question of this kind, then it cannot be taken by a court away from the jury. And a disregard of the same degree of care in saving the property of others from injury by its action that an ordinarily prudent man would exercise in protecting his own property, is negligence in this corporation, as it would be in an individual.

It cannot be said that the facts and circumstances in the case before us lead inevitably to the conclusion that there was an absence of negligence on the part of the defendant. "Negligence is almost always to be deduced as an inference of fact from several facts and circumstances disclosed by the testimony, after their connection and relation to the matter in issue have been traced, and their weight and force considered. In such cases, if unbiased men would differ as to such inferences, then they cannot be made without the intervention of a jury, although all the witnesses agree in their statements, or there be but one statement which is consistent throughout." *Hill v. City of Fond du Lac* 56 Wis. 246.

In this case the nature of the break in the fence; the dis-

tance to defendant's depot; the time it would take to go there, get the necessary materials, and return and repair the fence; the time of day and the season of the year when it was discovered; by whom it was discovered; the action of the railroad employees whose duty it was to repair it, and that they knew the injury likely to happen if it was not fixed, and knowing this, did not notify the plaintiff, or manifest any concern about it till morning—were, in my opinion, such facts and circumstances as were peculiarly within the province of a jury, and properly belonged to no other tribunal. It was for them, and them alone, to decide whether, under such facts and circumstances, the defendant used such proper diligence as a reasonably prudent man would in protecting his own property from damage or destruction. Therefore no error was committed, and

The judgment of the court below will be affirmed with costs.

CHAMPLIN and SHERWOOD, JJ. concurred.

CAMPBELL, J. The declaration in this case charges no negligence but failure to keep up a proper fence. And under this declaration and the facts in the record no question could arise except whether the fence which was injured was allowed to remain unrepaired an unreasonable time. And, as the injury was done the same evening, the only question of negligence, as injurious to plaintiff, was whether the fence should have been repaired that evening. There is nothing alleged which could bring into the controversy any failure of the agents of the road to send messages to plaintiff to tell him what had happened to his fence.

Negligence being the cause of action alleged, it devolved on plaintiff to prove it by sufficient evidence. It could not be assumed without pertinent proof. There was no complaint of the original fence. The injury to the fence is shown by plaintiff, by a witness called by himself, to have been first known a few minutes before sundown. The only witness who showed any notice to the company of the burning of the fence was one of the men who was employed on the road,

and who passed in a hand car on the way to Holly. There was no proof from any one, except incidentally, that there were repairing materials obtainable. The witness referred to indicates that they were to be found at Holly, but he distinctly gave it as his opinion that before they could be found and brought to the place where they were needed, it would be too dark to do the work without difficulty, if at all. His testimony clearly negatives any negligence in not repairing the fence that evening, and it is the only testimony on which plaintiff could rely to make out the notice to the company.

I do not think that juries can be allowed to disregard testimony and form their own conjectures, for which they have no legitimate data. In my opinion there was no proof to go to the jury to make out a failure of the defendant to act with reasonable diligence.

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LEWIS COTHERMAN v. ESTATE OF SOLOMON COTHERMAN.

Exclusion of testimony of claimants against decedent's estate—Evidence of settlement—Exceptions.

1. The statutory rule excluding the testimony of a party where the facts were known only to himself and to one who, if living, would be the adverse party, does not prevent the wife of a claimant against an estate from testifying as to her husband's claim.

2. The fact that a claim is apparently outlawed does not necessarily exclude evidence thereon; the question whether or not it is barred is one to be dealt with when the testimony is all in.

3. A claimant against an estate is a competent witness as to matters not shown to be known only to deceased himself. And *it seems* that if the adverse party consents he can testify as to matters known to them alone.

4. A settlement of previous accounts is not to be conclusively presumed from the giving of a note by one party to the other. Whether it furnishes a prima facie presumption or is only a question for the jury —Q.

5. Exceptions, though covered by assignments of error, will not be noticed on review if not made to the trial judge and noted in the bill of exceptions.

Error to St. Joseph. (Pealer, J.) Oct. 29.—Nov. 19.

Appeal from commissioners on estate. The executors bring error. Affirmed.

O. F. Bean for claimant.

Howell, Carr & Barnard for the defendant estate.

CAMPBELL, J. Plaintiff, who is a son of the deceased, presented a claim against the estate, which was disallowed, and on appeal to the circuit court he obtained a verdict for a part of it. The executors bring error. The errors assigned are somewhat numerous, but so far as they rest on exceptions brought to the notice of the judge they relate to but a few matters, and may be grouped together so as to present but a few points.

Some objections were made to the action of the court in allowing the appeal papers to be perfected. But as the action came within repeated decisions of this Court, we need not consider it.

The claim consisted of a series of charges extending back to 1870, 1871 and 1872, with an interval of over six years between these and the next credit in 1878, and the only transaction in this interval was a credit to deceased for plowing in 1876, no amount being carried out.

The items of the account were all entered on paper, as she swears contemporaneously, by Margaret Cotherman, wife of plaintiff, he being somewhat illiterate. Some of them were sworn to by herself, and some by other witnesses. The item of plowing was sworn to by various persons, and plaintiff was allowed to testify to the amount of land plowed and to the value of the plowing, but nothing more.

It was shown that about a year after the date of the last charge, plaintiff made a note to his father for between five and six hundred dollars, which had not matured, but was

payable without interest in January, 1888. Defendants declined to introduce it as a defense, but claimed it was evidence that there had been a settlement and balance found due deceased.

When Margaret Cotherman was sworn as a witness only two exceptions were taken to her testimony. One was that she was incompetent to testify to matters within the knowledge of deceased, and the other that some of the items she proved were more than six years old, and barred by the statute of limitations.

The first of these objections has no force. She was not a party to the litigation in any way, and was on the same footing with any other witness. The second objection was also untenable. The items were not inadmissible, but they could not be recovered unless shown to be out of the operation of the statute. That question was one to be dealt with when the testimony was all in, and was so dealt with by charges which were excepted to.

Plaintiff was a competent witness to matters not shown to be within his father's knowledge. The testimony concerning the plowing showed that the plowman did all his work in the absence of decedent, and the objection did not apply.

There was testimony to go to the jury upon all the items, and it was not excepted to, except as before mentioned. The court granted the instruction prayed for, that the jury should not act upon any testimony of Mrs. Cotherman depending on what her husband told her, but must act on evidence from persons cognizant of the facts. This charge was twice given,—once when presented as a request, and again after the charge was finished, when a juror made an inquiry of the court, which led the court to repeat it again, precisely as desired.

The only exceptions to the substance of the charge are those which complain of the rulings concerning the statute of limitations, and the refusal to charge that the note mentioned must be presumed to have been given in full settlement of accounts.

Upon the effect of this note the court charged the jury quite fully that they were to determine from all the facts

whether it was or was not a settlement, and should they find it so they must give a verdict for the estate. The exception is to the refusal to charge that it must be held as a settlement as matter of law.

We find no support for this broad doctrine in the authorities, and nothing was cited to sustain it. Whatever we might be disposed to think of the probabilities, it was a question of fact and not of law. From the amount of the verdict it is impossible to tell how much, if any, of the early items previous to 1878 was allowed. Most of them must have been rejected, if not all. But we cannot say that the statute is not in question on the record as it stands, and the rulings are material.

It was, we think, for the jury to say whether there had been a running account during the period in question. The relations of the parties were such that laxity of dealing and settlement would not be unnatural, and was certainly possible. The inability of the plaintiff to be sworn without the consent of defendant makes it impossible to question him on that subject, or on the transaction out of which the note grew, the evidence of which, if existing, is probably in the hands of the estate. Whatever any one may think of the probabilities, they were all in the hands of the jury, and the finding indicates that, whether right or wrong, their verdict was not given without consideration of the items. We cannot substitute our possible views for theirs, if we should hold different impressions.

The assignments of error cover several objections not covered by exceptions. No exception can be noticed which was not made to the judge and noted in the bill.

The judgment should be affirmed.

SHERWOOD, J. concurred.

CHAMPLIN, J. Solomon Cotherman died testate February 5, 1883. Defendants are his executors. Commissioners to examine and allow claims against his estate were duly appointed by the probate judge of St. Joseph county; and among the claims presented to them and disallowed was that

of the plaintiff, who appealed therefrom to the circuit court where a trial was had before a jury, which resulted in a verdict for the plaintiff. The case comes here by writ of error.

The claim against the estate, as presented to the commissioners, consisted of an account with debit and credit items. Those on the debit side commenced in 1870, and contain a single charge for that year; two in 1871; one in the month of May, 1872; five in 1878, the first bearing date September 10th of that year; thirty-one in 1879; and nineteen in 1880, the last charge bearing date December 13th of that year. Those on the credit side commenced in 1868, a single credit being given that year; one in 1869; two in 1871; in 1876 there is a single credit as follows: "1876, by plowing,"—no time in the year being mentioned, and no amount credited therefor. There are six credits in 1879 and three in 1880, the last item bearing the date of October 9th.

It will be seen that the continuity of the account is made to depend upon the credit item, in 1876, of plowing, and the date at which it occurred, for the reason that between May, 1872, and September 10, 1878, there are no items charged against the estate in plaintiff's account, a period of over six years and three months. The debit items from 1870 to and including May, 1872, amounted to $320. It was claimed by the defendants that these items, and the amounts charged therefor, were barred by the statute of limitations. To prevent the operation of the statute it became necessary for the plaintiff to prove the item of credit for plowing in 1876. The following is all the evidence there was introduced upon the trial concerning this item. On the direct examination of Mrs. Cotherman, the wife of plaintiff, the counsel for plaintiff asked this question:

"*Question.* And in September, what do you know of the old gentleman doing some plowing for him on this account?
Answer. He sent a boy to plow, and furnished a team."

The next witness was James Snyder, who had formerly lived in the family of Solomon Cotherman until he was sixteen years old, and staid there winters until he got married.

He was in his twenty-eighth year at the time of the trial in 1884, and consequently was in his twentieth year in 1876; and unless the plowing was done in the winter season, it is not probable that it was done by him that year. His testimony upon the subject is as follows:

Direct examination:—*Question.* Do you remember of plowing there for Lewis at the old gentleman's request?

Answer. Yes, sir; I plowed there.

Q. In the year 1876?

A. I plowed there. I could not tell you what year it was; for I don't remember anything about it.

Q. About what year, as near as you can now tell?

A. I don't know.

Q. How long a time did you plow there?

A. I was there about four weeks, and probably worked about two of them. Part of the time I worked, and part of the time I played.

Q. Whose team did you have?

A. Solomon Cotherman's.

On his cross-examination this testimony was elicited:

Question. Is it not a fact that all the work you know of his doing for the old man is some done on exchange of work between him and the old gentleman, and didn't you so understand it?

Answer. They exchanged work back and forth, yes, sir.

Q. All the work you have sworn to you understood at the time to be exchange of work?

A. Yes, sir.

The next witness for plaintiff was his son, Dell Cotherman, who testified as follows:

Question. State what you know of your grandfather plowing for your father in 1876.

Answer. Well, I don't know of his plowing, but I know of Jim Snyder plowing.

Q. Who was James Snyder working for at the time he came there?

A. For my grandfather.

Q. How long did he work there on your father's place plowing?

A. Well, I could not tell you just how long. He worked there quite a while I know. I know while he worked there we acted the fool lots of days; went hunting.

Q. About how long; a day or two?
A. Yes; he was there longer than that, I think.
Q. Are you able to state about how long?
A. No, sir; I was not very big myself.

Witness further stated that he plowed in the field east of the house, and he plowed the whole field, but was unable to tell how many acres, and that his grandfather sent him there. On his cross-examination he was asked: "How old was you when this boy Snyder was plowing there?" to which he answered: "Well, I don't remember just how long ago it was; I went to school sometime; but while he was there I didn't go to school. I had been to school before that time." He was then asked: "Can you tell what year it was?" and he replied, "No, sir; I can't tell what year it was."

The only other testimony upon this item was that given by the plaintiff, against the objection of defendants' counsel, as follows: "I am the claimant in this case, and heard the testimony of my son in regard to some plowing that was done, as he said, by one Snyder. *Question.* How much plowing was done? *Answer.* Eight acres we had in the lot." He further testified, against defendants' objection, that the plowing was worth two dollars an acre.

I have now given all the evidence which was offered to support the plaintiff's item of credit for plowing done in 1876 which appears in the record before us. The defendant's counsel move to strike out all testimony in support of the items of account on the debit side which were prior to September 10, 1878, for the reason that the same were barred by the statute, which the court refused, and defendant excepted. In this the court erred. There was no testimony whatever to show that the plowing, which appears as a credit, was done in 1876. No witness states that the plowing was done that year, or what year. It appears from the testimony of Mrs. Cotherman that from 1870 to 1878 her husband and herself lived on a farm in Cass county, about twelve miles distant from his father's residence, and in 1878 they removed nearer to him, and from thence resided about three-quarters

of a mile from him. It also appears that the plaintiff could not write, except his name, and his wife was in the habit of keeping his accounts upon pieces of paper, under his direction and at his request, and that the account was made up from these sources. The charges consisted mainly of items of labor performed by plaintiff and his son Dell, and for team work, the larger portion of which the witness Mrs. Cotherman knew nothing about, except as she had been informed by plaintiff. On the trial she was permitted, against defendants' objections, to testify to all of these items; her attention being called to them seriatim by counsel for plaintiff. Counsel for defendants then moved to strike out all of the testimony as to the amounts, and everything that, according to her testimony rested upon his statement, because it was nothing more nor less than hearsay from him, and his testimony could not be admitted; he could not swear to it himself, because prohibited by the statute. The court overruled the motion, saying: "You may have an exception at present. The jury will observe, as we go along, how far it is her testimony, and how far it is his."

This ruling was clearly error. It is the duty of the court and not of the jury to exclude irrelevant or hearsay testimony, and the admission of hearsay testimony in this case was a clear violation of the rule which excludes such testimony from being given in evidence. It cannot be presumed that the jury were capable of determining as they went along what part of Mrs. Cotherman's testimony was admissible and proper to be considered by them, and what portion was not. This was a grave error in the trial judge which ought not to be overlooked or sanctioned. That it had its effect upon the minds of the jury is apparent from this record. The defendants' counsel requested the court to charge the jury that "all items of accounts charged by the claimant's wife against his father, from the mere statement of the claim himself, and not proved by other testimony, must be excluded;" and at the close of his charge he read this request to the jury as a part of his charge. After the jury had retired they returned

again to the court for further instruction, when the following occurred:

A Juror. "Then, if you will read that once more; there are a couple of us that don't exactly understand it."

The Court. "All items of account charged by the plaintiff's wife against claimant's father, from the mere statement of claimant himself, and not supported by other testimony, must be excluded; *that is, it cannot be supported simply by her testimony.* You will determine from all the evidence in the case how many of those items, if any, simply rest upon her testimony alone. You will consider all the other testimony bearing upon them."

These instructions left her testimony of a hearsay nature to stand as evidence, but required that it should be supported by other evidence. Nothing was pointed out to them as not proper to be considered and weighed by them. On the contrary, the jury were left to determine as best they might what portion of her testimony was hearsay and what was not. This, it seems to me, was clearly error. The error of admitting such testimony in the first instance was of such a nature that it could not be cured by a charge to the jury, because it became impossible to sift out and clearly identify that which was proper for their consideration from that which was not.

As before stated, the last item in plaintiff's account is December 13, 1880. The uncontradicted evidence showed that afterwards the plaintiff made and delivered to Solomon Cotherman a promissory note, of which the following is a copy:

"$547.77. FLOWERFIELD, Mich., January 18, 1882.

Six years after date, I promise to pay to the order of Solomon Cotherman the sum of five hundred and forty-seven and 77-100 dollars, without interest. Value received.

LEWIS COTHERMAN."

This note was introduced in evidence by the executors, as evidence of a settlement and adjustment of all previous accounts or indebtedness between the parties. No evidence was given or offered by the claimant to show for what, in fact, the note was given, and consequently it is to be presumed that all claims of the plaintiff against Solomon Cother-

man were settled and adjusted at the time the note was given, and that he owed Solomon Cotherman the amount thereof at that time. This presumption is only prima facie, and is liable to be explained; but until explained it is to be taken as true, and affords sufficient evidence of a settlement and adjustment of the account presented, and of the amount due to the testator at the time the note was given. *Gould v. Chase* 16 Johns. 226; *Duguid v. Ogilvie* 3 E. D. Smith 527; *De Freest v. Bloomingdale* 5 Den. 304; *Lake v. Tysen* 6 N. Y. 461; *Sperry v. Miller* 16 N.Y. 414; 1 Phil. Ev. (Cow. & H. Notes) 702, note 191; *Kelly v. Jackson* 6 Pet. 632; *Carver v. Jackson* 4 Pet. 1. These authorities are in point, and are founded in good sense, as well as the common experience of mankind in their mutual dealings with each other. When dealings are had between parties, and afterward one who claims that the other is indebted to him gives to such other a promissory note for a certain amount, the fair presumption is that such indebtedness has been canceled, and he has become indebted himself to such party. It is a circumstance of that importance, reversing, as it does, the relative condition of the parties from creditor to debtor, that calls upon the person who seeks to enforce a claim of indebtedness to explain why, at a subsequent time, he appears a debtor to the one he claims to be his debtor.

So it has been held that the giving of a bond and mortgage furnishes a presumption of a liquidation of all accounts between the parties: *Chewning v. Proctor* 2 McCord Ch. 14, 15; *Blount v. Starkey's Adm'r* 1 Tayl. 110; *Weidner v. Schweigart* 9 S. & R. 385. In *Kelly v. Jackson* supra, Mr. Justice Story said: "What is prima facie evidence of a fact? It is such as in judgment of law, is sufficient to establish the fact; and if not rebutted, remains sufficient for the purpose. The jury are bound to consider it in that light, unless they are invested with authority to disregard the rules of evidence, by which the liberty and estate of every citizen are guarded and supported. No judge would hesitate to set aside their verdict and grant a new trial, if, under such circumstances, without any rebutting evidence, they disre-

gard it. It would be error on their part, which would require the remedial interposition of the court. In a legal sense then, such prima facie evidence, in the absence of all controlling evidence or discrediting circumstances, becomes conclusive of the fact; that is, it should operate upon the minds of the jury as decisive to found their verdict as to the fact. Such we understand to be the clear principles of law on this subject."

The defendants in this case requested the circuit judge to charge the jury that if they found that the parties met, and the claimant gave the deceased a note, the law presumed that their accounts were settled thereby. This the court refused, but charged the jury that if they should find there was a settlement at the time the note was given, the plaintiff could not recover. He gave them no instructions as to the presumptions arising under the circumstances of the case. I think the defendants were not only entitled to the instruction requested, but that the court should have charged the jury that the presumption from the giving of the note was that the plaintiff's account was settled, and that instead of his father owing him, he owed his father; and no explanation having been made as to what the note was given for, the presumption arising from the settlement and adjustment was conclusive, and he should have directed a verdict for the defendants.

I am of opinion that for the errors pointed out the judgment should be reversed, and a new trial ordered.

MORSE, C. J. concurred.

ELIAKIM T. WALKER v. WILLIAM S. WHIPPLE.

Partnership—Duration—Dissolution.

Whether, where the duration of a partnership is not fixed by the agreement therefor, either partner cannot dissolve it at pleasure—Q. Whether any condition or limitation as to its duration can be ingrafted on the partnership contract as an implication from its nature—Q.

Appeal from Washtenaw. (Speed, J.) Oct. 29.—Nov. 19.

BILL for accounting, etc. Complainant appeals. Affirmed.

Noah W. Cheever and *Charles R. Whitman* for complainant. The duration of a partnership may be determined by all the facts and circumstances of its formation and the acts of the partners: Lindley on Partnership, 218–220; Parsons on Partnership, 415; Story on Part. §§ 84, 277; in case of a partnership at will, it may be dissolved at any time, but all subsisting engagements must be wound up, and the partnership continues for that purpose. *Peacock v. Peacock* 16 Ves. 49; *Crawshay v. Collins* 15 Ves. 218; *Featherstonhaugh v. Fenwick* 17 Ves. 298; *Crawshay v. Maule* 1 Swanst. 508; *Miles v. Thomas* 9 Sim. 606; but the partner dissolving it must do so in good faith at a reasonable time and in a reasonable manner, and so as not to be unnecessarily injurious to his copartner: Parsons on Part. 435; *Howell v. Harvey* 5 Ark. 270.

Sawyer & Knowlton for defendant. A partner not for a term can instantly dissolve the partnership without being liable in damages for so doing. *Fletcher v. Reed* 131 Mass. 312; *Buck v. Smith* 29 Mich. 166; 1 Colly. Part. §§ 100, 101; Parsons on Part. *401, 402; *Carlton v. Cummins* 51 Ind. 478; all that is requisite is that he should make this purpose distinctly known to the other partners; and as soon as it is known it takes effect, without any previous notice. Parsons on Part. *403; *Featherstonhaugh v. Fenwick* 17 Ves. 307; the withdrawal of a partner and his refusal to go on with the business amounts to a dissolution: *Pine v. Ormsbee*

2 Abb. Pr. (N. S.) 375; an implication that the partnership shall last for a certain time does not arise from the fact that goods have been bought, and debts created do not warrant such an inference; nor does the fact that a lease has been taken for a definite term; nor that a partnership for a definite term had previously existed; nor that the business cannot be closed before a definite period without great loss. Pars. on Part. 382, 383; 1 Colly. Part. (6th ed.) Wood's notes, 158; *King v. Accum. Ass'e Co.* 3 C. B. (N. S.) 151; *Booth v. Parks* 1 Moll. 465.

CHAMPLIN, J. In this case it is conceded that the copartnership entered into was not limited by the express agreement of the parties. It was therefore determinable, in the absence of fraud, at the will of either party. I do not agree that a limitation may be ingrafted upon such a copartnership agreement by implication arising out of the business engaged in, or the circumstances of the case. It may be said that it is generally understood that such contract relations are not formed except with a view of engaging in some business which may require both time and capital to carry out the object for which the partnership was formed. It is nevertheless true that unless the term for which the partnership is to continue is limited or fixed by the agreement, either party may, at his pleasure, dissolve the relation. This is elementary law. The defendant exercised his right, and the partnership was dissolved by his refusing to continue the business further in company with complainant. It does not concern us what his reasons or motives for doing so were. There were no existing engagements of the firm that have interfered with the winding up of the partnership affairs. The whole matter between the partners was satisfactorily settled and adjusted by the decree appealed from by complainant, except a claim made by him, but which the court below disallowed, of prospective profits which complainant claims might have been realized had the defendant not dissolved the partnership. The effect of allowing such claim would be to mulct the defendant in damages for doing what he had a legal right to do.

I can find no warrant for the infliction of such penalty,

and the results which would flow from the establishment of such doctrine would be injurious and far-reaching in their consequences. The farthest courts have gone in this direction occurs in cases where, by the terms of the partnership agreement, the time for its duration was limited, and before the expiration thereof one of the parties has dissolved the partnership. But in such cases there has been a breach of the contract, and the damages allowed are such as were the consequences of such breach.

I think the decree of the circuit court should be

Affirmed with costs; and it is so ordered.

MORSE, C. J. concurred.

SHERWOOD, J. The bill in this case was filed to settle the affairs of a copartnership previously existing between the parties. The partnership agreement was entered into in July, 1883, for the purpose of running a steam-threshing machine. The parties were equal partners in the ownership of the machine, and were to share equally in the expenses, profits and losses. They commenced business about the 7th day of August, and continued the same until about the 17th day of September, 1883, at which time the defendant became dissatisfied with the manner in which the machine was managed and the help controlled, took the engine and separator into his private custody and, against the consent and protest of complainant, locked them up into his barn, and refused to allow them to be longer used in the business. He subsequently gave to defendant notice that he dissolved the copartnership. At this time the business of threshing for that season was about half completed, and many contracts were outstanding and made with different parties to do their threshing, several of which had been partly completed; and the defendant refused to allow the plaintiff to use the engine and separator for the completion of such work, or to do any other work during the remainder of the season. The record shows that the gross proceeds of the business were from $100 to $120 per week. It also appears that the parties failed to

come to any adjustment or settlement of the company business, for the reason that the complainant claimed that he was entitled to damages because of the defendant's refusal to continue the partnership business through the season, or allow him the use of the machine to finish the jobs of work then on hand. The decree at the circuit was in favor of the complainant, but failed to give him the damages claimed, and he brings the case into this Court for review.

The complainant's claim for damages raises the only question needing consideration here. No written articles of copartnership were made. The time of its continuance was not limited by any express agreement between the parties. The limitation can only be considered and determined for the purpose of ascertaining the damages, if any, to which the complainant may be entitled. When the time is entirely indefinite, neither express nor implied limitation, the plaintiff cannot recover any damages at all; but if the circumstances under which the contract of copartnership was made show a limitation must necessarily be presumed or by reasonable intendment inferred, then the rule is different, and such limitation will be allowed to enter into the consideration of damages. The subject is one not entirely free from difficulty in any case; still there are cases where the question is so far capable of solution that courts may with safety fix the limit to which the copartnership relation and obligations extend when the agreement between the parties is silent upon the subject, and wherein a failure so to do would result in extreme hardship and injustice. Such consequences, however, can never receive the sanction of a court of equity when the jurisdiction is complete. It will always so construe a contract as to preserve equally the rights of all the parties. The object for which the copartnership was formed, the character of the business to be carried on, the season of the year in which it must be done, or within which the custom of the country requires it to be done, together with such other circumstances as necessarily accompany the making of the copartnership contract, will usually furnish sufficient aid to the court to enable it to determine the reasonable time the

copartnership must continue to preserve the equitable rights and interest of the parties thereto, as well as the rights of those doing business with the firm after notice to dissolve is given. This does not conflict with the well-established doctrine that it is the right of either partner in a partnership, when the time of its continuance is indefinite, to dissolve the relation as to all future business transactions. The relation cannot be created except upon the express or implied understanding between the parties that the undertakings of the firm with third parties during its existence shall be carried out. And if either party fails to discharge his obligations in this regard towards the other, he will become liable to the other in such damages as the latter in consequence thereof may sustain. Chancellor Kent says, in the third volume of his Commentaries, that "It is an established principle in the law of partnership, that if it be without any definite period, any partner may withdraw at a moment's notice, when he pleases, and dissolve the partnership. The civil law contains the same rule on the subject. The existence of engagements with third persons does not prevent the dissolution by the act of the parties, or either of them, though those engagements will not be affected, and the partnership will still continue as to all antecedent concerns, until they are duly adjusted and settled." [p. *53.]

Partners are trustees for each other as to the partnership property and effects, and in all their dealings with each other, relating to the partnership business, perfect good faith is required both before and after dissolution. Neither is entitled to the exclusive possession of the partnership property to the injury or damage of the other. Where a partnership, by the terms of the contract between parties, is to extend or continue for a definite period, and one of the partners forces a dissolution without reasonable cause, I can see no reason why he should not be liable to his copartner for such actual damages as he may sustain by reason of such violation of the contract; nor can I see any good reason why, in the adjustment of the copartnership accounts in equity, the court should not ascertain the facts when such a claim is made, and conclu-

sively determine the whole matter in the final decree. *Adams v. Kable* 6 B. Mon. 384; *Mc Mahon v. McCleman* 10 W. Va. 419; *Howell v. Harvey* 5 Ark. 270. In this case all the circumstances under which the contract was made fully appear in the record. The parties appear to have been farmers and neighbors. They both knew all about the business of threshing. They purchased the machine for the purpose of running it and threshing for other persons during the threshing season. They both engaged work for the machine, and had secured enough to keep it running through the entire season. The machine was a good machine, and its work was in good demand in the neighborhood, and the price for the work to be done was agreed upon when they commenced business. The weekly income, as well as the weekly expenses of carrying on the business, was definitely known to both parties from actual experience, so that there was no difficulty in ascertaining with much certainty the loss sustained each day the machine was idle. It was also clearly shown that the season of threshing continued about two months.

Under the facts above appearing I think it was clearly within the contemplation of the parties that the contract of copartnership should extend through the threshing season of 1883, and that such limitation is fairly to be presumed and implied. Any other construction, it seems to me, would hardly be in accord with good common sense. It further appears from the record that the complainant was ready and willing at all times to fulfill his copartnership obligations with the defendant, and that the latter forced a dissolution at a time when it would be attended with the largest amount of damages to the complainant, in the absence of any reasonable excuse for so doing; that he not only failed to act in that good faith towards his partner which the relation he sustained toward him required, but actually violated his contract of partnership with the plaintiff, and equity and justice require that he should make reparation to the complainant for the actual damages he has sustained. The testimony shows that twenty-four working days elapsed after the defendant took exclusive possession of the property of the

firm, and prevented its use by the plaintiff and refused to fulfill their partnership obligations to the farmers whose threshing they had engaged to do, or allow the plaintiff the use of the machine for that purpose, before the plaintiff purchased the defendant's interest in the machine. Had this purchase not been made, the plaintiff's damage would have been much greater than it is now. The net proceeds per week, we think, are clearly shown to be at least $88, which for four weeks would amount to the sum of $352, one-half of which should be added to the sums already allowed to complainant in the decree of the circuit judge, and with this modification the decree should stand

Affirmed, and the complainant allowed his costs.

CAMPBELL, J. concurred.

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ADA B. WILMARTH v. ROBERT B. WOODCOCK.

General demurrer—Encroachment by cornice projecting over boundary—Allegations in bill to abate nuisance—Irreparable injury—Ejectment.

1. A general demurrer to a bill in chancery challenges the equity of the case therein presented, and must be overruled if it sets out any case for equitable relief, however imperfectly.

2. A bill in equity will lie against complainant's neighbor for building and maintaining a cornice that projects over complainant's boundary line to the permanent injury and depreciation of his property. And this is so, though a remedy be given by statute (How. Stat. ch. 273) for the abatement of a private nuisance where the party complaining thereof has recovered therefor in an action on the case.

3. Whether, in a chancery bill to abate a private nuisance, it is necessary to allege that the injury it does exceeds $100; and whether the suit must fail, if it falls below that—Q. But a bill alleging that the injury amounts to $500 is not bad for setting up a standard of damages that might be recovered at law.

4. The "irreparable injury" alleged as a ground of equitable jurisdiction, is not necessarily such injury as cannot be measured by a pecuniary standard.

5. The allegation in a bill to abate the private nuisance of an encroachment on complainant's premises, that defendant has claimed ownership of a strip thereof, is not such a statement of a dispute about a boundary as would deprive the court of jurisdiction, if the bill states with certainty the actual boundary and complainant's ownership on one side.

6. As between the parties to a bill to abate a nuisance by encroachment, the complainant, being in possession of the invaded premises, cannot bring ejectment; it is for the party maintaining the nuisance to do so if he claims the right to them.

Appeal from Kent. (Montgomery, J.) Oct. 29.—Nov. 19.

BILL to abate nuisance. Defendant appeals. Affirmed.

Harvey Joslin for complainant.

Mark M. Powers and *O. C. Ransom* for defendant.

CHAMPLIN, J. This is a general demurrer for want of equity to a bill of complaint filed by the complainant against the defendant to abate a private nuisance. The material allegations of the bill are that the complainant is the owner of lot 15, in block 10 of Bostwick and Co.'s addition to the city of Grand Rapids, except a strip six feet in width, front and rear, off from north of said lot; that her lot is forty-four feet in width, fronting on Sheldon street, and constitutes her homestead; that defendant owns the land next to and adjoining her land on the north; that a line fence marks the boundaries of their respective lands; that defendant commenced the erection of a barn upon his premises so near the line that she feared the cornice would project over upon her premises; that she made inquiries of defendant as to whether he intended to construct a cornice over her premises, but could obtain no information from him as to his intentions; that she warned him that he must not so construct his barn as to cause any part of it to project over her premises. Nevertheless defendant built his barn near the line, and constructed a cornice which projects over her premises a distance of sixteen inches at the west end, and six inches at the east end, and covers a distance of twenty-one feet in length; that the cornice is

built upon a gable of the barn, and at the eaves is about fifteen feet above the ground, and the peak is about twenty-eight feet above the ground; that the projection of said cornice over the line of said lot, as herein set forth, materially and permanently injures her said property; that it would prevent the use of a portion of her said land for the purposes of a residence; that it very materially injures the looks of her homestead, and would very much depreciate the market value thereof, and render it unsalable; that, having but a limited amount of land, such an unjust appropriation is an irreparable injury to her homestead, and the evident intent, as your oratrix verily believes, of the said Robert B. Woodcock, in wrongfully infringing upon her rights in this regard, is to ultimately encroach still further upon her premises, as he has given out and insisted that he owns three feet in width off from the north side of your oratrix's said land, which he intends, as your oratrix has been informed and believes, to recover unjustly from her. And your oratrix further shows, and charges the fact upon her best judgment and belief, that if said projection is permitted to remain, her said homestead will be thereby depreciated in its market value, and in value, considering the injury in its looks and convenience in the use and enjoyment of her said property, at least $500.

The defendant claims that the bill states no case for equitable relief—*first*, because it appears by the bill that there is a dispute about the boundary; and *second*, complainant has an adequate and complete remedy at law, in an action of trespass or trespass upon the case, and because the injury does not appear to be irreparable, since she states the depreciation in the market value of her homestead will be at least $500, and it is not alleged that defendant is pecuniarily irresponsible and unable to respond in damages at least to that amount.

A general demurrer challenges the equity of the case made by the bill, and must be overruled if a case for equitable relief is set out, however imperfectly. *Glidden v. Norvell* 44 Mich. 206; *Hoffman v. Ross* 25 Mich. 175; *Clark*

v. Davis Har. Ch. 227. The bill states a case for equitable relief. The continued invasion of complainant's rights of property by the maintenance of the projection of the cornice over her north line, constituting a permanent injury to and depreciation of her property, addresses itself to and calls in exercise the equitable jurisdiction of the court. No remedy at law is adequate, owing to the uncertainty of the measure of damages to afford complete compensation. In one sense it is taking from complainant her property without condemnation and without due process of law. No person can be permitted to reach out and appropriate the property of another, and secure to himself the adverse enjoyment and use thereof, which, in a few years, will ripen into an absolute ownership by adverse possession.

How. Stat. ch. 273, provides a remedy, where the plaintiff prevails in an action on the case for a private nuisance, for the abatement of the same. It is quite evident that there may be cases where the present injury would be so inconsiderable to the mind of a jury that, although the nuisance complained of might be of the most annoying kind, they might fail to give the plaintiff a verdict for damages. This statute does not take away the jurisdiction of a court of equity; but affords a concurrent remedy; and we can see no good reason for turning the complainant out of a court having full and complete jurisdiction to seek her remedy in a court having not greater but more limited power to afford complete and adequate relief. *Fraedrich v. Fliette* 25 N. W. Rep. 28: 63 Wis. ; *Denner v. Chicago, Milwaukee & St. Paul Ry. Co.* 57 Wis. 218.

The statement that the depreciation of her property will be at least $500 does not deprive the party of relief in a court of equity. The object of the pleader in making the averment was doubtless to show that the injury exceeded $100. We do not feel called upon to say, upon this record, whether an averment of the kind is necessary in cases of nuisance, nor that a suit in equity must fail if the proofs should disclose that the damage was less than $100.

Irreparable injury, in the sense in which it is used in con-

ferring jurisdiction upon courts of equity, does not mean that the injury complained of is incapable of being measured by a pecuniary standard; nor does it appear from the face of the bill that the injury complained of, for which relief is sought, is a question of a disputed boundary between the parties. The bill states with certainty and particularity the boundary line between her and the defendant, and her ownership in fee of the land south of such boundary. Her averment that she believes that defendant intends ultimately to encroach still further upon her premises, and stating as the basis for such belief that defendant has given out and insisted that he owns three feet in width off of the north side of her land which he intends unjustly to recover from her, is not such a statement of a dispute about a boundary as would deprive the court of jurisdiction. The defendant urges that he has a right to have his title to the three feet, which he insists he owns, and which is in the possession of the complainant, tried by a jury. This suit does not deprive him of that right. The courts of law are open, and the remedy by ejectment is ample, and he is the only party who can bring the action.

The decree of the court below is affirmed with costs. The record will be remanded, with leave for defendant to answer in twenty days on complying with the order of the court below as to payment of costs.

The other Justices concurred.

DRS. K. & K. U. S. MEDICAL AND SURGICAL ASSOCIATION v. POST & TRIBUNE JOB PRINTING COMPANY.

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Dissolution of Attachment—Levy of execution.

1. It is no bar to the dissolution of an attachment upon property the right to which defendant has not relinquished, that an execution has meanwhile been levied upon it in favor of a third party. Johnson v. DeWitt 36 Mich. 95 overruled.
2. The dissolution of a wrongful attachment cannot affect the lien of an execution in favor of a third person upon the same property.

Certiorari to Wayne. (Chambers, J.) Oct. 29.—Nov. 19.

Attachment proceeding. Plaintiff petitions for certiorari. Reversed.

James H. Pound for plaintiff.

Griffin & Warner for defendant.

MORSE, C. J. June 10, 1884, the Post & Tribune Job Printing Company sued out of the Wayne circuit court a writ of attachment against the petitioner, and the sheriff, by virtue of said writ, seized and took into his possession certain personal property belonging to petitioner. July 21, 1884, the petitioner filed an application before a circuit court commissioner of said county for a dissolution of the attachment; and upon hearing, October 7, 1884, said commissioner found that said Post & Tribune Job Printing Company had no legal cause for suing out said attachment, and made an order dissolving the same, and gave the petitioner costs. The plaintiff then appealed to the circuit court, and June 4, 1885, a jury trial was had.

The plaintiff upon the trial introduced in evidence an execution issued out of the Superior Court of Detroit, dated September 27, 1884, and returnable October 24, 1884, in favor of one James S. McCoy and against the petitioner, and

proved that on the day of its issue the sheriff, by virtue of it, levied upon the same property mentioned in said writ of attachment. This evidence was objected to by petitioner's counsel as being immaterial, which objection was overruled by the court and exception taken. Thereupon, without any further showing, the plaintiff's counsel requested a verdict, and the court instructed the jury substantially that under the evidence in the case the said defendant was not at the time of the application before the commissioner for a dissolution of said attachment, and was not then entitled to a dissolution of the same because of said execution levy; and that the plaintiff was entitled to have a verdict denying the right of the defendant to a dissolution of the attachment. The jury rendered a verdict accordingly, and upon such verdict it was ordered and adjudged by the circuit court that the order heretofore made by the circuit court commissioner dissolving the attachment be reversed, and that the plaintiff recover against the defendant his costs, to be taxed, and have execution therefor.

We cannot agree with the circuit court. There was no judgment offered in evidence or proven in favor of McCoy against the petitioner, and the possession of the property by the sheriff could not be justified under this execution alone, without the further proof that it was issued upon a valid and subsisting judgment. It would be no protection to the sheriff in a suit against him to recover the property.

But, without this, there is another consideration. In our view of the case the petitioner would, if there had been a valid judgment shown to support this execution, have been entitled to a dissolution of the attachment and an order for the return of the property, as against the plaintiff in this proceeding. It would be opposed to every principle of good sense, equity and justice to hold that a plaintiff can, as in this case, swear out a causeless attachment, seize the defendant's property under it, hold the property by delay and appeal nearly a year, and then upon the hearing, while unable to give a single reason why he should hold it longer or have taken it in the first place, and admitting himself by implica-

tion to be a naked trespasser, yet hold the possession without the slightest claim of right, and obtain besides a judgment for costs against the defendant, who has simply all this time been seeking his own; and this for no other reason than the fact that, in the mean time, some third person with no interest in the proceeding has levied upon the property.

It is claimed that there is a precedent for it in this State, but we cannot believe it. If there is, it is one that should be followed no longer. On the argument the decision of the court below was attempted to be sustained by the former decisions of this Court; but, as we read them, with the exception of one case, the doctrine therein taught, especially in the later cases, seems to sustain our present views. At least it is the better doctrine, and more in accordance with right and justice; and when the law, through any technical perversion, works substantial injustice, clearly seen, it should at once be righted, and by a liberal interpretation made to work out and accomplish its proper function, namely, the establishment beyond mistake of equity and justice.

A little examination, we think, of the decisions of this Court will make it clearly apparent that, with one exception, all the cases in this State are in harmony with the idea that in the extraordinary proceeding by attachment the levy of a third party upon the attached property cannot in any way alter or vary the rights or remedies of either the plaintiff or defendant therein. In *Chandler v. Nash* 5 Mich. 409, the defendant, before the writ of attachment was issued, had voluntarily assigned his property for the benefit of his creditors, and delivered it to his assignee. Consequently, the court very properly held that he could not ask its restoration to himself. In *Price v. Reed* 20 Mich. 73, the defendant had given a chattel mortgage upon the property, and before he applied for a dissolution of the attachment had voluntarily turned it over to the mortgagee, who was entitled to the possession. Yet in this case Justice Christiancy dissented, and held that, notwithstanding this, the defendant was entitled to a dissolution, and an order for the return of the property as against the plaintiff, who showed no rights whatever in

the property. After these decisions by what seems to us a misapplication of the rule established by them, Mr. Justice Marston, in *Johnson v. De Witt* 36 Mich. 95, held that third parties, by the operation of law, might become entitled to the possession of the attached property while the legal title was yet in the defendant, and thereby defeat his right to have the attachment dissolved, operating precisely as if he had by his own voluntary act parted with his title or possession before he applied for a dissolution; and cited in favor of this doctrine, also, the two cases of *Osborne v. Robbins* 10 Mich. 278, and *Macumber v. Beam* 22 Mich. 396. Both these cases were decided upon a point raised as to the allegation of *ownership* in the petition, and have not the slightest tendency, in our opinion, toward supporting the ruling in *Johnson v. De Witt.*

There is also to be found in the opinion of Chief Justice Marston in *Zook v. Blough* 42 Mich. 487, a single sentence supporting his former opinion in *Johnson v. De Witt.* But the point was not involved in that case, and the remark must be considered as a mere dictum. This case of *Johnson v. De Witt* was one in which it appeared that *before* the application was made to dissolve the attachment the property was out of defendant's hands and in the possession of a United States marshal, and held by him under three execution levies against the goods and chattels of the defendant. The rest of the court appear to have concurred in this opinion; but later, so apparent was the injustice of this decision, that when it came to be applied to a case of successive attachment levies in *Sheldon v. Stewart* 43 Mich. 574, the court unanimously held that the fact that the attached property was held under levy of a large number of other attachments than the one defendant was seeking to have dissolved, was no bar whatever to his right to have the attachment in question dissolved, or to have an order made restoring the property to him; and that the presence of these levies could not compel him to submit in silence to an ex parte allegation of fraud or misconduct. In that case Mr. Justice Graves well said: "The contrary doctrine would directly lead to injustice. It would admit a ready method

for defeating the benign purpose intended by the Legislature when they devised this remedy. * * * Nothing would be easier, in the vast majority of cases than a duplication of levies to preclude any attempt against the seizure. * * * The idea is repugnant to the spirit and design of the statute." He cites *State Bank of Fenton v. Whittle* 41 Mich. 365, and *Schall v. Bly* 43 Mich. 401, in support of his views, which cases, we think, directly sustain him.

By an examination of the record in the case of *State Bank of Fenton v. Whittle*, above referred to, we find in that case, as in this, the property attached, or a portion of it, was personal, and the execution levy was on such personal property. Mr. Justice Cooley, in disposing of that case, says: "One error assigned is that the commissioner ordered a return of the property to the defendant, notwithstanding it was shown to be held by the sheriff under an execution. The evidence that it was so held was insufficient, but the order could do no harm to the execution creditor, as the officer's lien under his writ, and his right to custody by virtue of it could not be disturbed by the commissioner's order."

A distinction is sought to be made on the argument here between an attachment and an execution levy; but we can see none in principle or effect. The decision in 36 Mich. 95, upon which plaintiffs rely, was grounded directly upon the idea that the defendant, having by the levy lost the right to the possession as against some third person, was debarred by the operation of law of the right to have a dissolution of an attachment laid upon his property by one who had no authority to do so. An attachment levy, while it exists, takes away the defendant's right of possession just as completely as the levy of an execution. Indeed, its office and purpose is to seize and hold the property away from him until judgment can be obtained, and execution issued and levied upon it.

The dissolution of an unjust attachment, obtained by a false or mistaken statement and oath of the plaintiff, can do no harm to the valid lien of a third party, while its retention is an indefensible wrong, and a fraud upon the rights of the defendant. It is the right of the defendant to have it re-

moved, and it is the duty of the court to aid him. He is "not bound to submit in silence to a levy which he considers based on an untrue statement against his honor and good faith, merely because other persons have subsequently levied upon the same property." 43 Mich. 402.

This is the language of the later cases in this State, and we believe that it is in accord with right and justice. The affirming of the judgment of the court below in this case would not only be in conflict with these decisions, but against all equity. It would give a confessed wrong-doer the possession of defendant's property for a year, and then, to cap the climax of absurdity and injustice, punish the defendant with costs for attempting to reclaim what of right belongs to it from a possession presumably obtained by fraud, and retained by an utter distortion of legal principles.

The judgment of the circuit court must be reversed with costs to defendant

CHAMPLIN and SHERWOOD, JJ. concurred.

CAMPBELL, J. The defendant company sued out an attachment against plaintiff in certiorari, and the latter having applied to a circuit court commissioner, and that officer having made an order dissolving the attachment, but giving no order for return of the property, the circuit court, to which the matter was appealed, ordered a jury, on demand of the defendant in attachment, who, on the charge of the court, gave judgment against the dissolution. The circuit judge held that the fact that the attached property was held under execution levies cut off any right to have an order of dissolution.

Certiorari was brought to this Court, that writ having been allowed to be taken out, subject to such views as the court might entertain as to its propriety on the hearing.

This writ has been allowed, for want of any other remedy to review the action of a commissioner or judge at chambers sitting as an officer and not as a court, in carrying out the special proceedings to dissolve attachments. But it is no part of the office of such a writ to review the propriety of

any action where the conclusion depends upon the effect produced on the mind of the officer by the facts before him, which he must weigh for himself. *State Bank of Fenton v. Whittle* 41 Mich. 365; *Hyde v. Nelson* 11 Mich. 353; *Linn v. Roberts* 15 Mich. 443; *Brown v. Blanchard* 39 Mich. 790; *Watson v. Hinchman* 42 Mich. 27; *Powers v. O'Brien* 44 Mich. 317; *Schall v. Bly* 43 Mich. 401.

Since the statute was so amended as to enable the circuit court, as a court, to hear such proceedings on appeal from the officer, and to have the aid of a jury, if so desired, the original power of this Court to issue certiorari has been regarded as practically superseded, in accordance with the views expressed in *Farrell v. Taylor* 12 Mich. 113. Any decision by the circuit court as a court, is an interlocutory and not a final order in the cause which is pending in the same court. It was held in *Gray v. York* 44 Mich. 415, that it could not come up for review on writ of error. It is a question of some interest whether the writ of certiorari will lie generally or at all to bring up the interlocutory action of the circuit court. Upon the present hearing the question need not be determined, and will be left for future consideration.

The only question presented on the merits is whether execution levies, existing on the same personal property which is attached, prevent the right of defendant in attachment to get a dissolution and return of the property.

This question was distinctly decided in *Johnson v. DeWitt* 36 Mich. 95, which has never been departed from and which was recognized and followed in *Zook v. Blough* 42 Mich. 487. And it was held in *Price v. Reed* 20 Mich. 72, that this right of possession is open to determination at the time of the hearing. The statute giving appeals in these cases contemplates that there shall be a hearing before the circuit court, in the same manner as in other appeals on trials of fact, and anything can be shown there which could be shown before a judge or commissioner.

As the question is not a new one I do not think it should be opened, and I think the writ should be dismissed.

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ROBERT CUMMINGS, JOHN CUMMINGS, ROBERT H. LANE, AND JOHN M. KENYON v. DAVID R. COREY.

Will—Executor as trustee and beneficiary—Creditor's bills.

1. Whether a defendant should be required to answer over, on exceptions, where the disclosure sought is matter of record—Q.

2. Taking a bill as confessed notwithstanding the answer, is equivalent to admitting the truth of the answer, but denying its sufficiency.

3. Wills are to be so construed as to carry out the evident intentions of the testators so long as they are lawful.

4. Any language in a will which indicates that the devisee is to hold the devise, in whole or in part, for the benefit of others, is sufficient to create a trust; and the property is in his hands as a trust fund if the will imposes a duty upon him in respect to it by the performance of which others are to be benefited.

5. The executor of a will may be at once trustee and beneficiary under it.

6. A wife who had a separate estate when she was married, made her husband, who was an insolvent debtor, the executor of her will, in which she provided, after making other bequests, that he should have the *use* of the remainder during his lifetime, and that on his death it was to be divided as directed. It was to be kept invested and no encroachment was to be made upon the principal, except in emergencies. *Held,* that this will created a trust for the husband's benefit, and that he was charged as executor with its execution. And the fund is beyond the reach of a creditor's bill against the husband, as the trust was not created by the defendant. How. Stat. § 6614.

Appeal from Ingham. (Gridley, J.) Nov. 5–6.—Nov. 19.

CREDITOR'S bill. Defendant appeals. Reversed.

L. D. Johnson and *R. C. Ostrander* for complainant. Where a bequest to a tenant for life is specific, or the intention that he should enjoy the property in its existing state is apparent, he is entitled to such possession and enjoyment even as against the executor: 2 Wms. Ex'rs 1502; Schouler

Ex'rs 250; Hinckley on Testamentary Law 123; *Proctor v. Robinson* 35 Mich. 290; *Sutphen v. Ellis* id. 447; nor does the payment of annuities require the estate to vest in the executor: *Craig v. Hone* 2 Edw. Ch. 554; *Rock River Paper Co. v. Fisk* 47 Mich. 212; property held in trust for the benefit of a judgment debtor might at common law be reached by his creditor by bill in equity regardless of the person from whom the trust fund proceeded: *Hallett v. Thompson* 5 Paige 583; *Hadden v. Spader* 20 Johns. 554; *Hooberry v. Harding* 10 Lea 392; *Turley v. Massengill* 7 Lea 353; *Taylor v. Harwell* 65 Ala. 1; *Jones v. Reese* id. 134; the statutory exception of trusts from the scope of a creditor's bill does not apply where the judgment debtor is the trustee and has a beneficial interest in the trust property: *Leroy v. Rogers* 3 Paige 234; *Degraw v. Clason* 11 Paige 136; *Wetmore v. Truslow* 51 N. Y. 342.

Edward Cahill for defendant. The trust created by a will devolves on the executor if no other trustee is named: 1 Perry on Trusts 262; *Pettingill v. Pettingill* 60 Me. 412; *Richardson v. Knight* 69 Me. 385; and persons may be trustees where they are also beneficiaries with others: 1 Perry on Trusts 117; *Chase v. Chase* 2 Allen 101.

SHERWOOD, J. The bill of complaint in this cause is filed by the creditors of the defendant to reach equitable interests in property under his control, and which complainants claim should be applied to the satisfaction of their judgment obtained against him, upon which execution has been issued and returned unsatisfied for want of property out of which to make the same.

For several years prior to the filing of complainants' bill the defendant had been engaged in the mercantile business in the counties of Ingham and Ionia, and about a year before this suit was commenced became insolvent, being indebted several thousand dollars more than he was able to pay. He was at that time married to a widow lady who was the owner of property in her own right to the amount of over $10,000. After the defendant became insolvent his wife died, leaving, besides himself, who was in feeble health, an aged mother. During her last illness, Mrs. Corey made her will (a copy of

which will be found in the margin[1]), and named therein her husband as her executor.

By this will it cannot fail to be observed that the controlling idea of the testatrix was—*first*, to secure and protect her husband, who was then without the means of support, and an infirm old mother, from want and destitution; and *second*, in doing this, to so manage the estate that as much as possible might be saved to be transmitted, after their death, to her other relations named in the will. Notwithstanding the great financial embarrassment under which her husband was laboring at the time the will was made, it appears that his wife had perfect confidence in his ability and integrity, to give him the control and management of her property, and have him execute her will, and carry out the trusts she had created, including that wherein he himself was the beneficiary. After his wife's death the will was probated, and the defendant was appointed her executor, gave the required

[1] I, Jennie S. Corey, of Lansing, Ingham county, State of Michigan, do make this my last will and testament: I give to my mother, Lovina Spaulding, during her life-time, the house which she now occupies in the village of Manchester, Mich. I also desire that the sum of one hundred dollars be paid her yearly as long as she may live, and more each year should she need it, as I desire that she may want for nothing so long as there may be anything belonging to me left. And at her death it is my wish that the house and lot be sold, and whatever it may bring be equally divided between my two nieces, Jennie and Clara Annabil. Also that the sum of twenty-five dollars be paid to each of them yearly until their marriage. My piano I give to Mary and Nellie, and should either wish to take the piano on leaving home, let her pay the other for her half. My watch and chain I give to my niece Jennie L. Annabil; also set of corals, plain gold ring, scarlet and black lace shawl. I give my woolen shawl, and all worsted dresses that I may have at my death, to my sister, Nettie C. Annabil, and to my sister and Jennie I leave all books which I may have on side bookcase, and those which that contains I wish to remain here as long as my husband makes this his home, and if at any time he should wish to, and house or his home should be broken up, I wish Mary and Nellie to take what books they would like, and send whatever they do not care to retain to my sister. My garnet silk, and my point-lace, gold bracelets, gold chain, and one gold ring, also one set of silver spoons, I wish my dear little Nellie to have; to Mary I give my best black silk, fur cloak, and sealskin furs, set of cameos, one set of silver spoons, one plain gold ring, with part of point-lace; the remainder of my clothing, whatever it may be, I wish to have divided equally between Mary, Jennie, Nellie, and Clara, giving to each one that which will be of the most service to them; my beds and bedding I wish to remain where they are until my husband may make some change in his home, then I wish to have it equally divided between my two girls, Mary and Nellie, and two nieces, Jennie and Clara Annabil. I wish to be perfectly just in dispos-

bonds, made and returned an inventory of the property of the estate, entered actively upon the discharge of his duties, and has ever since continued in the administration of the trusts assumed.

The complainants by their bill seek to reach the property of the defendant, which it alleges he has concealed or put beyond the reach of an execution, and which consists of that which he annually receives from the estate of his deceased wife under the will, and prays for a discovery, the appointment of a receiver, etc.

The defendant's answer was excepted to for insufficiency, and he made a second answer. This being excepted to for the same reason, it was submitted to the circuit judge, who sustained the exceptions and required the defendant to answer over. This the defendant declined to do, and thereupon the bill was taken as confessed and a receiver was appointed by the court. From this order appointing a receiver the defend-

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ing of what I may have, and would gladly have remembered my dear brother's children at this present time, but there are good and proper reasons why I should not, and in after years perhaps it will be of more use to them. I have said that I wished to be perfectly just, yet many may question my judgment somewhat in what I am about to do; yet to me it seems perfectly right. As my dear husband, David R. Corey, is in poor health, and is more to me than all the world besides, I wish him to have the use, during his life-time, of the remainder of my property, real and personal, about our home, not hitherto disposed of, including the house we now occupy, and all real estate mortgages which I may have at my death. I earnestly desire and hope that the property may be invested in the same way that it is now, and as I have kept it for many years, and at his death I wish all to be divided equally between my sister Nettie's and brother George's children, and Mary and Nellie. In no case, unless a long sickness should occur, do I wish him to use the principal, as the interest will be ample for all ordinary wants, but should it in any case be necessary for his comfort to use more than the interest, I wish him to do so. I also give him small diamond ring which he now wears, and the one he gave me before our marriage I wish him to give the daughter that marries first. To my dear friend, Mary S. Vandegieft, of Manchester, Mich., I give my gold ear-rings and the gold thimble she gave me on my wedding-day. And I hereby appoint David R. Corey executor of this my last will and testament.

In witness whereof, I hereunto set my hand and seal this 9th day of Dec., 1881.

JENNIE S. COREY.

Signed, sealed, and acknowledged by Jennie S. Corey to be her last will and testament.

MRS. HELEN CRAWFORD.
ANSON L. CRAWFORD.
PELEY G. COREY.

Admitted to probate February 14th, 1882.

ant appeals to this Court for a review of the proceedings, and to obtain a construction of the provisions of the will relating to the bequests therein contained to him and for his use.

The order appealed from takes the bill as confessed for want of answer as to all matters to which the exceptions relate. It appoints a receiver, and directs the defendant to turn over to him the accumulated rents, interest and profits, and all property not exempt from execution, in which the rents, interest and profits may be invested; also, from time to time, all future rents, interest, and profits in excess of the annuity payable to Lovina Spaulding under the will.

The bill is not one in aid of execution. No levy has been made upon any property to which reference is made in the bill. It must be treated as a bill to have complainants' judgment paid out of choses in action or other personal property of the debtor not liable to execution, which in equity should be liable to the payment of his debts.

The second answer makes the will of the testatrix a part thereof, and denies every allegation in the bill tending to show that defendant has property of any kind which he has concealed, or equitable interests which he refuses to disclose, except that which came from his wife's estate. It admits that he is in possession of certain property as executor of her estate, but of this the inventory is on file in the office of the judge of probate, and it could hardly be necessary to come into a court of equity to obtain discovery of the property therein mentioned.

By taking the bill as confessed, notwithstanding the answer, the complainant must be held to admit the statements of the answer to be true, and to deny the sufficiency of the facts stated to make out a defense. These facts, as the record presents them, are: "(1) That defendant is insolvent; that he has no money or other property, real or personal, or things in action, due him, or held in trust for him (except where such trust has been created by, or the fund so held in trust has proceeded from, some person other than defendant). (2) That the only property in his possession or under his control

is that which came into his possession as executor of his late wife's estate under a will; that he gave bonds as such executor to faithfully administer the trust, and has not yet been discharged. (3) That the income only of this property so in his hands was available for the purpose of paying legacies, and for his own use. (4) That said income did not exceed six hundred dollars per annum, and was barely sufficient for defendant's support, and to pay the minimum sum required to be paid annually to the other beneficiaries."

Under these facts, which we think must be taken as admitted by the complainants, the court, in making the decree he has in this case, must substantially hold that the income to be derived from the estate of Mrs. Corey, without regard to the amount, or whether there is or not more than sufficient for defendant's support, may be taken by defendant's creditors; and to secure this the estate may be taken out of the hands of the person designated by the testatrix and appointed by the judge of probate, and given over to the custody of a receiver receiving his authority of another jurisdiction.

The complainant's counsel contend that the testatrix intended that, subject to the payment of the annuities, the defendant should have absolute control of the principal and right to dispose of it for his own use, influenced and not restricted by the request in relation to the manner in which it should be invested and his use of it; and whether this be so or not, the defendant is given at least an unconditional life-estate, charged with the annuities, but one of which (that in favor of Lovina Spaulding) is unexpired, so far as the pleadings disclose; that this estate is devised directly to him as the legatee thereof, not as executor; that it is not by reason of his duties as executor that he is entitled to the possession and to receive the rents and profits of the property; that that right is created, exists and is exercised independent of any such duties, and no words of grant or devise are employed to indicate a purpose that any estate should pass to or vest in the executor, nor is that necessary for the exercise of any of the powers conferred on the executor.

We are not able to agree with this contention of the com-

plainant's counsel, but are clearly of the opinion that under the provisions of the will the property is held by the defendant as executor in trust for himself and others as beneficiaries; *i. e.*, in trust (1) to pay the annuities out of the rents and profits; (2) to pay himself the remainder of the rents and profits; (3) to preserve the principal for those entitled to the remainder estate at his death; and that the trust having been created by, and the funds so held in trust having proceeded from, some person other than the defendant, his interest therein is protected from creditors. The complainants' bill can be regarded as a creditors' bill only, and that brings this case within the exception contained in the statute. See How. Stat. § 6614. Mrs. Corey herself drew the will under consideration. She was not expert in draughting such instruments, but succeeded very well, we think, in writing out her desires and intentions in regard to her property, and it is our duty to construe the instrument in such manner as to carry out those intentions, and not disregard her purposes if they were lawful. *Jones v. Jones* 25 Mich. 401.

When we come to consider the circumstances under which this lady made her will, it seems to us the construction asked for by complainants' counsel, and the one substantially acceded to by the learned circuit judge who made the decree in this case, could never have entered the mind of the testatrix. On the contrary, the effect of such a construction was unquestionably what she wished to avoid. What she sought to do, so far as the will related to her husband, was to secure to him a sufficient amount to support and make him comfortable through life, and place it in such manner that it could not be taken to liquidate her husband's insolvent indebtedness. This was lawful, judicious, kind and commendable. The construction claimed by complainants' counsel would completely defeat the intention of this wife, and the whole object and scope of her will, so far as it relates to her husband, by taking her property thus set apart for him, and placing it in the hands of a stranger, with directions to apply it to the payment of the very indebtedness which it had been her object to escape. Mr. Corey was an invalid at

the time the will was made, and the testatrix knew all about his insolvency, and undoubtedly of his indebtedness, and of his inability to support himself, much less to pay his debts And with the clearly avowed purpose of the testatrix (in consequence of other relatives having a claim upon her bounty) to leave for her husband only enough for his reasonable support, how it could ever have been thought that justice requires that this little sustenance fund should be turned over to the husband's creditors is more than we can conceive. Courts in the name of justice may commit such errors, but neither law nor equity can ever tolerate them.

We are not, in this case, called upon to construe a contract where the minds of several parties must be found to have met and concurred, to give effect to the instrument, but simply to ascertain the intention of Mrs. Corey at the time she made the will in question. In the first instance, the testatrix provided for the support and maintenance of her mother in comfort so long as she should live, and it was the executor's duty to see that that was done; and, in the language of Mrs. Corey, he was to see to it "that she want for nothing so long as there may be anything belonging to me left." She thus limits her bounty to her mother only by the extent of her property, provided the mother's necessities require it. What that necessity might be was then to her unknown, but she was not afraid to leave it to the discretion of her husband, whose kindness, prudence and affection she had known and tested for years, to ascertain and supply. This watchful care the decree of the court, under the views of complainants' counsel, should, in the event of the husband's neglect to pay his insolvent debts, be turned to the cold indifference of a stranger who occupies his place in the interest of mercenary creditors residing in a foreign state. The humanity of the law will never allow such perversion of its teachings, or the perpetration of such injustice. The testatrix, after providing for her mother and the payment of two small annuities of $25 each to two of her nieces, and making a few other minor bequests to her relatives, says: "As my dear husband, David R. Corey, is in poor health,

and is more to me than all the world besides, I wish him to have the use, during his life-time, of the remainder of my property," etc. Then follows the injunction to keep the property invested, and the admonition to use only the income, except in case of sickness or necessity, when he could draw on the principal, and giving the remainder after his death to her brother's and sister's children. This lady's will shows not only consideration and affection, but judgment and discretion. If she had appointed any other person her executor, we doubt if counsel for complainants or any one else would have ever entertained the idea for a moment that he was any more than a trustee for the beneficiaries under the will. No particular form of words is necessary to create a trust. Any language in a will indicating that the donee is to hold the devise or bequest for the benefit of others, in whole or in part, is sufficient; or when one is charged with a duty respecting it, from the performance of which others are to reap a benefit, the property is in his hands as a trust fund. 1 Perry on Trusts, § 112; *Harding v. Glyn* 1 Atk. 469; *Pushman v. Filliter* 3 Ves. 7; *Brest v. Offley* 1 Ch. Rep. 246; *Moriarty v. Martin* 3 Ir. Ch. 26; *Bernard v. Minshull* 1 John. 276; *Cook v. Ellington* 6 Jones Eq. 371; *Warner v. Bates* 98 Mass. 274. We think the language of this will creates a trust, and that the execution of the same is devolved upon the executor. 1 Perry on Trusts § 262; *Richardson v. Knight* 69 Me. 285; *Pettingill v. Pettingill* 60 Me. 412; *Wilson's Estate* 2 Penn. St. 325; *Williams v. Conrad* 30 Barb. 524. There is no legal objection to his being at the same time trustee and beneficiary. 1 Perry on Trusts, § 117; *Whiting v. Whiting* 4 Gray 240; *Carr v. Living* 28 Beav. 644; *Andrews v. Bank of Cape Ann* 3 Allen 313; *Chase v. Chase* 2 Allen 101; *Loring v. Loring* 100 Mass. 340; *Gilbert v. Bennett* 10 Sim. 371.

This case comes clearly within the exception of the statute which permits the filing of the complainant's bill (How. Stat. § 6614), and which was intended to apply to this class of cases. *Craig v. Hone* 2 Edw. Ch. 569. The statute was intended for the benefit of the needy and unfortunate, and

its provisions should be made to apply to all cases coming within its spirit, which has always been the rule of this Court. *Alvord v. Lent* 23 Mich. 369. There is no surplus to be looked after or reached in this case. The answer shows, and it is one of the things that must be taken as admitted, that the income is barely sufficient for the payment of the legacies and the defendant's support, but it is impossible for any one to tell what amount of either principal or interest, or of both, may yet be required for the support of the defendant and testatrix's mother, and the whole estate is in trust for both of those purposes. It is difficult to see how this question can be determined before the decease of these beneficiaries, and then whatever there may be will pass to the other legatees entitled thereto under the will.

The decree of the circuit judge must be reversed with costs.

The other Justices concurred.

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CHARLES W. SINES v. THE SUPERINTENDENTS OF THE POOR FOR WAYNE COUNTY.

[See 55 Mich. 383.]

Contract of hire—Statute of frauds—Parties.

1. Where, under a contract for a year's service the employee has gone on from year to year and at the end of a year is allowed to go on without objection, a presumption arises which will warrant a jury in finding that the parties to the contract have assented to its continuing in force for another year. And the Statute of Frauds does not apply to defeat it.

2. One who has engaged in his own name to furnish his own services and those of his wife can sue on the contract in his own name; as his wife is not a party thereto and her earnings under it belong to her husband, she need not be joined as plaintiff.

Error to Wayne. (Jennison, J.) Nov. 10.—Nov. 19.

ASSUMPSIT. Defendants bring error. Affirmed.

John Atkinson for appellants.

Ervin Palmer for appellee.

CHAMPLIN, J. This suit is brought by Mr. Sines against the superintendents of the poor of Wayne county, to recover damages for not having been retained in their employment for the remainder of the year, commencing October 1, 1882, after February 1, 1883. His declaration contains two special counts.

In the first he alleges that the defendants promised and agreed with him that if he would undertake to perform the duties of keeper of the Wayne county almshouse, and would cause his wife to perform the duties of matron of the same, from the first day of October, 1882, to the first day of October, 1883, they would pay him $800 when requested, and would furnish him during the year house-rent and board for himself and wife, and keep and board for his horse, in consideration of which he agreed to perform the duties of keeper, and to have his wife perform the duties of matron; and they entered upon and performed said duties up to February 1, 1883, and were willing to continue, but the defendants on that day, without just cause or provocation, refused further to allow them to perform such duties, or to pay him for their further services, or to furnish house-rent and board for himself and wife, or to keep and board his horse, whereby he has been deprived of profits, etc., and was compelled to remain wholly out of business for eight months, although he diligently sought to again get into business and employment, and to procure employment for his wife, and was put to great trouble and expense in and about procuring a house suitable to live in, and in keeping and boarding his horse.

The second count avers the promise to be to pay him what his services would be reasonably worth, and to furnish house and board for himself and wife, and keep and board for his horse. No question arises under the second special count, or under the common counts, which were also added to the declaration. The plea was the general issue.

On the trial the plaintiff testified in his own behalf that he

had been in the employ of the defendants, commencing February 1, 1875, and was their clerk from that time until August 18, 1877, and understood their manner of doing business during that time; he entered into negotiations with and made a contract with the board; that he was employed in August, 1877, to take charge of the almshouse as keeper; that he was to have $800 per year, and the keeper's house was to be furnished to live in, and he was to have his living. The plaintiff then read in evidence, from the defendants' record, the following resolutions:

"WAYNE COUNTY, November 10th, 1880.

At a session of the superintendents of the poor:—present: Messrs. M. Dunn, J. Guthardt, and J. C. McDonald:—the undersigned, superintendents of the poor, have this day elected C. W. Sines as keeper of the Wayne county almshouse, for the year ending 1881, at a salary of eight hundred dollars per year.

WAYNE COUNTY ALMSHOUSE, January 4th, 1882.

Resolved, by the board of superintendents of the poor in and for Wayne county, at one of their regular sessions, held at their office at the almshouse in said county on the 4th day of January, 1882, that C. W. Sines and wife, the present keeper and matron, be, and they are hereby, reappointed keeper and matron of said almshouse for and until the first day of October, 1882, at the rate of eight hundred dollars per annum."

[Signed, the three superintendents.]

The plaintiff further testified that during the year preceding the resolution of January 4, 1882, he did the duties of keeper, and his wife the duties of matron, and received $800 a year, and had the house and living, and had the keeping of a horse, together with his care and grooming; that the contracts were always made with him, and no contracts were made with his wife; that the fiscal year and his services by contract ended on September 30th; that just prior to the expiration of the year, he made inquiry of the president of the superintendents as to whether they desired him to remain another year; that he wanted to know, as his houses were

both occupied, and he wished to know, on account of letting his farm the next year; and if they did not want him another year, he wanted to leave when his time was out. The president informed him that he would bring the matter before the board, and in the mean time that he should go on and perform his duties the same as before. Payments for his services had been made monthly, and defendant and wife continued to perform the duties of keeper and matron until in January, 1883, and the usual monthly payments for services were made, and nothing was done about terminating his employment until January 3, 1883, when the following notice was served upon defendant, namely:

"WAYNE COUNTY ALMSHOUSE, January 3rd, 1883.

Charles W. Sines: Take notice, that your services as keeper and your wife as matron of the Wayne County Almshouse will not be required after the 1st day of February, 1883. You will therefore leave the premises, and deliver up the keys and possession of the county property belonging to said almshouse into the hands of the superintendents of the poor. They have this day appointed S. D. Curtis and his wife as keeper and matron of said Wayne County Almshouse in your stead.

DANIEL SHANNAHAN,
JOHN J. VROOMAN,
Superintendents of the Poor."

Defendant continued in service until February 1, 1883, and then delivered up the keys to the superintendents, under protest, and endeavored to find work elsewhere during the remaining eight months of the year, but only partially succeeded, having earned only $104 during the time. It will be observed that no reason is stated in the notice for discharging defendant, and none was offered or proved upon the trial.

It is urged by defendants that the contract claimed by the plaintiff is void by reason of the Statute of Frauds; that the talk with the president in September, to continue work until he had laid the matter before the board, was a contract not to be performed within a year. But this is an erroneous view of the testimony. The contract had been previously made for a year's service, and under that contract defendant had

gone on from year to year, and in such cases, if nothing is said or done by either party at the end of the year to terminate it, but on the contrary, the person performing service is allowed to continue on without objection, the facts raise the presumption from which the jury have found that both parties have assented to the contract continuing in force for another year. *Tatterson v. Suffolk Manuf'g Co.* 106 Mass. 56. The case of *Tallon v. Grand Portage Copper Min. Co.* 55 Mich. 147, as was said by us when the case was here on a former occasion, rules this case upon the point under consideration.

It is also claimed that the wife of plaintiff should have joined as plaintiff in the action. There is no merit in this point. She was not a party to the contract, and her earnings, whatever they were, as matron, belonged to the plaintiff. *Harrington v. Gies* 45 Mich. 374.

Upon the question of damages we discover no error in the record.

The judgment of the circuit court is affirmed.

The other Justices concurred

ELIZABETH E. WATSON v. DANIEL M. WATSON.

[See 47 Mich. 427; 49 Mich. 540 and 53 Mich. 168.]

Seduction—Evidence of familiarities—Charge to jury—Credibility of testimony.

1. In an action for the seduction of an adopted daughter, evidence of kissing and similar familiarities between the parties is admissible to aid the jury in understanding their whole family relations.
2. A charge to a jury must, on review, be considered as an entirety; the trial judge cannot be expected in giving it to reiterate every qualification and condition with every clause.
3. The jury must determine for themselves as to the credibility of a witness, and make up their minds from a view of all the circumstances even where there are apparent discrepancies in the testimony of the same witness.

4. When the testimony of experts, based on subsequent examination or proofs, is met by positive testimony of facts, the jury must determine what the facts are, and cannot be required to give such testimony as is theoretical in its deductions any weight they think it does not deserve.

5. In a conflict between scientific and other testimony, the judge cannot decide for the jury that one witness is more to be regarded than another.

Error to Kent. (Montgomery, J.) Nov. 10–11.—Nov. 19.

CASE. Defendant brings error. Affirmed.

John T. Holmes and *Fred A. Maynard* for appellant.

Godwin & Earle for appellee.

CAMPBELL, J. This case has been in this Court more than once before, and the character of it need only be mentioned as an action for seduction, brought by a young woman against the person in whose house she was brought up. The present record does not present many new phases, and as we cannot review the conclusions of the jury we must leave the facts where they have left them, and look only at such matters as raise questions of law. All but one of the questions relate to the charges and refusals to charge, or to other rulings on the closing of the case. The record does not purport to set out all the testimony, although needlessly prolix, as the bill of exceptions indicates the points sufficiently as arising on but a small part of it.

Two witnesses, William Moore and Edwin Todd, who had done more or less work for Mr. Watson, testified to various acts of familiarity, including kissing and embracing, and other things of a similar nature. No objection was made to any of this testimony, and the witnesses were fully cross-examined as to all of the circumstances. After the testimony of both of these witnesses was completed, a motion was made to strike it out as immaterial and irrelevant to the issue. This was denied.

We do not think it was improper, in such a case as this, to give the jury a full understanding of the whole family rela-

tions of these parties. Aside from those relations, a portion of this testimony had some bearing on the main issue, and except for the family surroundings would have been quite material. With those conditions it was not in itself very important, but it was nevertheless to be construed by the jury as men of sense, in all its bearings. The court very properly and carefully called their attention to the question whether such familiarities as were shown, were different from what might be entirely innocent and natural between persons so situated. It was not improper to refuse to strike out the testimony of these witnesses, and the whole weight of it was for the jury who could not have been misled by the instructions.

The charges made in the declaration were in substance an original seduction in 1875, followed by illicit intercourse running through several years, and the birth of a child in July, 1881. The whole burden of the argument for the defense is that the charge was so framed as to lay stress at one time on the early act independently of the later ones, and again to lose sight of the earlier and dwell only on the later.

In our opinion the charge is not open to any such construction. It cannot be taken up piece by piece. It must be read as it was given to the jury, continuously and connectedly. It cannot be expected that in every clause of his charge a judge will reiterate all the conditions and qualifications which he means to express. To do so would create and not prevent confusion. The great zeal and earnestness of counsel have induced us to look into this charge with care and caution, and we have found no such discrepancies as are urged. It is impossible, in our opinion, to read it without being impressed by the great care taken by the trial judge to make the jury feel the absolute necessity of finding not only the original seduction at the time and in the manner claimed, but also the continuity of the intercourse, and the responsibility of defendant for the bastardy.

There was testimony showing a discrepancy between the date fixed for the begetting of the child as first complained of in the bastardy proceedings before its birth, and the date

relied upon on the trial. Upon this the plaintiff gave her explanation how the discrepancy occurred. Defendant's counsel insisted that the witness swore falsely at one time or the other, and asked some charges based on that theory, which were in substance that the bastardy complaint was such a solemn and deliberate act that plaintiff was bound to know and was responsible for the facts there stated; that she could not be allowed to make any material change as to the time of the act without showing she did not know the contents of the complaint or was misled without fault or negligence and that there was no testimony to relieve her; that the change in her statement as given on the trial tended to impeach her, and the jury would be justified in refusing to credit it, and that if she swore deliberately to an untruth it would not be safe to rely on any of her testimony except as corroborated.

The court did very fully and positively charge the jury, in language quite as strong as that in the requests, as to the effect of falsehood on the credibility of witnesses, and the duty of juries in considering it. They were also told that the variance referred to in those requests tended to impeach plaintiff, and that if she understandingly misrelated facts they would be justified in refusing to accept her testimony unless corroborated. But the court told them, as it was bound to tell them, that they must determine for themselves upon her credibility, and make up their minds from a view of all the circumstances. The charge given was as strong against the plaintiff in this regard as could be reasonably asked, and is not open to complaint.

The court sufficiently called the attention of the jury to the question of defendant's alleged physical condition. The testimony of the physicians is not set out in the record, and was properly omitted. It was for the jury to find, under the charge as given, that plaintiff's case was made out by the preponderance of testimony; and when the testimony of scientific witnesses, based on subsequent examinations or proofs, is met by positive testimony of facts, the jury must determine what the facts are, and cannot be required to give medi-

cal testimony which is theoretical in its deductions any such weight as they think it does not deserve. The charge was not improper as given, and the judge could not decide for the jury that in such a conflict one witness was more to be regarded than another.

No other questions are now relied on. There is no error in the record, and

The judgment must be affirmed.

The other Justices concurred.

MATHIAS SCHNEIDER v. JAMES MCIVOR.

Official papers.

One who is shown to be entitled to the office of supervisor can compel his predecessor to deliver to him the books and papers pertaining to the office. How. Stat. § 8539.

Error to Iosco. (Tuttle, J.) Nov. 11.—Nov. 19.

Proceedings to compel surrender of official records. Plaintiff brings error. Affirmed.

A. C. Maxwell for plaintiff.

S. G. Taylor for defendant.

SHERWOOD, J. The proceedings in this case were commenced before Robert White, Esq., a circuit court commissioner for the county of Iosco, to compel the delivery of books and papers to the defendant under How. Stat. § 8539. The plaintiff claims that he was duly elected to the office of supervisor in the township of Sherman, in said county, on the 6th day of April, 1885, and that the books and papers which he seeks to recover of the defendant are those pertaining to the office to which he claims to have been elected, and which are withheld by the defendant wrongfully. In the case

of the Attorney General on relation of the plaintiff against the defendant, post p. 516, decided at the present term of this Court, it was held that the defendant is entitled to the office of supervisor in the said township of Sherman. That case necessarily rules this.

The judgment at the circuit, which was in favor of the defendant, must be affirmed with costs.

The other Justices concurred.

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PETER P. CURRAN v. JAMES NORRIS.

Delivery of official papers to successor—Appearance—Certiorari.

1. The statutory proceeding for compelling a public officer to surrender the books and papers of his office to his successor (How. Stat. ch. 295) is summary and does not apply for determining the latter's right to the office, but only for ascertaining whether he has been declared by the proper authority to have been elected or appointed.
2. The right to a public office is to be settled by a proceeding in the nature of quo warranto.
3. Public proclamation by the inspectors of election, after canvassing the votes, that a specified person has been elected is sufficient prima facie evidence of his right to the books and papers of the office to warrant an order to the former incumbent to show cause why he should not surrender them to his successor.
4. Appearance in response to a summons to answer a complaint waives the informality where the proper process should have been an order to show cause.
5. Certiorari does not lie to review proceedings under How. Stat. ch. 295, to compel a public officer to surrender the books and papers of the office to his successor, unless a want of jurisdiction appears, or a gross violation of the statute.

Error to Iosco. (Tuttle, J.) Nov. 11.—Nov. 19.

Proceedings to compel surrender of official records. Plaintiff brings error. Writ of certiorari quashed.

A. C. Maxwell for appellant.

S. G. Taylor for appellee.

CHAMPLIN, J. At the election for township officers held in the township of Sherman, in the county of Iosco, Peter P. Curran was, by proclamation, at the canvass of the votes for township clerk, duly declared elected to the office of township clerk. James Norris was his predecessor in office, and after Curran was elected he demanded of Norris the books and papers appertaining to the office of township clerk, and Norris refused to deliver over the same. Curran then instituted proceedings to compel a delivery of the books and papers, before Robert White, the circuit court commissioner of the county of Iosco, by lodging with him his complaint, setting forth the fact of his election, that Norris was his predecessor, his demand and Norris' refusal to deliver the books and papers appertaining to the office of township clerk. Whereupon the circuit court commissioner issued a precept to the sheriff or any constable of the county, commanding him to summon Norris to be and appear before him at the court-house in Tawas City, in said county, on the 18th day of April, 1885, at one o'clock in the afternoon of said day, to answer the said complaint. At the time fixed Norris appeared before the commissioner; the complaint was read to him and he was requested to plead thereto, and he pleaded "not guilty." Defendant also objected to the jurisdiction of the court, which was overruled. Evidence was then introduced on both sides, and after hearing the proofs and allegations of the parties, the commissioner adjudged that said James Norris unlawfully withheld and detained the books and papers belonging to the office of the township clerk of the township of Sherman from his successor in office, Peter P. Curran, contrary to the statute in such case made and provided, and that the said James Norris was guilty as charged in the complaint, and thereupon he ordered the said James Norris to deliver up to Curran, as his successor in office, all the books and papers belonging to the office of township clerk of said township on or before the Monday then next, and in case the same

were withheld and not so delivered up at that time, a warrant issue committing Norris to the common jail of the county, there to remain until he should deliver such books and papers, or be otherwise discharged according to law; and he adjudged costs against Norris and in favor of Curran, and ordered execution thereof. Norris then made an affidavit for certiorari, and applied to Judge Tuttle, who allowed the writ, and on hearing in the circuit court he reversed and annulled the judgment of the commissioner, with costs.

The case is brought here upon writ of error, and these errors are relied upon, none of which we consider good if the writ of certiorari was a proper remedy under the circumstances. How. Stat., ch. 295, provides for a speedy and summary remedy to compel the delivery of the books and papers appertaining to an office by an incumbent whose term of office has expired, to his successor in office. It allows a complaint to be made to any judge of a court of record, or to any circuit court commissioner for the county where the person so refusing shall reside; and if such officer be satisfied by the oath of the complainant, and such other testimony as may be offered, that any such books and papers are withheld, he shall grant an order, directing the person so refusing to show cause before him, within some short and reasonable time, why he should not be compelled to deliver the same. And at the time appointed, upon due proof of the service of such order, such officer shall proceed to inquire into the matters set forth in the complaint. If the person charged with withholding such books and papers shall make affidavit before such officer that he has truly delivered over to his successor all such books or papers in his custody or appertaining to his office, within his knowledge, all further proceedings before such officer shall cease, and the person complained against shall be discharged; if he does not make the affidavit, and it shall appear that any such books or papers are withheld, the officer shall by warrant commit such person to the jail of the county, there to remain until he shall deliver such books and papers or be otherwise discharged according to law. Under this statute the officer granting the order must necessarily satisfy

himself, by sworn testimony, that the person who is alleged to have withheld the books and papers is a person who has been removed from office, or the term for which he shall have been elected or appointed has expired; that his successor has been elected or appointed, and has demanded the books and papers in his custody as such officer, or in any way appertaining to his office. In investigating the election or appointment of a successor, he proceeds no farther than to ascertain the fact whether such person claiming to be the successor has been by the proper authority declared elected or appointed. He cannot determine the right of such person to the office. The law has provided an appropriate remedy to determine the question of right to a public office by proceedings in the nature of a quo warranto.

In this case the commissioner received evidence that Mr. Curran was publicly proclaimed by the inspectors of election, after the votes were canvassed, to have been elected to the office of township clerk at the annual election held in April for the election of township officers. This was sufficient prima facie evidence of his being the successor of Mr. Norris as township clerk. The complaint authorized him to proceed and issue the order to show cause. The precept which he did issue was not an order to show cause before him why Norris should not be compelled to deliver the books and papers to his successor, but was a summons to answer the complaint. This informality was waived by the appearance at the time stated. But Norris showed no cause why he did not deliver over to Curran the books and papers. He filed no affidavit, and it was made to appear that such books and papers were withheld. The commissioner therefore adjudged that Norris did unlawfully withhold and detain the books and papers belonging to the office of the township clerk of said township of Sherman from his successor in office; and he should have at once issued his warrant committing Norris until he should deliver the books and papers, or be otherwise discharged according to law. Instead of doing so he made a further order that Norris deliver up to his successor such books and papers on or before the next Monday, and in case

they were not delivered at that time, then a warrant of commitment issue. This was irregular, and was giving to the respondent favors to which he was not entitled. It is of the utmost importance to the public that the officers elected or appointed by proper authority, should at once receive from their predecessors in office the books and papers appertaining thereto, and this statute was enacted to compel such delivery. Proceedings under it are summary, and it is not contemplated that they will be delayed by writs of certiorari to review the proceedings of the judge or commissioner, unless such officer has proceeded without jurisdiction, or has acted in gross violation of the statute. In this case the application for certiorari nowhere denies the allegations of the complaint. No showing is made that Curran was not declared elected township clerk by the inspectors of election, and no reason is stated why Norris, his predecessor in office, should not deliver to his successor the books and papers.

For these reasons we think the allowance of the writ of certiorari was improvident, and the writ must be quashed. No costs will be allowed to either party.

The other Justices concurred.

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ATTORNEY GENERAL v. JAMES McIVOR.

Quo Warranto—Plea to the Information.

A plea to the information in a quo warranto proceeding need not be verified; and if it shows that respondent has been declared elected it need not aver his citizenship or other qualifications for office. And if it states the number of votes cast at the election it need not explicitly negative the casting of a greater number.

Quo warranto. Submitted Nov. 11. Decided November 19.

A. C. Maxwell for relator. Relator in quo warranto proceedings must state that he is a citizen and eligible to the

office he claims. *Reynolds v. State* 61 Ind. 392; *State v. Bieler* 87 Ind. 320; *State v. Long* 91 Ind. 351.

Sibley G. Taylor for respondent.

CAMPBELL, J. The information in this case was filed to try the title of respondent to the office of supervisor of the town of Sherman in Iosco county, relator being suggested in the information as the person entitled to the office.

Respondent pleaded that at the spring election he and Schneider were opposing candidates, and that fifty-nine votes were cast of which he obtained thirty and Schneider twenty-nine; that after the canvass it was determined by the inspectors that defendant was elected to the office, and that the proper statements of election were filed and the same thing appeared from them, and that defendant duly qualified and entered upon the discharge of the duties of the office.

The commencement of this proceeding is an official assertion that defendant is the incumbent de facto and that relator is not. The information called upon defendant to show his title, and his plea, if true, shows it.

Instead of replying, as would be necessary to controvert the election, a demurrer was interposed, which undertakes to raise questions concerning the sufficiency of the plea.

The first objection is that it does not aver citizenship or other qualifications for office. The election is enough to call upon the prosecution to show its invalidity by facts in reply. No such averments were necessary in the plea.

The second objection is that it is not shown by the plea that no more than fifty-nine votes were cast. We think the plea sets up all that was necessary and is sufficiently certain.

The objection that the plea is not verified is supported by no rule of law.

The other objections are general, and all are in our opinion frivolous.

Judgment must be rendered in favor of defendant, overruling the demurrer, and declaring him entitled to the office. Costs are granted against the relator.

The other Justices concurred.

Frank P. Lyon v. Geo. W. Irish et al.

Municipal contracts—Trustees not personally liable.

A contract made by village trustees, as such, for the building of abutments to a public bridge does not bind the trustees personally for payment, but is apparently binding on the village.

Error to Eaton. (Hooker, J.) Nov. 17.—Nov. 19.

Assumpsit. Plaintiff brings error. Affirmed.

Geo. H. Cagwin, for appellant, claimed that the contract in the case was the individual obligation of the trustees: *White v. Skinner* 13 Johns. 307; *Tippets v. Walker* 4 Mass. 594; *Haverhill Insurance Co. v. Newhall* 1 Allen 130; *Fiske v. Eldridge* 12 Gray 474; *Tanner v. Christian* 4 El. & Bl. 591; *Parker v. Winlow* 7 El. & Bl. 942; *Sturdivant v. Hull* 59 Me. 172; *Tannatt v. Rocky Mountain National Bank* 1 Col. 278; *Powers v. Briggs* 79 Ill. 493.

Huggett & Smith and *Geo. E. Nichols* for appellee. Where the officers of a public or municipal corporation act officially under an innocent mistake of law, in which the other contracting party equally participates with equal opportunities of knowledge, neither party at the time looking to personal liability, the officers are not personally liable nor is the corporation liable. Dill. Mun. Corp. (3d ed.) § 237 n.; *Houston v. Clay County* 18 Ind. 396; *Bourdman v. Hayne* 29 Ia. 339; *Duncan & Co. v. Niles* 32 Ill. 532; *Ogden v. Raymond* 22 Conn. 379; *M'Henry v. Duffield* 7 Blackf. 41; *Mann v. Richardson* 66 Ill. 481.

Sherwood, J. The defendants were trustees of the village of Grand Ledge, and a committee on streets therein. On the 3d day of September, 1883, they made the following contract with the plaintiff:

"This agreement, made this 3rd day of Sept., A. D. 1883, by and between H. A. Lyon, of Wacausta, Clinton county, Michigan, and Geo. W. Irish and Milo Campbell, trustees of the village of Grand Ledge, county of Eaton, state aforesaid.

Witnesseth that the said H. A. Lyon, in consideration of the covenants hereinafter mentioned on the part of the parties of the second to be performed, doth agree to and with the said Geo. W. Irish and Milo Campbell, trustees of the village of Grand Ledge, that he will, within thirty days from the date hereof, build and complete two wing-walls and one abutment at the south end of bridge across Grand river, in the village of Grand Ledge, Eaton county, Michigan, according to specifications hereto annexed, furnishing all material for the same.

And the said Geo. W. Irish and Milo Campbell, trustees of the village of Grand Ledge, county and state aforesaid, covenant and agree to pay to the said H. A. Lyon two hundred and ninety-five dollars, payments to be made as work progresses.

In witness whereof, we have hereunto set our hands and seals this 3rd day of September, A. D. 1883.

H. A. LYON. [L. S.]
GEO. W. IRISH, Trustee. [L. S.]
MILO CAMPBELL." [L. S.]

The plaintiff went on and performed the work mentioned in the contract, and now brings this suit to recover the balance due from the defendants. The cause was tried in the circuit court for the county of Eaton before his honor Judge Hooker, without a jury, who found the facts and rendered judgment thereon for the defendant, and the plaintiff appeals. He claims the findings do not support the judgment. The facts found are substantially as follows:

1st. On September 3, 1883, defendants were members of the common council of Grand Ledge, a municipal corporation by virtue of the laws of Michigan.

2nd. On that day they executed a writing with one H. A. Lyon, the brother of plaintiff, which writing was upon said trial marked Exhibit A [being the contract].

3rd. By the terms of said writing said Lyon was to build abutments for a bridge in Grand Ledge, and was to receive $295 in payment therefor. By the terms of the specifications, which were made a part of the contract, he was to receive payment as work progressed, subject to approval of the committee on streets of the village of Grand Ledge.

4th. Both parties understood that this was a contract between Lyon and the village, and both believed it a valid contract, binding upon said village.

5th. H. A. Lyon performed the labor contemplated by said contract.

6th. H. A. Lyon received payment in part, to wit, the sum of $60, from the village.

7th. H. A. Lyon subsequently assigned said claim to his brother, the plaintiff.

8th. Payment has been refused by the village authorities and defendants before action brought.

Upon these findings the circuit judge found the law applicable thereto as follows:

1st. The village of Grand Ledge had no power to make or authorize such a contract, and is not bound.

2nd. The persons named as defendants, being officers of said village, acting bona fide and without concealment or fraud, are not personally bound upon said contract.

3rd. The defendants should have judgment of no cause of action, with costs.

It was unnecessary to pass upon the legal liability of the village; but under the testimony which would be necessary to support the finding of facts above stated, it is difficult to see why the village should not be both legally and equitably liable.

We think the other conclusions of law reached by the court are irresistible upon the facts found.

The judgment must be affirmed with costs.

CAMPBELL and CHAMPLIN, JJ. concurred; MORSE, C. J. did not sit.

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THE DUCEY LUMBER CO. v. JAMES M. LANE.

Reasonable time—Implied tenancy—Cost of piling-room.

1. The "reasonable time" during which a purchaser of lumber is entitled to leave it where it is piled, before removing it, is for the jury to determine, in view of the circumstances, where suit is brought for the use of the space occupied.

2. The purchaser of lumber becomes presumptively the tenant of the owner of the premises on which it is piled if he does not remove it within a reasonable time and on being notified that he must take it away; and if such notice is accompanied by a statement that a specified rent will be charged for their occupancy, he is presumed to assent to the terms if he does not remove it.

3. A contract for the sale of lumber provided that a balance of payment was to be adjusted, "on basis of eight per cent. interest, *after thirty days from date,* on amount due either party hereto, *when lumber is tallied or inspected.* Said tally or inspection is to be made within thirty days from date by tallyman or inspector agreeable to both parties hereto, and each party standing one-half of the expense thereof; *all other expenses* from and after this date to be paid by the" purchaser. *Held,* that title passed by this memorandum of agreement; but whether it did or not, the expense of storage until the lumber should be removed fell upon the purchaser.

Error to Muskegon. (Russell, J.) Nov. 11.—Nov. 19.

ASSUMPSIT. Defendant brings error. Affirmed.

N. A. Fletcher and *Geo. P. Wanty* for appellant. Where the price of merchandise depends on its quantity the measuring of it is presumably a condition precedent to its transfer: *Lingham v. Eggleston* 27 Mich. 324; *Hatch v. Fowler* 28 Mich. 205; *Hahn v. Fredericks* 30 Mich. 223; *Wilkinson v. Holiday* 33 Mich. 386; *Grant v. Merchants' Bank* 35 Mich. 515; *Scotten v. Sutter* 37 Mich. 526; *Carpenter v. Graham* 42 Mich. 191; *Brewer v. Salt Ass'n* 47 Mich. 526; *Byles v. Colier* 54 Mich. 1; 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; *Marq. Hough. & Ont. R. R. v. Harlow* 37 Mich. 554; *Lockwood v. Thunder Bay River Boom Co.* 42 Mich. 538; *Central Mills v. Hart* 124 Mass. 123; *Leonard v. Kingman* 136 Mass. 123; *Wales v. Chase* 139 Mass. 538.

Smith, Nims, Hoyt & Erwin for appellee. Silence gives consent to terms imposed for continued occupation: *Hunt v. Bailey* 39 Mo. 257; *Roberts v. Hayward* 3 C. & P. 432.

CHAMPLIN, J. Plaintiffs are the owners of a saw-mill at North Muskegon, and also of docks upon which lumber manufactured at their mill is piled convenient for being shipped on board of vessels. During the sawing season of

1882 they manufactured and piled on their dock a quantity of pine lumber for Frank Wood and E. C. Misner & Co. In April, 1883, defendant entered into the following agreement for the purchase of this lumber, viz.:

"Memorandum of agreement made and entered into this 13th day of April, A. D. 1883, by and between E. C. Misner & Company and Frank Wood, parties of the first part, and James M. Lane, party of the second part, witnesseth: The first parties hereby agree to sell to second party all of their merchantable white pine lumber out of number one stock piles (lumber under ten feet in length only excepted,) manufactured in 1883 from logs marked 'Hill & Nice' and now piled on mill-docks of the Ducey Lumber Company of North Muskegon, Michigan, amounting to 1,275,000 feet, more or less. Terms of sale as follows, namely: Second party to pay cash, or bankable paper as good as cash, at rate of $15.50 per thousand feet for above lumber, on the docks where it now stands, and agrees to pay five thousand dollars on same on or before April 20th; the balance, more or less, to be adjusted on basis of eight per cent. interest, after thirty days from date, on amount due either party hereto, when lumber is tallied or inspected. Said tally or inspection to be made within thirty days from date by tallyman or inspector agreeable to both parties hereto, and each party standing one-half of the expense thereof; all other expenses from and after this date to be paid by the party of the second part. It is further agreed by both parties hereto that the second party is to take whatever mill culls there may be now piled in with said merchantable lumber, paying therefor in cash $5 (five dollars) per thousand feet. It being agreed however, that the second party only pays the aforesaid five thousand dollars on both of above sales previous to inspection or tally, the balance, one way or the other, being adjusted as heretofore stipulated. The interlineations, 'Out of No. 1 stock piles,' '5,' (before thousand, 1st page,) 'After 30 days,' 'Within 30 days from date,' '5,' (before thousand, 2d page,) having all been made previous to signing of within.

In witness whereof, the parties hereto have hereunto subscribed their hands and seals the day and year first above written. [In duplicate.]

Signed and sealed in presence of

Witness: FRANK WOOD. [Seal.]

E. C. MISNER & Co.,

By E. C. MISNER. [Seal.]

JAMES M. LANE." [Seal.]

It may be remarked, in passing, that the statement in the memorandum that the lumber was manufactured in 1883 was a mistake, as the testimony of Mr. Misner, about which no question is made, was positive that the lumber was manufactured in 1882, and piled on plaintiff's dock.

On the 11th of May, 1883, plaintiff wrote and mailed to defendant the following letter, which defendant admitted to the witness Hofstra he had received, namely:

"*James M. Lane, Grand Rapids, Michigan*—DEAR SIR: We need piling room, and would like very much to have you move lumber piled on our dock. We will be obliged to charge twenty-five cents per thousand if not taken off the dock by June 25th, 1883, and twenty-five cents per thousand each month thereafter, for if not moved it will necessitate our piling back from water edge, and cause moving of lumber a second time. Hoping you will attend to this matter at once, we remain,

Very respectfully yours,

DUCEY LUMBER COMPANY,

Per HOFSTRA."

No answer was returned and no attention paid to this letter.

The first shipment of lumber by defendant was on the 25th of June, 1883, and proof was made of shipments after that date to October 31, 1883, aggregating 835,270 feet. This suit was commenced on the 1st day of March, 1884, at which time there was about 150,000 feet still remaining upon the dock.

The declaration is in assumpsit. The first count alleges that the defendant is indebted to plaintiffs in the sum of $1500 for dockage room, by the plaintiffs found and provided for, in and about the docking, storing and keeping certain lumber before then docked, piled and stored on certain docks of the said plaintiffs for said defendant, at his special instance and request; and being so indebted, the defendant, in consideration thereof, promised to pay the same on request. The second count alleges that the defendant promised to pay therefor what the plaintiffs reasonably deserved to have of the defendant for the docking, storage and keeping of the lumber on request, and avers that he reasonably deserved to

have $1500 therefor, whereof the defendant had notice. The declaration then alleges a request to pay, and defendant's refusal.

Before bringing suit, plaintiffs made out and presented to defendant a bill for such storage, wherein they charged him seventy-five cents for each thousand feet for each month from and after the 25th day of June, 1883, for the quantity remaining on their dock from time to time. It was proved that there was no custom prevailing for mill or dock owners to charge for the use of dock, or for storage of lumber thereon, and that this was the first instance when such charge had been made.

The lumber was manufactured by the plaintiffs in 1882, under an agreement with Woods and E. C. Misner & Co. that plaintiffs should do the sawing for $2.50 per thousand feet, and cross-pile the lumber upon their docks, for which they had received full payment. There was no agreement as to the length of time the lumber should remain upon the docks, or when it should be removed therefrom; neither was there any agreement between Woods, E. C. Misner & Co. and plaintiffs as to anything being paid for dockage or storage.

The object of cross-piling lumber is to facilitate seasoning, and thus render it of greater value in the market than green lumber, and the fact that it was cross-piled implies that the lumber is to remain upon the dock where piled a reasonable time to accomplish the purpose for which it was cross-piled. What that reasonable time is, the jury must determine under all the facts and circumstances of the case as disclosed by the evidence. The evidence showed that the space occupied by this lumber was required by the plaintiffs in their business, and that they were put to great inconvenience by reason of this lumber not being removed. It was plainly the duty of the owner of the lumber to remove the same from the dock after the reasonable time had expired in which it might remain for the purpose of seasoning, without any express contract requiring him to do so; and if he permits it to remain longer, and after notice by the owner of the dock

that if he does so he will charge him a certain price per thousand for dockage or storage, an assent on the part of the owner may be presumed to the terms proposed, founded on his duty to remove the lumber, and his silence and continued use of the dock for the purpose of storage. In *Ward v. Warner* 8 Mich. 508, it was stated that "where one has the clear right to the use and control of property, and permits its use by others, upon condition of payment therefor, when the condition is specific in terms the law will imply from the use by one having knowledge of the terms an assent to them, and a corresponding promise to pay." See also *Hogsett v. Ellis* 17 Mich. 367; *Dwight v. Cutler* 3 Mich. 566; *Dalton v. Laudahn* 30 Mich. 349.

The defendant asserted no adverse right to the use or occupancy of the dock, nor did he deny that plaintiff was entitled to compensation for such use. What he did claim was that he was not liable to pay for such use until he became the owner of the lumber, and that he did not become such owner until the lumber was inspected and tallied, which was not in fact done until it was loaded upon the vessels. We shall notice this claim further on.

Considering, for the present, the defendant as the owner of the lumber at the time the notice was served upon him, and that the reasonable time in which the lumber should have been removed had expired, his occupancy of the docks after the 25th of June would render him liable to pay at least what it was reasonably worth for such use after that time. The contract relation of landlord and tenant was implied from what transpired, and his assent to the very terms of the letter may be presumed by the jury from his acquiescence and occupancy after receiving the letter.

We also think that the title of the lumber was intended to pass by the memorandum of agreement. The inspection and tally was agreed to be made in thirty days. If, as defendant claims, the inspection was not to be made until the lumber was shipped, the conclusion would follow that the lumber was all to be removed within thirty days. There can be no doubt but that the possession and control of the lumber

passed at once to the defendant. He could ship it at his pleasure. His vendors had no voice in saying when it should be shipped. Nor is it a reasonable construction of the contract that the lumber might be left upon the dock indefinitely at the risk and expense of the vendors. So far as the question under consideration is concerned, it is entirely immaterial whether the memorandum vests the ownership of the lumber in defendant or not, for by the express terms of the agreement each party was to stand one-half of the expense of tallyman and inspector; all other expenses from and after that date were to be paid by the defendant. The expense of storage wss not only for the benefit of the defendant, but by his agreement if expenses were after the date thereof incurred for that purpose, he was to pay them.

We have considered the exceptions taken to the introduction of evidence upon the trial, and find no error therein. The charge of the court was as favorable to the defendant as the case would permit, and upon the whole record we are of opinion that

The judgment should be affirmed; and it is so ordered.

The other Justices concurred.

ROBERT P. EMERSON v. ADOLPHUS N. BACON ET AL.

Disposition of property exempt from execution.

Attachment will not run for property exempt from execution, such as a horse, wagon and harness used in defendant's business and transferred by him to a third person whether absolutely or by way of security.

Error to Kent. (Montgomery, J.) Nov. 11.—Nov. 19.

REPLEVIN. Defendants bring error. Affirmed.

Peter Doran for appellants.

N. A. Fletcher and *Geo. P. Wanty* for appellee. Creditors

have no right to complain of dealings with property which the law does not allow them to apply on their claims: *Smith v. Rumsey* 33 Mich. 183; *Dart v. Woodhouse* 40 Mich. 399; *Rhead v. Hounson* 46 Mich. 247; *Anderson v. Odell* 51 Mich. 492.

CAMPBELL, J. Plaintiff replevied a horse, lightning-rod wagon and harness from defendants, worth less than $200, which they held under an attachment levy against one Waldo E. Hill. Plaintiff held under a bill of sale from Hill, prior to the attachment which he claimed was absolute, but which there was some evidence to show was held as security. The debt due plaintiff, whether paid or secured, was largely in excess of the value of all the property transferred. Plaintiff lent the property to Hill, who was using it in his business of selling and putting up lightning-rods when it was attached.

There are several questions presented by the record, but most of them become immaterial in view of the fact that if this property was Hill's, it was used in his business and was exempt from execution, so that his creditors could not complain of any disposition he made of it. *Buckley v. Wheeler* 52 Mich. 1. This being so, plaintiff's right, whether absolute or as security, was such that the attachment could not prevail against it, and the court below so held.

The other questions need not be considered.

The judgment must be affirmed.

MORSE, C. J. and CHAMPLIN, J. concurred. SHERWOOD, J. did not sit in this case.

ALBERT H. PETRIE ET AL. v. JAMES M. LANE.

Cross-examination—Breach of contract—Rescission—Speculative damages—Verdict.

1. The right of cross-examination, within reasonable bounds, secures to litigants the best means of ascertaining the reasonableness and truthfulness of the direct testimony; and it is error to deprive counsel

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of the opportunity to cross-examine before the witness is discharged from the stand on the close of the direct examination.

2. Where defendant in an action for breach of contract does not admit the contract and plaintiff testifies to it, defendant may put in by cross-examination anything that would tend to show that it was unreasonable or could not have been carried out by either party.

3. In an action for non-performance of contract defendant should be allowed to show by cross-examination of the plaintiff that the latter after the contract was made, had left it discretionary with defendant to rescind.

4. Speculative damages cannot be allowed in an action for such a breach of contract as consisted in defendant's refusal to carry out his agreement to furnish the job of sawing his logs to plaintiffs; only such actual damages as result from defendant's non-performance are recoverable.

5. Irregularities in receiving a verdict were not considered on review where the case had to go back for a new trial anyway, and it was unlikely that the same questions would again arise.

Error to Muskegon. (Russell, J.) Nov. 11.—Nov. 19.

Assumpsit. Defendant brings error. Reversed.

F. W. Cook and *Fletcher & Wanty* for appellant.

Delano & Bunker for appellees.

Sherwood, J. In the year 1882 the plaintiffs were copartners and mill-owners engaged in the manufacture of lumber for themselves and others, at the village of North Muskegon. The defendant had a large quantity of logs in the Muskegon river to be sawed, but no mill to saw them. The plaintiffs claim that on or about the 21st day of July, 1882, the defendant made a contract with them whereby he agreed to furnish to the plaintiffs, in the boom of the Muskegon Booming Company, for sawing, all the logs he had in the Muskegon river which should come down into the boom, under the control of that company, during the sawing season of that year, and that the plaintiffs agreed to saw and pile the same in flat piles on the dock for two dollars per thousand feet, or if they cross-piled the lumber they were to have twenty-five cents per thousand additional; that the contract was verbal, and

upon the conclusion thereof the defendant gave the following written order to the plaintiffs:

"MUSKEGON, July 21, 1882.

Muskegon Booming Company:

Please deliver my logs to A. H. Petrie & Co.'s mill, and oblige,

Yours, etc.,
JAMES M. LANE."

that subsequently, in pursuance of this order, the Booming Company delivered to the plaintiffs 575 logs; that a few days thereafter the defendant took the logs out of plaintiff's boom to another mill to be manufactured, and entirely refused to perform his contract for the balance of the season with the plaintiffs; that the defendant's logs included in the contract amounted to 1,555,000 feet. This suit is brought to recover the damages the plaintiffs claim to have sustained by reason of the refusal of defendant to perform his alleged contract. The plaintiffs' declaration is special upon the contract; plea, general issue. The cause was tried in the Muskegon circuit before a jury, and the plaintiffs had judgment for $1309.56. The defendant denied the contract on the trial, but the jury found specially against him upon that point. The question was made upon the trial whether the plaintiffs had the facilities for doing the defendant's work mentioned in the contract. The plaintiff Petrie went upon the stand as a witness for plaintiffs, and testified to the contract and the number of feet of lumber the parties expected to have sawed and piled under the contract; the defendant's counsel then sought to show upon cross-examination the facilities plaintiffs had for doing the work mentioned. The court refused to allow counsel to make such inquiries.

These should have been allowed; they were both pertinent and material. The attempt to cure this error at a subsequent stage of the trial was not sufficient to remove the grounds of the mischief complained of. It is the privilege of cross-examination, kept within reasonable bounds, which secures to litigants the best means of ascertaining the reasonableness and truthfulness of the testimony given, and it is the right

of counsel to make such examination before the witness is discharged from the stand, after the direct examination has been concluded; and when he is deprived of this privilege it is error. The contract declared upon was not admitted by the defendant, and after it was testified to by the plaintiff anything which would tend to show that it was unreasonable, or could not have been carried out by either party, was proper cross-examination. It was sought to be shown also by Petrie, upon cross-examination, that the plaintiffs, a few days after the contract was made, left it discretionary with the defendant to rescind whatever contract had been made. This was proper, and its exclusion was also error.

Two other questions were presented for consideration upon the argument. The first relates to the rule of damages and the proofs offered upon that subject. It is sufficient to say upon this point no speculative damages can be allowed in the case. If the plaintiffs establish their contract, and the violation of the same by the defendant, such actual damages as they can show they have sustained as the necessary consequence of the defendant's non-performance they will be entitled to recover, and no other. The second relates to some alleged irregularities in receiving the verdict of the jury, and the direction given by the court at the time. As the case must go back for a new trial, and it is not likely the same question will recur, there is no occasion for considering this now.

For the reason above noticed the judgment must be set aside and a new trial granted.

The other Justices concurred.

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LOUIS GROSSLIGHT v. GEORGE B. CRISUP.

Garnishment proceeding pleaded in abatement—Rule 106.

1. Garnishment proceedings may be pleaded in abatement of an action afterwards brought by the principal defendant against the garnishee. They are not an absolute bar, however, unless judgment has been obtained against the garnishee in the principal suit.

2 Where defendant in a pending action is garnished in a suit brought by a third person against the plaintiff, he should as soon as possible plead the garnishment proceeding in abatement of the first suit, and he can do so at any stage before judgment therein. This can only be done by filing notice of the proceeding as a special defense under Circuit Court Rule 106, or by plea puis darrein.

3. A plea puis darrein continuance is either in abatement or in bar; and when such a plea interposes the special defense that defendant has been garnished as plaintiff's debtor since the beginning of suit, it is a plea in abatement.

Error to Wayne. (Chambers, J.) Nov. 11.—Nov. 19.

Garnishment proceeding. The garnishee brings error. Reversed.

W. B. Jackson for appellant. Garnishment proceedings can be pleaded in abatement of a suit for the debt against the garnishee. *Near v. Mitchell* 23 Mich. 382.

John G. Hawley for appellee.

CHAMPLIN, J. This case was begun in justice's court to recover the sum of $200. The defense was a set-off "on a judgment recovered by the defendant against plaintiff before Justice of the Peace Schweikart, for three hundred dollars." Plaintiff had judgment before the justice, and defendant appealed. On December 9, 1884, the case being on the docket of the circuit, and about to be called for trial, one Thomas R. Crisup began a suit against Grosslight, the plaintiff, and garnished George B. Crisup, the defendant in this cause. On December 10th, the day of the trial, but before the trial began, a plea of the general issue, with a notice of these pro-

ceedings, was filed under Rule 106 of the circuit court. The plaintiff's attorney did not ask for a continuance. On the trial the plaintiff proved that defendant owed him $200, and the defendant admitted the indebtedness, but claimed that the garnishment proceedings constituted a defense to the action. The court admitted evidence of the garnishment proceedings, but held they were no defense to the action, and directed a verdict for the plaintiff.

The question raised by the record is whether the pendency of the suit in the same court in an action on behalf of the principal defendant against the garnishee precludes the garnishee from being charged as such upon a suit subsequently brought. The statute authorizing proceedings against garnishees in courts of record enacts that from the time of the service of the writ the garnishee shall be deemed liable to the plaintiff to the amount of property, money, goods, chattels and effects in his control, belonging to the principal defendant, or of any debts due or to become due from such garnishee to the principal defendant, or of any judgment or decree in favor of the latter against the former, etc.

It is a universally acknowledged principle that the law of garnishment should not have such a construction placed upon it as to make the garnishee twice liable to the payment of the same debt. Consequently, if he is sued by the principal debtor after the commencement of garnishee proceedings against him, he may plead the pendency of such proceedings in abatement of such suit. The garnishee proceedings, however, are not an absolute bar to an action by the principal defendant until a judgment is obtained against the garnishee in the principal suit. When the garnishee suit is subsequent in point of time to that of the principal defendant for the recovery of the debt, and before judgment, it is plain to be seen that the garnishee will be twice made liable for the debt, unless he can bring these proceedings before the court by plea in abatement; and to prevent such consequences it is his duty to do so at any stage in the progress of the first suit, before judgment, and at the first opportunity. It can only be done by a plea puis darrein continuance, or by

notice authorized by Rule 106. Such pleas are either in abatement or in bar. Gould's Pl. ch. vi, § 124. In this case the facts set up in the notice constituted a plea in abatement, and, as proved upon the trial, entitled him to a judgment abating the suit.

The plaintiff claims that great inconvenience would arise, as well as delay in the prosecution of the suit, by permitting a plea in abatement at this stage of the proceedings. But the statute has made provision by which such delay may be avoided and the suit proceed by the plaintiff's availing himself of § 8105, and filing the bond therein provided for, and thus secure a discontinuance of the garnishee proceedings.

The judgment of the circuit court is reversed, and a new trial ordered. The plaintiff in error will recover costs in this Court, and the costs of the court below will abide the event of the re-trial.

The other Justices concurred.

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JOHN R. WILSON, TRUSTEE UNDER THE WILL OF SAMUEL W. ODELL v. LELIA D. ODELL ET AL.

Wills—Accumulations—Costs.

1. A will provided annuities for the testator's children, all of whom were under twelve years old at the time of his death, and it set aside certain real estate to be held "for the purpose of aiding in carrying out this trust." Otherwise it gave the executors a general power of sale. It also gave a residue to the children's children, after the death of all the children and on the majority of the youngest grandchildren, continuing the annuity of any deceased child to the children of such child until the division. *Held*, that as the reservation of the specified land and of the accumulations therefrom are void for any period beyond the minority of the youngest child (How. Stat. §§ 5553–4), the land goes to the heirs, by intestacy, subject only to the accumulations so far as needed to pay the children's annuities, the rest, like the land, going to the heirs-at-law and not to the grandchildren.

2. Costs of a necessary proceeding to obtain the construction of a will, are chargeable on the estate.

Appeal from Muskegon. (Russell, J.) Nov. 11.—Nov. 19.

BILL to construe will. Defendants appeal. Reversed.

Smith, Nims, Hoyt & Erwin for complainant.

Delano & Bunker and *John Tait* for defendants, claimed that the provision suspending alienation was void (*Coster v. Lorillard* 14 Wend. 265), and also the reservation of land to trustees for annuities: *Hawley v. James* 16 Wend. 62.

CAMPBELL, J. Complainant filed his bill to obtain a construction of the will of Samuel W. Odell deceased, making the widow and minor heirs parties. The controversy arises upon the effect of certain clauses of the will extending its operation beyond four lives in being and during the minority of all possible grandchildren, none of whom are now in existence.

The will, which was made May 6, 1882, contains several clauses, which were as follows: Testator gave to his wife Lelia D. Odell, and complainant, as trustees in trust for the purposes named, all his realty and personalty, "with full power to said trustees to sell my real estate, *except as otherwise provided*, at such times and in such parcels as they shall deem advisable, and out of said property pay" as subsequently stated,—*first*, funeral expenses and a monument for testator and his parents; *second*, an annuity of $1500 in quarterly payments to his widow in lieu of dower, and for all her services under the will; *third*, annuities for support, clothing and schooling of his three children, of $600 each while under fourteen and $1000 beyond that age, payable quarterly for them until of age, and to them personally thereafter. This third clause contains at its close this provision: "And for the purpose of aiding in carrying out this part of the trust, lots 11, 14, 15, 16 and 17 in subdivision of block 7; lot 6, block 65; S. W. ¼ lot 5, lots 6, 7 and 8, block 68, all in the city of Muskegon; lot 18 of A. S. Williams' subdivision of Park Lots 8 and 9 of Detroit, and the S. E. fr. ¼ of

section 19, T. 4, R. 2 W., and all in the State of Michigan, are to be held as part of my estate."

The *fourth* clause gives two pecuniary legacies to a nephew and niece. The *fifth* gives the residue to his children's children after the death of all his children and on the majority of his youngest grandchild, continuing the annuity of any deceased child to the children of such child until the division.

Mrs. Odell renounced her rights under the will, and all action under it, leaving complainant sole trustee.

No question is raised about the validity of the trusts whatever we may think of their wisdom so far as the personalty, or realty which may be liable to sale, is concerned. The period of restraint extends no further than the continuance of lives in being and the minority of their children.

The portion of the third clause which retains the land described and exempts it from sale, is admitted to be invalid as continuing control beyond lives in being. But parties differ as to the extent of the invalidity and its effect on the rest of the will. Ths circuit court held that the clause might be regarded in the same way as if not inserted, so as to leave all the property liable to sale. Defendants claim it creates an intestacy, complete or modified.

The facts do not show the value or rental condition of the various lands owned by the testator. They only show that his estate consists, in the opinion of one witness (no others being sworn), of $103,950, of which $85,775 is realty and $18,175 personalty. The lands mentioned in the third provision are estimated at $31,500. The income of all the estate is $10,000, and of the property in the third provision $2250 clear.

The children's income, in aid of which this land is entirely devoted, will not, at present rates of rental, absorb it until all of them are over fourteen years old. Anna was eleven when the bill was filed in January, 1885, and the boys were three and five years old respectively. Assuming, what is not probable, that the property will not increase in value, their annuities, if paid entirely out of this land, will for the present leave an

unexpended balance of $450 a year. But this land is not the only property from which they are to be paid, and is only given in aid of the other property, but not to be devoted to any of the other purposes of the trust. At present rates, and considering the trusts as all operative, there would be a general accumulation from the whole estate of over $5000 a year, not counting re-investments.

We think there is a decided objection to treating the condition in the third clause of the will as one which may be stricken out so as to leave this land to fall within the general power of sale. The property so to be disposed of is open to any and all of the purposes of the trust, including the provision for funeral expenses, monuments, and specific legacies as well as annuities. While not probable, it is legally possible, that if so liable, this specified land may become necessary for these purposes from losses or depreciation of the rest. But the third clause of the will devotes this land solely to the raising of the children's annuities, or as the will says "for the purpose of aiding in carrying out this part of the trust." It is not given for the general purposes.

It is then a provision for using the land for the purpose of raising these annuities, and any accumulations, as well as the land itself, must be regarded as intended to fall into the residuary bequests, and not to be used for other purposes.

This seems to bring it within How. Stat. §§ 5553 and 5554, which will not allow accumulations to be made beyond the minority of persons in being, but which do not make provisions broader than this void except for the excess. The statute in such case makes the direction void as to the time beyond such minority, but not otherwise.

The effect of this would be to leave this trust valid for the purpose of accumulating rents and profits, until terminated by the minority of the children, and in *Toms v. Williams* 41 Mich. 552, it was intimated that this covered the period until the youngest should become of age. But as no other provision covers this land, and the provisions for the grandchildren, so far as real estate is concerned, are illegal, this land must be regarded as going to the heirs by intest-

acy, subject only to these accumulations so far as they become necessary to pay the children's annuities. Any balance not so needed belongs, with the land, to the heirs-at-law, and not to the grandchildren.

The decree below must be reversed, and a new decree entered in accordance with these principles. The costs are a proper charge against the estate, as the bill was properly filed to avoid difficulty.

The other Justices concurred.

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MARY YALE v. ALEXANDER STEVENSON, LEVI S. SHOOK, ROBERT J. DIXON AND JOSHUA IVISON.

Married woman's mortgage—Sale in gross—Ejectment.

1. A wife's mortgage upon her own land is not invalidated by her husband's joining in it; nor is the sale thereunder made void by the fact that the notice of sale describes her as his wife.

2. A mortgage sale of several lots which were fenced and used as one parcel when the mortgage was given and had continued so, was not void under the statute in force in 1869. Comp. L. (1871) § 6918.

3. Where land has been regularly sold under a mortgage the mortgager cannot, in an action of ejectment for it, attack the mortgage as fraudulent, or as discharged before foreclosure. The remedy for such defects, if not lost by laches, would be in equity.

Error to Isabella. (Hart, J.) Nov. 12.—Nov. 19.

EJECTMENT. Defendants bring error. Reversed.

Graves & Brown and *L. T. Durand* for appellants. A wife may mortgage her property to secure her husband's debt: *Watson v. Thurber* 11 Mich. 457; *DeVries v. Conklin* 22 Mich. 259; and though the husband join in the mortgage, still her separate property will be bound: *Frickee v. Donner* 35 Mich. 151; lots fenced in one parcel may be so sold on mortgage foreclosure: 2 Jones on Mortgages, 1618, 1857–8; *German Bank v. Stumpf* 73 Mo. 311; *Lamerson*

v. Marvin 8 Barb. 9; *Griswold v. Fowler* 24 id. 135; *Anderson v. Austin* 34 id. 319.

Dodds Bros. and *I. A. Funcher* for appellee. Land described in parcels must be so sold on foreclosure: *Sherman v. Willett* 42 N. Y. 150; *Lamerson v. Marvin* 8 Barb. 9; *Griswold v. Fowler* 24 Barb. 135; *Ellsworth v. Lockwood* 42 N. Y. 105; *Cox v. Wheeler* 7 Paige 250; not only when expressly described in the mortgage, but also when afterward subdivided by consent of the mortgager: *Durm v. Fish* 46 Mich. 314; *Grover v. Fox* 36 Mich. 461; *Piel v. Braysr* 30 Ind. 332; *Bardeus v. Huber* 45 Ind. 235; *French v. Edwards* 13 Wall. 506; *Petermann v. Turner* 37 Wis. 244; see *Clark v. Stilson* 36 Mich. 485.

MORSE, C. J. The plaintiff and appellee brought an action of ejectment in the circuit court for the county of Isabella to recover lots 3 and 4 in block 24 of the village of Mount Pleasant. Plaintiff, who was then owner in fee of the premises, mortgaged these lots, together with other property situated in the village of Isabella, to defendant Stevenson, November 3, 1868. Her husband joined with her in the mortgage. At the time the mortgage was executed these lots were inclosed by a fence on the outside, and cultivated as one parcel by the plaintiff, who lived upon a lot in Isabella. No house was on these lots, and there has never been any building erected upon them. Default having been made in the payment of the mortgage debt, the mortgaged premises were sold to defendant Stevenson, September 4, 1869, upon a foreclosure by advertisement. The sheriff's deed shows that these lots were sold together in one parcel and bid in for $400, and the property in the village of Isabella was sold together and bid in for $200. None of the property has ever been redeemed from said sale, nor has any offer been made to pay the amount due upon the mortgage, or to redeem any portion of the lands. At the date of the foreclosure of the mortgage plaintiff was living in the village of Isabella, about two miles north of the lots in question in this suit, and knew when it was foreclosed. She lived on the property in Isabella about a year and a half after the foreclosure sale, when she moved

to Mount Pleasant, where she has since resided. Neither she nor her husband forbade the sale under the mortgage. She has lived, since she has been in Mount Pleasant, within two or three blocks of these lots, but has never said anything to defendant Stevenson about the invalidity of the mortgage, or demanded possession of the property. Stevenson has been in possession of the lots ever since the expiration of the time of redemption, and has cultivated them for a garden. The plaintiff testified that she was aware of this, but had not herself, or by any one else, made any objection to it in any way.

Upon the trial, it was admitted by counsel for the respective parties that plaintiff was the owner of the lots at the date of the mortgage, and that defendants had been in possession under the mortgage sale, or claimed an interest in the premises, and plaintiff thereupon rested her case. Upon defendants' taking the case it was admitted by her counsel that plaintiff never had any homestead rights in these lots, and thereupon defendants introduced in evidence the mortgage from plaintiff to defendant Stevenson, the deed made and executed by the sheriff upon the foreclosure sale, the notice of the sale attached thereto, the affidavit of the sheriff, and the certificate of acknowledgment and record of the same. Plaintiff's counsel objected to this proof, (1st) because notice of sale stated that mortgage was executed by A. K. Yale and Mary E. Yale, his wife, and did not specify that her interest was to be sold, and apt language was expressly used that her interest in the sale was merely as his wife; (2nd) because the lots were described separately, and they should have been sold as described, separately, but the deed showed they were sold and bid off in a lump for $400, and all the balance for $200. The court received the evidence at the time it was offered, and plaintiff's counsel excepted; but when the testimony was closed the court came to the conclusion that the sale was irregular and void, for the reason that the lots were not sold separately; and also that it was not necessary for plaintiff, under the testimony, to have given

notice to quit before bringing suit, and directed a verdict for the plaintiff.

The defendants claim (1) that the foreclosure sale was not void; (2) that if it was, the plaintiff was not entitled to recover in this case without having first demanded possession of the property, of defendants or some of them; and (3) that the plaintiff could not, in this action, introduce testimony to show that the mortgage was discharged before its foreclosure.

The plaintiff introduced evidence, under the objection of defendants' counsel, tending to show that one McLaren, an agent of defendant Stevenson, obtained her signature to the mortgage to release a span of horses of her husband, upon which Stevenson held a chattel mortgage, and that this release of the horses was the sole consideration for the real-estate mortgage; and that afterwards Stevenson foreclosed the chattel mortgage, and took the horses thereon in fraud of this agreement to release, upon which the real-estate mortgage was based.

It also appeared by the evidence of defendant Stevenson that about six months after the foreclosure sale the plaintiff and her husband left the property in the village of Isabella, and one Grinnell moved upon it, claiming title adversely to plaintiff; that when the sale took place plaintiff ceased to occupy the lots in question in this suit, or to pay taxes thereon; that he (Stevenson) at once took possession, and the spring after the sale took out the stumps, repaired the fence, and has occupied and cultivated them as a garden and paid taxes upon them every year since, without any objection or hostile claim from any source whatever; that the first he knew that it was claimed the foreclosure proceedings were invalid or that the plaintiff claimed the property, was when he was served with the declaration in this case.

The defendant Joshua Ivison bought the lots of defendant Stevenson, May 15th 1884, upon a contract of purchase, without, as he testified, ever hearing that plaintiff or any one besides defendant Stevenson claimed the property, and that no one ever interfered with his possession or demanded possession of him. This suit was brought May 26, 1884.

The defendants' counsel also requested the court to instruct the jury as follows:

"If the jury find that upon the foreclosure sale of the real estate in question the plaintiff voluntarily quit the possession and occupancy of the property described in the mortgage and yielded up the possession thereof to defendant Stevenson, and rented a portion of it, to wit, the property in Isabella village, of defendant Stevenson, and continued in possession of the same with her husband for a period of about six months as tenant, paying him, Stevenson, rent therefor, and since then defendant Stevenson has continued to occupy and cultivate the property described in the declaration continuously up to the time of the sale to defendant Ivison, and with the knowledge and permission of plaintiff, the plaintiff is not entitled to recover, not having demanded the possession thereof of defendants, or either of them."

As it is conceded that all the property described in this mortgage belonged to the wife, we think the form of the mortgage, or the notice of sale under it, describing plaintiff as the wife of Abram K. Yale, did not invalidate the mortgage, or the sale of the premises under it. It conveyed her interest as absolutely as if her husband had not joined with her. Her interest in the lots was a title in fee, and having no dower interest therein it must be presumed that when she executed the mortgage she knew what she was conveying.

The sale of these two lots fenced and used as one parcel at the time the mortgage was given, and so used and occupied ever since, was not void under the statute in force at the time of sale. They were not separate and distinct, as the parcels or tracts sold in the cases of *Lee v. Mason* 10 Mich. 403 and *Udell v. Kahn* 31 Mich. 198, but come clearly under the decision of this Court in *Larzelere v. Starkweather* 38 Mich. 96, which was a foreclosure sale made before the amendment to the statute in 1875. The evidence shows that in this case, as in that, these lots were "held, occupied and worked" as one parcel.

The mortgage sale therefore being regular, in our opinion the plaintiff could not in this action attack the mortgage either as fraudulent in its inception, or on the ground that it

had been discharged before its foreclosure. Her remedy in such case would be, if not lost by laches, in a court of equity.

In this view of the case it is not necessary to notice the other errors complained of. The circuit judge should have directed a verdict for the defendants.

The judgment of the court below is reversed with costs of both courts, and the record herein remanded to the circuit court for the county of Isabella for such further proceedings as may be desired to be taken under the statute.

The other Justices concurred.

JOHN L. STODDARD v. CHARLES H. PRESCOTT.

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Certificate of tax-sale—Cloud on title—Consideration.

1. A cloud on title is created by any instrument which purports by its terms to be a conveyance from the original source of title to an adverse claimant, if extrinsic evidence is needed to show the invalidity of the instrument.

2. A certificate of tax-purchase will cloud title if the deed to be issued thereon would establish presumptive title adversely. And as the fact that the certificates attached to the assessment rolls were not filled out or attached by the proper officer, or that part of the tax had been illegally assessed, could not appear on the face of the deed, evidence of such facts would be inadmissible in defense to an action for the consideration agreed upon for the assignment of such certificate.

3. The assignment of a certificate of tax-purchase that is regular on its face, is a valuable consideration where the certificate is sufficient to cloud the assignee's title.

Error to Bay. (Green, J.) Nov. 12.—Nov. 19.

ASSUMPSIT. Defendant brings error. Affirmed.

Shepard & Lyon for appellant.

John L. Stoddard for himself. Proceedings for the assessment of a tax which under the law may culminate in the issue of a deed that is prima facie evidence of the regularity of the proceedings, constitute a cloud upon the title to the

property, although there may be an illegality in the proceedings appearing upon their face, which will render them and the deed to be issued void: *Palmer v. Rich* 12 Mich. 414; *Scofield v. City of Lansing* 17 Mich. 437; *M. H. & O. R. R. Co. v. Marquette* 35 Mich. 504; Blackwell on Tax Titles 567; the rule is otherwise only when the statute under which the tax is levied is unconstitutional and void, as in *Detroit v. Martin* 34 Mich. 170; *Curtis v. East Saginaw* 35 Mich. 508; where there is any consideration of value, there can be no question into its sufficiency; parties place their own value on their own purchases, and unless a bargain is rescinded they must pay what they agree to pay: *Kennedy v. Shaw* 43 Mich. 361; *Oakley v. Boorman* 21 Wend. 588; *Johnson v. Titus* 359: 2 Hill 606, 608; *Spann v. Bartzell* 1 Fla. 301: 46 Am. Dec. 346, 356; 1 Add. on Cont. (Morgan's ed.) §§ 9, 16; 2 Field's Lawyers' Briefs §§ 94, 95; *Davis v. Steiner* 14 Penn. St. 275: 53 Am. Dec. 547; *Holt v. Robinson* 21 Ala. 106: 56 Am. Dec. 240; *Brown v. Ray* 10 Ired. L. N. C. 72: 51 Am. Dec. 379.

CHAMPLIN, J. This action was brought to recover the amount of $300, under the following circumstances: At the annual tax sale of land for delinquent taxes, in the county of Bay, held in May, 1884, the plaintiff bid off certain land belonging to defendant, and received the usual certificate of purchase therefor. Afterward he informed defendant of his purchase, and offered to sell his interest to him for $300. After one or more interviews on the subject the defendant called at plaintiff's office just before six o'clock on the 30th of October, 1884, and wanted to fix the matter up. He said that he felt sure that he had paid his taxes, but had not been able to find his receipts, and that he was about to sell his property, and he did not want any thing of that kind in the way, and that he could better pay for the tax title than to have the thing standing in his way, for it might interfere with his sale, and he asked plaintiff if he would agree to refund a part of the money in case he should find his receipts. He stated distinctly to plaintiff that he understood the tax title was not worth anything, that it was good for nothing, and that he, plaintiff, could not do anything with it; but he thought the best thing for him to do under the circumstances

was to pay up, and he would have the thing all cleared, and there would be nothing in the way of selling the property. Finally he agreed to pay plaintiff $300 for the tax title, with the agreement on the part of the plaintiff to repay to defendant $275, in case he found the tax receipts for the years 1879 and 1880, and $150 if he found the receipts for one year; the particulars of which agreement were embodied in the following paper, which plaintiff drew up, signed, and delivered to defendant, viz.:

"BAY CITY, MICHIGAN, October 30, 1884.

Received of C. H. Prescott $300 for tax title on lots 7, 8, 9, 10, 11, 12, and west 12 and half feet of lots 2, 3, 6 and 13, in Bay City, as per plat of James Fraser's first addition, north of Center street, all in block nine (9) of said plat, for the year 1880 and 1879. If said Prescott shall, after giving notice to me, prove to the satisfaction of the Auditor General that the taxes aforesaid, and for which said property was sold, were duly paid, and the said Auditor General shall for that reason cancel said sale within sixty days from this date, then I agree to repay to said Prescott, on demand, $275. If proof is made as aforesaid of payment of the taxes for one of said years and not both of them, within the time aforesaid, then I agree to repay to said Prescott $150.

J. L. STODDARD."

He also assigned to defendant the tax certificate of purchase and delivered it to defendant, who thereupon wrote a check upon a bank in Bay City for $300, payable to the order of the plaintiff, and delivered it to him. The next morning plaintiff put the check in the bank for collection, and in a day or two it was returned to him protested for nonpayment. He at once notified defendant and that he held the check subject to his order, and a few days after he saw defendant and requested an explanation, but none was given; but he admitted that he stopped payment of the check, claiming that he found that he had paid his taxes. He produced no receipts and took no steps to have the certificates canceled. He retained in his possession the agreement signed by plaintiff, and the certificate, and produced them upon the trial at plaintiff's request, and has never paid the $300, or

any part thereof. There is no pretense that plaintiff made any false or fraudulent representations to induce defendant to purchase plaintiff's interest in the tax certificate, or that he did not fully understand the nature and character of the transaction, nor that he had acquired any knowledge or information in regard to the invalidity of the tax certificate after he gave his check that he did not possess before. On the trial his counsel based his sole defense upon the proof contained in his offer, as follows:

"We propose to prove by Mr. Kelly, who was county clerk in 1879 and 1880, that in these years the certificates were not made out and afterwards signed by the chairman and affixed to the roll, but that the chairman signed the certificates in blank and left them with the county clerk, and the county clerk afterwards filled in the writing in the blank over the signature of the chairman of the board of supervisors, and in each of these years sent them to the different assessing officers through the county, and that the certificates of equalization were not attached to the rolls at the time the assessing officers met the board of supervisors at the October session, and after the October session had adjourned, were sent to the different assessing officers at their respective post-office addresses, having previously been signed by the chairman and filled out by the clerk and mailed by him.

And, further, that in each one of these years there was assessed upon the assessment-roll and spread upon the tax-roll of the city, a one mill tax, and that these lands—that the plaintiff obtained this certificate of the tax-sale was for—for the taxes of 1879–80, were sold for the taxes for these respective years for a tax that included a one-mill tax, and we claim that there was no authority in law for levying such a tax; that the provisions of our charter superseded the statute upon that subject, and that there was no authority for levying the taxes, for the reason that we had no primary schools in the city at the time, and no primary school library for the fund to be devoted to, but a public library of Bay City, which was a corporation; and we claim that when the proceedings to raise the tax show upon their face that the tax is invalid, that the tax title acquired through a sale of the property for taxes so levied and assessed is void, and that such a title would not be even a cloud upon the title of the owner of the property."

We think the court very properly excluded the proposed proof. The title which could have been acquired under the certificate would have constituted on its face a presumptive title to the land. Nothing would have appeared upon the face of the deed to apprise any one that the certificates required by the tax law to be attached to the assessment rolls were not filled out and attached by the proper officer, nor would it appear on the face of the deed that a mill tax had been illegally assessed. Every instrument purporting by its terms to convey land from the original source of title, however invalid, creates a cloud upon the title if it requires extrinsic evidence to show its invalidity. *Pixley v. Huggins* 15 Cal. 128; *Van Wyck v. Knevals* 106 U. S. 370. There is no doubt that such a title, emanating from the Auditor General, would, if it did not confer an absolute title, cast a cloud upon the defendant's title, and materially affect the market value and salability of his land. This he perfectly understood and sought to remedy by the purchase of the tax certificate. Under these circumstances the sale and assignment of the certificate was a sufficient and valuable consideration for the promise made by him to pay plaintiff $300. As no error appears in the record,

The judgment is affirmed with costs.

The other Justices concurred.

ELIZABETH WHITE v. WILLIAM W. WHITE.

Replevin by wife against husband—Ownership.

1. A wife living apart from her husband can bring replevin against him for her individual property after making due demand therefor.

2. Where defendant in replevin has waived return he is entitled to a verdict for the value of such property in his possession as is claimed by the declaration but as to the ownership of which there is no evidence.

Error to Cass. (A. J. Smith, J.) Nov. 12.—Nov. 19.

REPLEVIN. Defendant brings error. Reversed.

Harsen D. Smith for appellant.

Howell & Carr for appellee. A married woman may acquire property, own and control it, the same as though unmarried: *Berger v. Jacobs* 21 Mich. 215; it does not become her husband's by being in his possession: *White v. Zane* 10 Mich. 333; she may take it from his possession; *Starkweather v. Smith* 6 Mich. 377; he has no control over it: *Agricultural Ins. Co. v. Montague* 38 Mich. 549; she may maintain suits against him: *Markham v. Markham* 4 Mich. 305; *Randall v. Randall* 37 Mich. 563.

MORSE, C. J. August 13th, 1883, the plaintiff, who is the wife of defendant, brought replevin for a large amount of personal property, including "about sixteen acres of wheat in stacks, about eight acres of corn in stacks, and about eighty bushels of corn in the crib." It appears that in February, 1871, the defendant, who was living upon a farm belonging to his wife, by a written assignment transferred all his personal property to plaintiff, except a clover-huller and horse-power. March 14th, 1871, he also executed to her a bill of sale, transferring to her an engine, belts and trucks, twenty acres of growing wheat, and a mowing-machine and one reaper. Both of these instruments were received in evidence. The plaintiff testified in her own behalf, and several other witnesses gave evidence of statements made by defendant to the effect that his wife owned all the property on the place; all of them, excepting two, testifying to conversations from 1871 up to 1881, and not later. Nimrod Munsey testified that in the fall of 1882 defendant told him that all the property belonged to his wife; and Jeremiah White, a son of the parties, gave evidence that he had often heard his father say that all the personal property on the place belonged to his wife. "Heard him say so recently." The defendant offered no testimony, and before the case went to the jury a few articles were admitted to belong to him,

and the jury so found as to them, but rendered a verdict for the plaintiff for the balance of the property.

The defendant's counsel asked the court to instruct the jury that the plaintiff must identify the property and show that she was the owner of it at the time she brought her suit. This instruction was evidently aimed at the items of corn and wheat stated in the declaration, as near the close of the charge of the court the defendant's attorney said: "We ask for the wheat and corn." The court replied: "It is for the jury to say."

Defendant's Counsel. "There is nothing to show that she owned the wheat or corn."

The Court. "If they [the jury] find any property that belongs to him [defendant] under this testimony, then they will give him a judgment for the amount. It is for them to say what the testimony was, and not the court."

The defendant excepted to this charge of the court and his refusal to state to the jury that there was no testimony tending to show that the corn and wheat belonged to the plaintiff, and assigns error in the submitting of the question whether she owned the wheat and corn to them.

We think the circuit judge should have instructed the jury to find a verdict for the value of the wheat and corn for the defendant, he having waived a return of the property. There is an utter absence of any testimony in relation to the ownership of this portion of the property. Indeed, it is not mentioned by any of the witnesses, not even the plaintiff herself. As the evidence showed all the property in defendant's possession at the time of the serving of the writ, he was entitled to judgment for the wheat and corn, as against the plaintiff, who showed no right to it. There was no evidence even as to its being raised on her place.

Defendant also objected to any further evidence being given in the case, after it was shown she was the wife of defendant, upon the theory that the wife could not maintain replevin against her husband. The fact appeared that before and at the time of suing out her writ she was living separate and apart from defendant, and that before bringing the suit

she made a demand for the property. We have no doubts as to her right to maintain this action.

For the error in submitting the ownership of the corn and wheat to the jury the judgment of the court below is

Reversed with costs and a new trial granted.

The other Justices concurred.

EDNA CELIA NORTON ET AL. v. ELIAS B. SHERMAN ET AL.

Guardianship—Finding of mental incompetency.

1. It is a sufficient averment of the mental incompetency of a person whom it is sought to place under guardianship, to state in the petition for the appointment of the guardian that such appointment is necessary because, by reason of extreme old age and other causes, such person "is now mentally incompetent to have the charge and management of his property and has been mentally incompetent for some time past."

2. The Supreme Court will only consider questions of law in reviewing on error the proceedings had at the circuit on appeal from a probate order appointing a guardian for an incompetent. The sufficiency of the evidence to show incompetency is not such a question.

3. In a proceeding for the appointment of a guardian for an incompetent, a finding by a jury that respondent "is mentally incompetent to have the charge and management of his property" is sufficient, though the further question of his inability to take care of himself has not been submitted to the jury, especially if such inability has been found by the judge. How. Stat. § 6315.

4. A verdict and judgment in the circuit court in affirmance of a probate order appointing a guardian for an incompetent, may properly be remitted to the probate court for enforcement. How. Stat. § 6789.

Error to Cass. (A. J. Smith, J.) Nov. 12.—Nov. 19.

Appeal from appointment of guardian. Respondent brings error. Affirmed.

Harsen D. Smith for appellant.

Howell & Carr and *Spafford Tryon* for petitioners.

SHERWOOD, J. The petition of the plaintiffs in this case was for the appointment of a guardian for the defendant, to have the care and management of his property, in consequence of the mental incompetency of the defendant. He is feeble and infirm, and eighty-one years of age and over. The petitioners are a daughter, grandson and son-in-law of the alleged incompetent. The proceedings were had in the probate court for the county of Cass, and a guardian was duly appointed for defendant by that court. From the decree making such appointment the defendant took an appeal to the circuit court for said county.

The petition of plaintiffs for the appointment of the guardian, and reasons for appeal, constitute the only issue presented for trial in the circuit court, and are as follows: After giving the names of the petitioners, their residence and relations to the defendant, the petition proceeds:

"Your petitioners further represent unto said court that the said Elias B. Sherman is of the age of eighty-one years, and is feeble and infirm, and is an inhabitant of said county, residing at the village of Cassopolis, in said county and state, and is possessed of real estate and personal estate situated and being in said Cass county, and the estimated value of the personal estate, including money, bank stock and notes, is about the sum of twenty-five hundred dollars, as petitioners believe, and the estimated value of real estate is the sum of twenty thousand dollars or thereabout, as your petitioners are informed and verily believe.

Your petitioners further represent that it is necessary that a guardian be appointed of the person and estate of the said Elias B. Sherman, for the following specific reason: Because the said Elias B. Sherman, by reason of extreme old age and other causes, is now mentally incompetent to have the charge and management of his property, and has been mentally incompetent for some time past.

Your petitioners further represent that the names of the next of kin of the said Elias B. Sherman, and other persons interested in said estate, as your petitioners are informed and believe, are as follows: Mrs. Edna Celia Norton, a daughter; J. Silver Sherman, a son, both residing at Cassopolis, Michigan; Frank L. Jones and Carrol S. Jones, both grandsons,

and both residing at Marcellus, in said county; Mary Blanche Goucher, residing at Clay Center, Kansas; Ellen N. Graham, residing at Cassopolis; and Florence M. Tietsort, residing at Cassopolis; the last three named aforesaid being daughters of the aforesaid John Tietsort, and granddaughters of the said Elias B. Sherman.

Your petitioners therefore pray that a day be fixed for hearing this petition, and that a citation issue, to be personally served upon said Elias B. Sherman and upon some one of his nearest relatives, not less than fourteen days before the return-day thereof, requiring them to appear and show cause, if any, why a guardian should not be appointed as aforesaid after a full hearing and examination in the premises, and that Joel Cowgill, residing at Cassopolis, Mich., may be appointed guardian of the person and estate of him, the said Elias B. Sherman, according to the provisions of the statutes in such case made and provided.

Dated this 16th *day of March A. D.* 1885."

REASONS FOR APPEAL.

In the matter of the application for the appointment of a guardian for Elias B. Sherman, an alleged incompetent person.

The undersigned, being said respondent, his wife and son, respectively, and being aggrieved by the order or decree of said judge of probate, made on the 23d day of April, 1885, appointing a guardian for said respondent, Elias B. Sherman, as appears by such order or decree on file in said court, hereby give notice of and make application for an appeal to the circuit court for said county, from the said order or decree of said probate court, for the following reasons, to wit:

1st. The evidence taken before said probate court does not show that said respondent is or ever has been mentally incompetent to have the charge and management of his property.

2nd. The said evidence does not show that said respondent is or has been an insane person.

3d. Said petition is insufficient to confer any jurisdiction upon said probate court to make said order.

4th. Said decision is based largely upon inadmissible evidence and irrelevant facts, as appears from the opinion read by said probate judge.

5th. Said order is unjust.

Dated April 30th, 1885.

ELIAS B. SHERMAN.
SARAH S. SHERMAN.
J. S. SHERMAN.

By the decree of the probate court, from which the appeal was taken, it was adjudged that the defendant was mentally incompetent to have the charge and management of his property, and was incapable of taking care of himself, and a decree was entered appointing Joel Cowgill guardian for the incompetent and his estate.

The third reason for appeal stated, needing consideration, is that "the petition is insufficient to confer any jurisdiction upon the probate court to make said order" appealed from. The mental incompetency of the defendant is relied upon, and we think it is sufficiently averred in the petition when it says "that he is mentally incompetent," "and has been for some time past," and gives this as the reason they desire the appointment of a guardian.

The first reason for appeal given cannot be considered here. This case can only be considered on error upon the questions of law presented upon the record, and this allegation presents no such question. Neither does the second reason for appeal. Whether or not the fourth reason given for the appeal from the decree of the judge of probate is true, it is impossible to say from the record; but, in any event, that fact is not before us for discussion now.

In the circuit court a jury was had, but upon whose request does not appear. The cause was tried before them, but if upon any other issue than that presented in the petition and reasons for appeal, the record does not disclose it; neither are we informed by the briefs of counsel upon that subject. The verdict of the jury indicates that no other was presented or litigated before them. The language of their verdict is: "We find that Elias B. Sherman, the respondent in the case, is mentally incompetent to have the charge and management of his property, as the said petitioners in this cause have in their said petition alleged." The appellants claim this verdict is insufficient, because it does not find that the respondent is incapable of taking care of himself.

Such questions of fact as are raised upon the petition, or so many thereof as the parties, or either of them, or the

court, may desire, can be submitted to the jury. The statute contains this provision, after providing for the appeal: "Such court shall proceed to the trial and determination of the question according to the rules of law; and if there shall be any question of fact to be decided, issue may be joined thereon, under the direction of the court, and a trial thereof had by jury." How. Stat. § 6783.

The incapacity of the defendant to take care of himself does not seem, as a distinct question, to have been submitted to the jury. The objection is, therefore, not well taken. It is difficult to see that a person, however, who has become mentally incompetent for the reasons stated in this petition, could be otherwise than incompetent to take care of himself; but this last infirmity is found by the circuit judge, and that is sufficient. How. Stat. § 6315.

The following is the judgment rendered by the circuit judge in the case: "The jury heretofore impaneled in this cause, having found the said Elias B. Sherman to be mentally incompetent to have the care and management of his property, as alleged by said petitioners, it is therefore on motion of Howell & Carr, attorneys for petitioners, ordered that the judgment of the probate court of said county of Cass be, and the same is hereby affirmed, and that the said cause, together with the verdict of said jury, and the judgment of this court thereon, be remitted to said probate court for enforcement." This is fully authorized by the statute. How. Stat. § 6789.

We find no error in the judgment rendered, which must be affirmed; costs in both courts to be paid out of the estate.

MORSE, C. J. and CHAMPLIN, J. concurred.

CAMPBELL, J. If the questions argued were fairly presented, I should desire to consider them before expressing an opinion; but in the shape in which the record comes up, they do not arise. and I concur in affirmance on that ground.

JOHN MASON v. WILLIAM PETER.

Account—Disallowance by referee—Amendment of notice.

1. The disallowance of an item of account by a referee was proper where the parties had had a settlement, which from its nature presumably covered, though it did not specifically mention it.
2. Under the Statute of Amendments a notice of defense can be so amended as to make the pleadings conform to the referee's finding in the case; and such an amendment can bring in an item which the referee has disallowed and which would have been wiped out if there had been notice of recoupment.

Error to Bay. (Green, J.) Nov. 12.—Nov. 19.

ASSUMPSIT. Plaintiff brings error. Affirmed.

Shepard & Lyon for appellant.

Hatch & Cooley for appellee.

CAMPBELL, J. Plaintiff sued defendant to recover the amount claimed to be due and unpaid on transactions connected with building and repairing certain salt-well machinery and fixtures. Two wells were sunk and fitted at different times, and various repairs were made and articles furnished. Some defects were alleged in part of the work and apparatus. The entire controversy before us is narrowed down to one item for repairs to the first well, being the sum of $260 expended in the summer of 1870 for work done at that time.

The case was referred to George P. Cobb, as referee, who reported a series of charges on the one side and payments on the other to the amount of over $8800 on each side, leaving a small balance of overpayment due defendant. He disallowed the item of $260. Upon this he found as follows: "That some time in the summer of 1870, and about the month of August, plaintiff again repaired said well, and such repairs were reasonably worth two hundred and sixty (260) dollars, but they were rendered necessary by a defect in the joining together of certain sections of tubing when first

placed in the well by plaintiff, which defect was not discovered until such repairs were in progress."

The original contract price for work concerning the well thus repaired was $3675. The referee found that the well was completed and put in operation in 1868, but defects were subsequently found in putting together some of the tubing, and in the derrick and boiler; that some additional boring was done to the amount of $205, which plaintiff claimed to be extra. He also claimed $200 for furnishing a better engine than the contract required; and he claimed further various items for fitting tubing and for well-poles and their repair and for various other services and expenditures, amounting in the aggregate to $410. These various claims, if allowed, would have entitled plaintiff to not far from $4500.

In 1871 the parties agreed that the plaintiff's compensation "for all the services, work, labor, materials and expenditures hereinbefore mentioned, should be three thousand seven hundred and fifty dollars; that defendant should waive all claim on his part for defects in said boiler, and in the construction of said derrick." The $260 item was not mentioned in this finding.

There was testimony tending to show that the repairs called for in 1870 were made necessary by a failure to screw the tubing together properly, so that the ends moved and became worn, and the water and other substances leaked in so as to make it necessary to do what was done. And it also appeared that the precise nature of this defect was not discovered until the pipes were raised on that occasion.

It may probably be inferred from the finding that this item was not presented, or if presented, was not allowed on the settlement of 1871. The finding does not say distinctly how this was. It is claimed by plaintiff that the referee could not properly find that repairs called for by defendant should be entirely charged to plaintiff because there was some original defect which was allowed to lie for two years and become worse; and that there is no notice of recoupment.

It may be true that cases may arise where repairs which

were rendered necessary by some original defect, are not chargeable absolutely to the contractor. In the present case he was not called upon to repair such damages on his own account when employed. If he had been, he might have declined the work and left the questions of wrong and damage to be determined by action. The fact of any wrongful defect was not learned till the work was largely done. If this stood alone, there might be some doubt on the rights of the parties.

But the referee finds that in 1870 there was a settlement made and a balance struck. From the nature of this settlement it appears that claims of damage and of extra work were set up on either side, and a certain sum beyond the contract price was agreed upon. This work had been done a year before, and came within the same class of charges which were allowed for, and showed defects which were analogous to those which were considered on the other side. It may fairly be presumed that it was one of those items where the services of plaintiff were supposed to be no more than his liability for defects required him to make. Such is the fair purport of the referee's finding. It would, under this finding, have been wiped out, if there had been a notice of recoupment. The settlement of 1871, as found, included several items which were technically rather matters of recoupment than set-off, except upon the theory, which seems to us the natural one, that all these items were treated by the parties as mutual charges for money and services, and not for damages as such. We can see no reason for excepting this item of $260 from the balances struck in the case, or for supposing it was not regarded as settled by the omission to name it in the compromise. And if not so settled, it would come fairly within the statutes of amendments, which would have justified the allowance of an amendment of the notice of defense to make the pleadings conform to the finding. No objection seems to have been made to the testimony on this item, and the finding is, we think, supported by the testimony. But in our opinion, the record needs no amendment.

The judgment must be affirmed.

The other Justices concurred.

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GEORGE BERRINGER v. GEORGE W. COBB AND LUTHER BEECHER.

Contract of hire—Repugnant counts—Bill of particulars.

1. In an action by a mining superintendent for his wages, evidence that a person impleaded as joint defendant had paid the employees of the firm, superintended its operations and given orders to the plaintiff is admissible to show his joint interest in the mine and his acquiescence in the contract of employment, even though he did not himself make it.

2. Pleading a special count in assumpsit does not estop the plaintiff from recovering under the common counts, if he abandons the special count at the outset and all his evidence is consistent with the common counts.

3. Joinder of repugnant counts in the same declaration does not preclude recovery on one of them; they do not nullify each other.

4. Omission to file a bill of particulars is unimportant if defendant, by demanding one, could preclude any surprise, and if plaintiff's case proceeded throughout upon the theory on which he recovered.

5. A contract is not vitiated by previous statements of one of the parties unless they were statements of fact rather than opinion and were made for the purpose of obtaining the contract, were relied on by the other party as a controlling reason for entering into it, and turned out to be false.

6. A mining superintendent sued for his wages, and his employers claimed the rent of the house he occupied, as offset. *Held*, that unless there was proof of a custom that the superintendent should have his house free of charge, the set-off must be allowed; and it seems that the plaintiff's testimony that he never heard of a superintendent's paying rent for his house was enough to leave the question with the jury.

Error to Marquette. (Grant, J.) Nov. 12–13.—Nov. 19.

ASSUMPSIT. Defendants bring error. Affirmed.

F. O. Clark and *Ball & Hanscom* for appellants. When one of two inconsistent remedies has been elected the right to pursue the other is lost: *Thompson v. Howard* 31 Mich. 309; *Vanneter v. Crossman* 42 Mich. 465; *Detroit v. Mich. Paving Co.* 38 Mich. 361; *Nield v. Burton* 49 Mich. 53;

Wilmot v. Richardson 2 Keyes 519; *Goss v. Mather* 2 Lans. 283; *Ward v. Day* 4 B. & S. 337; *Smith v. Hodson* 4 Term. 211; Broom's Max. 160; *Jewett v. Petit* 4 Mich. 508; *Rodemund v. Clark* 46 N. Y. 354; *Smith v. Baker* L. R. 8. C. P. 350; one cannot deny facts admitted by his pleadings: *State Stock Co. v. Ridsdale* 34 N. J. L. 429; *Byrne v. Hibernian Bank* 31 La. Ann. 81; *Iowa Co. v. Houston* 43 Ia. 485; *Fowler v. Stevens* 29 La. Ann. 353; *Durham v. Williams* 32 La. Ann. 962; *Sullivan v. Triumph Mining Co.* 39 Cal. 459; *Kingsberry v. Buchanan* 11 Ia. 387; *Ellwood v. Lannon* 27 Md. 200; *Carradine v. Carradine* 33 Miss. 698.

Hayden & Young for appellee. Plaintiff can include widely variant claims in different counts of his declaration: *Barton v. Gray* 48 Mich. 166–7; *Ives v. Williams* 53 Mich. 636; *McLennan v. McDermid* 50 Mich. 383; *Cook v. Perry* 43 Mich. 623; *Fuller v. Rice* 52 Mich. 435; and he can abandon his special count and sue on the common counts as explained by his bill of particulars; *Wyman v. Crowley* 33 Mich. 84; recovery under the common counts is proper for services: *Hurst v. Litchfield* 39 N. Y. 377; 1 Chit. Pl. (16th ed.) 350.

Morse, C. J. Plaintiff filed a declaration against the defendants in assumpsit, averring specially that on the 19th day of May, 1881, he was employed by defendants as mining superintendent of the Rolling Mill mine owned by them, to take charge of said mine and works for one year from and after and including said 19th day of May, at a salary of $2500 for said year, payable monthly; and that said defendants promised to retain him in such employment for the term and price aforesaid; that in pursuance of such contract of hiring he entered such employment, and continued therein until November 1st, 1881, when they discharged him wrongfully, whereby he lost the wages and advantages he would have derived from said employment, and was out of work for the balance of the year. He also alleged an indebtedness of the defendants to him under the common counts, on the 1st day of May, 1883, of three thousand dollars.

Upon the trial the plaintiff gave no evidence of his being discharged by the defendants; but on the contrary testified that he was not discharged but continued at the mines the

whole year under his contract. He abandoned his special count early in the trial by the public statement of his counsel to the court, and based his claim to recover under the common counts for the balance of wages due and not paid, and also for machinery and materials sold by him to defendants. He obtained a judgment for $1594.47.

It is objected against this recovery by defendants (1st.) That there was no evidence tending to show that the defendant Luther Beecher was in any way connected with defendant Cobb in the contract of hire or in the running of the mine as a joint contractor; (2d.) The plaintiff's claim under the special count in the declaration was entirely inconsistent with the claim for wages proven by him under the common counts; that the assertion of indebtedness under the special count was a complete negation of the claim proven on the trial; and that the setting out of the special count and the adding of the common counts thereafter, must be considered as a deliberate election upon his part, as far as wages were concerned, to recover only upon the theory of the special count, and having so elected he could not change front upon the trial and recover upon an entirely different theory.

It is unnecessary to set out the evidence as to Mr. Beecher's connection with this hiring and his interest in the running of this mine. Without considering at all the evidence of what Cobb stated about the matter, there was an abundance of testimony authorizing the submission of this question to the jury, and we do not think the circuit judge erred in his charge relating to this part of the case. The payment of the pay-rolls by Beecher, his visits to the mine and personal superintendence of the same while there, his directions to plaintiff personally and by letter and through his son, and other facts and circumstances in the case, were sufficient to warrant the jury in finding that defendant Beecher was not only jointly interested with Cobb in the purchase and working of the mine, but that he knew of plaintiff's hiring and salary, and acquiesced in the same, although the contract was made with Cobb alone.

Nor do we think that the special count in the plaintiff's

declaration was such a solemn and binding statement of his cause of action as to preclude him from recovering upon the common counts in the manner he did. He made no claim and offered no testimony under this count upon the trial. He virtually abandoned it at once, as he himself was the first witness sworn, and his testimony was in perfect harmony with the theory upon which he obtained judgment. He also publicly abandoned it, as the record states, early in the trial. It would be going too far to say that he must be bound by one count in his pleading without some other action in the suit by him to sustain it. In our view he made an election to discard it in proper season, and was justified in proceeding as he did, under the common counts, to recover on the theory of his testimony as given in the outset of the trial. If he had given evidence under the special count and proceeded all through the trial until the case went to the jury, he could not then, at the last moment, have abandoned it and recovered under the common counts, as we held in *Wetmore v. McDougall* 32 Mich. 276. But there appears in the case at bar no action whatever by the plaintiff under the special count except to abandon it at once, and we are not prepared to hold that the mere pleading of it works any estoppel of his right to recover his wages for the time of his service, under the common counts.

It is not clear from the record whether plaintiff filed a bill of particulars under the common counts; but if he did not, the defendants, by demanding it, could have precluded any surprise upon the trial as to his claim under these counts. *Hall v. Woodin* 35 Mich 67. And it does not seem from the record that there was any surprise, or any cause for surprise, upon the part of defendants, as the plaintiff's case from the beginning proceeded upon the one theory upon which he recovered judgment. The joining of two counts in a declaration, one of which is repugnant to the other, does not preclude a recovery upon one of them. They do not destroy and nullify each other. *Barton v. Gray* 48 Mich. 167.

The defendants also claimed that they were induced to hire plaintiff by reason of the false statement made by him

that he had worked the mine before and knew its condition, and that it contained a large body of ore in the body of the mine then filled with water, and allege error in the charge of the court in respect to this claim. We are satisfied that the circuit judge clearly and sufficiently stated the law on this point, as follows:

"If, gentlemen of the jury, you find from the evidence in the case that Mr. Berringer did make this statement, and if the defendants relied upon this statement in making this contract, and that but for this statement made by the plaintiff they would not have entered into this contract, then it would vitiate the contract; and in order to determine that, it is not enough for you to find that the representations were false, but you must find, first, that these statements were made for the purpose of obtaining the contract; that Mr. Berringer made these statements for the purpose of inducing the defendants, or the defendant Cobb, to enter upon this contract. You must further find that these representations were relied upon by the defendants in making this contract, and in consequence of them, and but for them that they would not have made or entered into the contract; and you must further find that they were false.

Now, gentlemen, a mere statement of opinion on the part of Captain Berringer as to the prospects of finding ore in the mine would not be such a representation as would in law entitle the defendants to rely upon them. It must be a representation of a fact or facts, and those facts must have been relied upon, and the defendants must prove that they were not true, in order to entitle them to a defense upon this branch of the case.

If, therefore, you find that he did make this statement, and that the defendants did rely on it in making their contract, and that it was false, then your verdict would be for the defendants on this branch of the case."

We find no error in the instructions[1] to the jury as to de-

[1]The court charged as follows:

"The defendants claim as an offset to any claim the plaintiff may have, if he has any, the rent of a house upon the premises known as the Rolling Mill mine. So far as that is concerned, gentlemen, it seems nothing was said in the contract in regard to the use of a house by the plaintiff. In the absence of any such agreement, and in the absence of a showing of any custom as to the agent using such a house free of rent, I charge you there would be an implied promise on the part of the plaintiff to pay such rent as that house was reasonably worth.

fendants' claim of set-off for rent of a house to plaintiff, or in any of the proceedings.

The judgment is affirmed with costs.

The other Justices concurred.

There is no evidence of any agreement in regard to it, nor is there any evidence in regard to any custom relating to it, and therefore during the lifetime of the contract up to the time that the defendants claim that they discharged the plaintiff, they would be entitled to an offset to the rent of the house for what it was reasonably worth.

By the COURT—I believe you abandon it for the rest of the time.

Mr. BALL—There was a couple of months after the expiration of the time.

Mr. HAYDEN—I would suggest, that if there was no intention on the part of the defendants to charge house rent, that they could not charge for it, any more than the plaintiff could charge for property in the absence of any agreement.

By the COURT—Gentlemen, I will say in regard to this, that there was no agreement; then in order to escape payment of the rent it must appear that there was a custom that superintendents of mines in the position that this plaintiff was in could receive their house rent free of charge. If there was such a custom, then these parties would have been considered to have made this contract with reference to that custom, and it is for you to determine, from the testimony, whether such a custom has been proven or not. If it has not been proven, then you must give the defendants the benefit of the rent of the house for what it was worth up to the time he was discharged. After that it would be for you to determine what the arrangement was between the parties.

If the plaintiff continued there under his agreement, the same rule would apply. If the hiring was only for a month, or from month to month, and you should find it terminated as the defendants claim, then what was the arrangement afterward? If, as George Berringer testified, it was the understanding or agreement that he was to look after the property for the house rent, then of course they could not charge for it.

Error was assigned:

Eleventh. Because the circuit judge instructed the jury in his oral charge: "In order to escape payment of rent, it must appear that there was a custom that superintendents of mines in the position that this plaintiff was in, could receive their house rent free; if there was such a custom, then these parties would have been considered to have made this contract with reference to that custom, and it is for you to determine from the testimony whether such a custom has been proven or not."

Defendants claimed that the only evidence on the point was that of Berringer, who said, "I never heard of a mining superintendent paying rent for the house he occupied."

WILFORD BOURGET v. ANDREW MONROE.

Contract for support—Mutuality—Specific performance—Damages—Surviving action.

1. A court of equity cannot enforce a contract specifically unless it can be done mutually and completely and so as to secure substantially beyond question all that the parties contemplate.
2. A man agreed to let his married daughter and her family live on a lot he owned if she would support him during his life, and also promised that the land should be hers after his death. She and her children died in his lifetime, however, and the old man thereupon turned her husband off the premises. The husband as sole heir to his wife and children professed his readiness to fulfil the agreement to support him, and demanded specific performance or compensation. *Held*, that his bill therefor would not lie.
3. A decree for specific performance is impracticable where the contract is for the support of a parent in consideration of his devising his land to the child, and involves continuous duties that a court of equity cannot regulate, and a conveyance by will, which no court can compel.
4. A wife's sole contract to support her father in her family, while living with her husband, if valid at all, cannot, upon her death, bind her husband against his will.
5. Damages are not recoverable in equity where no case for equitable relief is made out to which the damages would be applicable or subsidiary.
6. Personal actions do not descend to heirs, and they cannot sue on a contract made by their ancestor unless they have a cause of action on covenants running with land.

Appeal from the Superior Court of Detroit. (Chipman, J.) November 13.—November 19.

SPECIFIC PERFORMANCE. Defendant appeals. Reversed.

Powell & Dorland and *John G. Hawley* for complainant.

Geo. S. Hosmer (*Dickinson, Thurber & Hosmer*) cited against the relief prayed, *Clinton v. Fly* 10 Me. 292; *Eastman v. Batchelder* 36 N. H. 141; *Bethlehem v. Annis* 40 N. H. 34; *Flanders v. Lamphear* 9 N. H. 201; *Flood v. Finlay* 2 Ball & B. 9.

CAMPBELL, J. This is a bill filed to obtain a specific performance or else compensation for the support of defendant. A general demurrer was put in, but overruled, and defendant appeals.

The bill alleges that in May, 1879, defendant entered into an agreement with his daughter, Josephine Bourget, complainant's wife, which it is alleged was in substance that she should support and maintain him, except as to clothing, during his life, and that in consideration thereof he should allow her and her family to possess and reside upon a certain lot named, in Detroit, belonging to defendant, and that it should be hers absolutely after his death; that in pursuance of this agreement till her death, said Josephine supported and maintained defendant, and resided on the land; and that pursuant to the agreement defendant and wife made a deed to her in 1881. The bill does not aver the contents of this deed or that it was delivered. If it had been, the bill would be improper, because the contract would have been fulfilled, and the courts of law could secure the possession of the land if disputed.

The bill further avers that Mrs. Bourget spent $147 in improvements, and labor to the amount of $75; and that defendant's support and maintenance was worth $1300; that Josephine Bourget died intestate in August, 1883, leaving two little children, one of whom died about a fortnight after, and the other, who inherited his share, in October, 1884, leaving his father, the complainant, his sole heir; that defendant, immediately after his daughter's death, left the house and shut it up and excluded complainant, and on the day she died and before her death, repudiated the alleged agreement, which complainant avers his readiness to perform.

Complainant fears defendant will dispose of the property, which will make a recovery difficult, and asks an injunction and specific performance, or compensation.

We can see no foundation for jurisdiction in this case. If Josephine Bourget were living, and had filed this bill herself, a decree of specific performance would, if made, involve continuous duties on her part, including all those household

cares and attentions essential to the decent care of parents by their children, which could not be constantly regulated by any process within the power of a court of equity, and which, if enforced unwillingly, would be destitute of the affection and confidence which are the chief value of such relations. The duties on defendant's part would also be continuous and dependent on good treatment, and the conveyance must either be made by will, which no court can compel a man to make, or by deed from his heirs. In other words, the performance could not be enforced mutually or at all, and is impracticable within any rule of equity.

The impropriety of interference in equity in such cases has been so uniformly recognized by this Court that it is not necessary to discuss it at length. A court of equity cannot enforce a contract specifically unless it can be done mutually and completely, and so as to secure substantially beyond question all that the parties contemplate. If this is impracticable, the remedy, if any exists, is to be found elsewhere. *Buck v. Smith* 29 Mich. 166; *Blanchard v. Detroit, L. & L. M. R. R. Co.* 31 Mich. 52; *Rust v. Conrad* 47 Mich. 449; *Bumpus v. Bumpus* 53 Mich. 346; *Wright v. Wright* 31 Mich. 380; *Roberts v. Kelsey* 38 Mich. 602.

The case of *Bumpus v. Bumpus*, so far as practicability is concerned, is a much stronger case in its facts than the present one, and the doctrine was there laid down that courts should not interfere in such cases. The case of *Chipman v. Thompson* Walk. Ch. 405, which is relied on by complainant, has no analogy to the present one. In that case full papers were made out, and a deed deposited in escrow and referred to in the written articles. The parties to be supported had both died, and the purpose of the bill was to compel delivery of the conveyance by the depositary. There was nothing difficult in the duties to be performed, and no delay required to determine whether the parties to the original agreement would perform their obligations.

In the present case the want of mutuality is especially manifest, apart from the other difficulties. It was never contemplated that the parent should have to look to any one but

his daughter for the care which he needed. Her death made the performance impossible. Beyond this, it cannot be claimed that any duty devolved on her infant children, or on complainant, which could be enforced by legal proceedings. Assuming that this future possibility was of such a nature that it passed by descent to complainant (which it would be difficult to maintain when the conditions are personal), it cannot be said that he could be bound unless he chose to accept an estate so burdened; and the mere devolution of the estate could not bring him into such relations of contract that defendant could force him to carry out his wife's obligations. It might be open to some consideration whether a married woman, living with her husband, could make such a sole contract as would bring into the family, for continued maintenance, and for a price to be paid to herself alone, strangers to the household.

It is claimed, however, that if specific performance cannot be granted, complainant can have a decree for damages. But there is no authority for holding that equity can grant damages unless there is some case of equitable relief made out also, to which the damages would be applicable or subsidiary.

Moreover, the action for damages for breach of contract, if lying at all, belongs to Mrs. Bourget's estate, and cannot pass by inheritance. Heirs-at-law cannot sue on contract, except where they have a cause of action on covenants running with the land. Personal actions do not descend to heirs.

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

MORSE, C. J. and CHAMPLIN, J. concurred. SHERWOOD, J. did not sit in this case.

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JOSEPH A. CARL v. DENNIS McGONIGAL.

Replevin—Demand.

Demand before bringing replevin is unnecessary where defendant has deliberately obtained the goods by a fraudulent promise to pay for them which he did not mean to perform.

Error to Clinton. (V. H. Smith, J.) Nov. 17.—Nov. 19.

REPLEVIN. Plaintiff brings error. Reversed.

Cook & Daboll for appellant.

H. & H. E. Walbridge for appellee.

SHERWOOD, J. Carl brought replevin in justice's court against the defendant for a cow and seventy-four bushels of corn, filing the usual declaration in replevin. Plea, general issue. On the trial before the justice the plaintiff recovered. The cause was then appealed to the circuit court for the county of Clinton. The cause was again tried before a jury. At the close of the testimony the circuit judge directed a verdict for the defendant, and the plaintiff brings the case here on error.

The record raises but one question in the case needing consideration here. The plaintiff proved no demand for his property before bringing suit. The defendant claimed the property under a contract of purchase, and that he took the property thereunder. The plaintiff, on the contrary, insisted the defendant contracted for the property, agreeing to pay the cash for it; that the contract was, however, only a pretense on the part of the defendant to get possession of the property; that he never intended to pay the plaintiff therefor, and that all that he did and said was only a part of a scheme of deception and fraud by which he intended to deprive the plaintiff of his property and secure possession thereof and never pay for the same; that such intention on the part of the defendant was unknown to the plaintiff until

the defendant had secured possession of his property; and that then the defendant substantially admitted the false pretenses and deception by which he obtained his possession. However this may be, the testimony was very strong, we think, in support of the plaintiff's theory of the case, which, if true, rendered a demand previous to bringing suit wholly unnecessary. *Whitney v. McConnell* 29 Mich. 12. The facts in support of this theory the plaintiff had the right to have submitted to the jury. The circuit judge held otherwise, and in this we think he was in error.

The judgment must be reversed and a new trial granted.

The other Justices concurred.

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JOHN H. LOWELL v. TOWNSHIP OF WATERTOWN.

Highway—Defects—Personal Injuries.

A man walking along a country road upon a dark night stepped into a hole, for which he was, however, on the look-out. *Held*, that his knowledge of the defect did not necessarily establish his negligence, but was only a fact for the jury to consider in deciding whether he was negligent or not.

Error to Clinton. (V. H. Smith, J.) Nov. 17.—Nov. 19.

CASE. Defendant brings error. Affirmed.

Cook & Daboll for appellant.

H. J. Patterson and *Spaulding & Barker* for appellee.

CHAMPLIN, J. This action was brought to recover damages which plaintiff suffered by reason of a defect in a public highway which it was the duty of defendant to keep in repair.

It is conceded that the highway was defective, and that the defendant was negligent in not having repaired the same, and that plaintiff was injured by reason of such defect,

and the only question raised in the record is whether the testimony of plaintiff himself did not show that he was guilty of such contributory negligence as should preclude him from recovering.

This testimony showed that the accident happened on a dark and misty night, while he was walking along the highway on his return from a neighbor's. He was traveling north in the carriage track. On the west side of the highway was a sidewalk. He was very familiar with the locality, and had for a long time known of the defect, which consisted of a hole about a foot square, made for the purpose of allowing water from the highway to pass into an underground drain constructed beneath the ditch of the west side of the highway. Plaintiff testified that he was thinking of this hole from the time he crossed the bridge over Looking-Glass river until he stepped into it; that he was attempting to pass from the traveled part of the highway to the sidewalk for the purpose of looking at a cow he had in the old cooper's shop, and the first he knew he was thrown forward and so severely injured as to render him insensible for a time; and on recovering he found he was unable to stand or walk. He made outcry, and was found by one of his neighbors.

The defendant's counsel claim that his knowledge of the defect, and his having it in his mind at the time, was conclusive evidence of his want of ordinary care in stepping into the very hole he had it in mind to avoid; and that for this reason the case should have been taken from the jury.

We cannot accede to this view. A person is not necessarily precluded from recovering for an injury caused by a defect in a highway, simply for the reason that he was aware of such defect; but this fact, with all others, is proper to be taken into consideration by the jury in determining whether, under all of the facts and circumstances, he was guilty of such carelessness or negligence without which he would not have been injured.

The judgment must be affirmed.

The other Justices concurred.

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CHAS. W. LYON v. HORACE B. KNEELAND, GARNISHEE.

Garnishment—Disclosure.

1. A garnishee's disclosure, even if it does not positively confess liability, may establish it when aided by other evidence.
2. A garnishee's statement that he does not know whether he owes the principal defendant or some one else for certain work, and that the defendant told him he only wanted enough money to pay expenses, and that the rest was to go to another person, is not such a disclosure as will sustain a judgment against the garnishee.

Error to Clinton. (V. H. Smith, J.) Nov. 17.—Nov. 19.

Garnishment proceeding. Plaintiff brings error. Affirmed.

Cook & Daboll for appellant.

H. & H. E. Walbridge for appellee. A garnishee's disclosure must show a clear and unqualified liability: *Hackley v. Kanitz* 39 Mich. 398; *Sexton v. Amos* 39 Mich. 695; *Spears v. Chapman* 43 Mich. 541; *Weirich v. Scribner* 44 Mich. 73; *Walker v. D., G. H. & M. R. R.* 49 Mich. 446.

CAMPBELL, J. The only question in this case is whether a garnishee's answer showed such a debt due by him to the principal debtor that a judgment for any sum could be given upon it. It was as follows:

"I know James McMannis; I made a bargain with him to thresh the wheat and oats—to do the threshing; I don't know whether I owe him or some one else for it. The threshing at time garnishee was made amounted to $21.65, and he threshed balance of job to amount $10.54. After the garnishee was served upon me, I paid Mr. McMannis $10. I supposed the garnishee was a subpœna in another case, and put it in my pocket without reading. When I went to settle up with Mr. McMannis he told me that all the money he wanted was enough to pay the expenses, and the balance was to go to Waters; Merritt Frank made the bargain with McMannis for me. The bargain was made with McMannis; nothing was said as to whom to pay the money

to, nor when to pay it, until after the job was all done, and I went to settle up with him."

This case, originating in a justice's court, was appealed to the circuit court and tried without a jury, and the court found in favor of the defense.

The only point raised is the one already referred to, as there was no other testimony in the case. We do not quite see how the question can arise without a bill of exceptions; but, however this may be, we see no error. An admission which does not positively confess liability to a party may, under some circumstances, be some evidence which, aided by other proofs, will be available to establish it. But here there is nothing which fixes liability by the admission itself, and there is nothing to supplement it.

The judgment must be affirmed.

The other Justices concurred.

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JOHN CAPWELL v. GIFFORD BAXTER.

Justice courts—Appeal after time has expired.

1. An appeal from a justice may properly be allowed where the beaten party relied on his attorneys and they were honestly mistaken about the date of an adjournment, so that judgment was taken by default and they did not hear of it until the time for appealing had gone by. How. Stat. § 7005.

2. Costs were withheld where error was due to the fault of the party complaining of it.

Error to Clinton. (V. H. Smith, J.) Nov. 17.—Nov. 19.

Motion for leave to appeal. The moving party brings error. Reversed.

Cook & Daboll for appellant.

Jacob L. McPeek for appellee. The acts of an attorney, regularly employed, are binding upon the client in the ab-

sence of any fraud or collusion: *Wilcox v. Kassick* 2 Mich. 165; *Wieland v. White* 109 Mass. 392; *Moulton v. Bowker* 115 Mass. 36; *Lawson v. Bettison* 12 Ark. 401; *Smith v. Stewart* 6 Johns. 34; *Bogardus v. Livingstone* 2 Hill 236; and to obtain relief against a stipulation on the mere ground of mistake or oversight of the attorney, it must have been one which ordinary care and attention would not have guarded against: *Rogers v. Greenwood* 14 Minn. 333; *Read v. French* 28 N. Y. 285.

MORSE, C. J. Defendant moved the circuit court for the county of Clinton for leave to appeal from a justice's judgment against him in favor of the plaintiff, after the expiration of five days from the rendition of the same, under How. Stat. § 7005. The judgment against him was rendered March 16th, 1885, for $170 damages and $10 costs, before R. W. David, Esq., a justice of the peace in the township of Eagle. Defendant resides in Dallas. It appears that on the 18th of February, 1885, he employed Cook & Daboll, attorneys at St Johns, to defend this suit, and on the 20th of that month Cook appeared for him therein, and the cause was adjourned until March 2, 1885, without joining issue; that said Cook informed him on the 20th of February that it would not be necessary for him to subpœna any witnesses or to take any steps in the cause until he was notified by his attorneys. On the 19th of March, 1885, he was informed by them that the suit had been adjourned until the 26th day of that month. Heard nothing about the matter after that until the 23d day of March, 1885, when said Cook notified him not to subpœna witnesses until further notice, as his attorneys had sent a stipulation to the attorneys for plaintiff adjourning the cause until April 22, 1885. On the 25th of March he received a telegram from his attorneys not to go to Eagle till further notice; that he wholly relied upon them to manage his suit, and rested upon their advice, not knowing anything about a judgment being taken therein until the 27th of March, 1885, when he was waited upon by a constable with an execution. It was too late then to appeal, and he claims that he has a good defense on the merits to said

action, and that the circumstances bring him within the statute.

It appears satisfactorily to us that on the 2d day of March the suit was further adjourned by stipulation between Mr. Daboll and the plaintiff or his attorney; that the plaintiff understood the adjournment to be to March 16th, 1885, when judgment was taken, no one appearing for defendant; that Mr. Daboll understood the case was adjourned until March 26th, 1885, and that he and Mr. Cook learned nothing to the contrary until March 25th, the date of their telegram to defendant; that on the 22d of March, Mr. Cook wrote Mr. McPeek of Grand Ledge, the attorney of plaintiff, sending him a stipulation to further adjourn the suit until April 22, 1885, and in a reply to this letter, received March 25th, first learned of the rendition of this judgment.

It is not contended that there was any bad faith on the part of defendant or either of his attorneys. The defendant rested, as any other client would, upon the assurances of his attorneys that he need not prepare for trial until notified by them. The attorneys were honestly mistaken as to the date of the adjournment. When plaintiff or his attorneys first learned of this judgment it was too late for appeal. Under the circumstances, we think the plaintiff is entitled to relief.

The circuit court must grant him leave to appeal, but no costs will be allowed to either party in this Court.

The other Justices concurred.

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JANUARY TERM 1886.

THOMAS WILKINSON v. MAX HEAVENRICH ET AL.

Contracts void for want of mutuality.

1. Where mutual promises are the consideration for a contract, it must be signed by both parties.
2. Contracts which are so drawn as to bind one party but not the other, and which are not to be performed within a year, are void for want of mutuality; and a written acceptance of their terms by the party not bound is useless after the other has refused to perform.

Error to Saginaw. (Gage, J.) Oct. 14.—Jan. 6.

ASSUMPSIT. Plaintiff brings error. Affirmed.

Wheeler & McKnight for appellant. A contract not to be performed within a year is good if only the party whom it is sought to charge signed it: *Clason v. Bailey* 14 Johns. 488, criticising *Lawrenson v. Butler* 1 Sch. & Lef. 13; *Justice v. Lang* 42 N. Y. 493: 52 N. Y. 323; 63 N. Y. 633; *Worrall v. Munn* 5 N. Y. 229; *Parton v. Crofts* 16 C. B. (N. S.) 11; *Farwell v. Lowther* 18 Ill. 252; *Hodson v. Carter* 3 Pinney 213; *Cheney v. Cook* 7 Wis. 413; *Laythoarp v. Bryant* 2 Bing. N. C. 735; *Shirley v. Shirley* 7 Blackf. 454; *Chambers v. Alabama Iron Co.* 67 Ala. 353; *Ives v. Hazard* 4 R. I. 14; *Vassault v. Edwards* 43 Cal. 458; *Rogers v. Saunders* 16 Me. 92; *Sams v. Fripp* 10 Rich. Eq. 447; *Laning v. Cole* 3 Green N. J. Eq. 229; *Eley v. Positive Ass. Co.* L. R. 1 Exch. Div. 30: 15 Eng. 279; *Burke v. Wilber* 42 Mich. 329; *Reuss v. Picksley* L. R. 1 Exch. 342; *Argus Co. v. Mayor* 55 N. Y. 495; *Chase v. Lowell* 7 Gray 33; Pomeroy Cont., §§ 75–6; *Smith v. Neale* 2 C. B. (N. S.) 67.

Wisner & Draper for appellee. The Statute of Frauds requires all agreements not to be performed within a year to be signed by both parties: *Parker v. Whipple* 29 Mich.

373; Wood on Frauds 667–9; Add. on Conts. § 18; Whart. Cont. §§ 2,523; Bish. on Cont. 428; Pars. Cont. 449; *Utica &c. R. R. v. Brinckerhoff* 21 Wend. 139.

CHAMPLIN, J. But one question is involved in this case, and that is as to plaintiff's right to maintain the action. The declaration alleges that on or about the 14th day of October, 1882, the defendants entered into a written contract with plaintiff as follows:

"We promise and agree to pay Thomas Wilkinson wages or salary at the rate of $3500 a year, for three years, from the second day of October, 1882, in consideration of his working for us for that length of time as cutter in our merchant tailoring department in the city of East Saginaw, Michigan. Payments to be made, as earned, in such sums and at such times as he may desire.

Dated October 14, 1882.

[Signed] HEAVENRICH BROS. & Co."

—that he worked for defendants under this contract, and in the business and employment aforesaid, and was always ready and willing to so work and be employed for defendants for the term of three years in said contract mentioned, and so worked until on or about the 5th day of July, 1884, when, without cause and against the wishes and contrary to the will and against the consent of the plaintiff, the defendants wrongfully dismissed and discharged the plaintiff from their employment, and refused to allow the plaintiff to work for them in the employment mentioned in said contract, whereby plaintiff lost the wages and profits and advantages which he would have derived from being continued in said employ, was thrown out of work, and was unable to get any employment for a long space of time, to wit, for four months. A second count alleges that on the 14th day of October, 1882, defendants entered into another contract with plaintiff, and in consideration that plaintiff would work for them promised and agreed to employ the plaintiff for three years as cutter in defendants' merchant tailoring department, and pay him, as such cutter, at the rate of $3500 each year, as earned, in sums and at times desired by plaintiff; that plaintiff

entered upon such employment as cutter and worked until about the 5th day of July, 1884, when he was wrongfully and against his will discharged, etc. The plea was the general issue, with notice that plaintiff did not perform the contract on his part, and for that reason they discharged him.

On the trial, after the introduction of the agreement in evidence, it was admitted that the defendants constituted the firm of Heavenrich Bros. & Co. at the time of the making of the contract that is offered in evidence; that plaintiff was discharged on the 7th day of July, 1884; that the defendants paid the plaintiff in full for his services up to the time of his discharge; that upon the 8th day of July the plaintiff served upon the defendants the following notice:

"*Heavenrich Bros. & Co., East Saginaw, Michigan*— GENTLEMEN: I hereby protest against your attempt to cancel our contract. I hold your written agreement for a three years' term of service, from October 2d, 1882. That contract I am ready and willing to perform on my part, and I hereby offer to continue, and request you to furnish me employment, under the terms of that arrangement.

Dated East Saginaw, July 8th, 1884.

[Signed] THOMAS WILKINSON.

The plaintiff was sworn in his own behalf, and was cross-examined relative to his performance of the contract on his part; but the scope of his evidence was unimportant, in view of the charge given by the court, which was that there was no mutuality in the agreement, for Mr. Wilkinson was not bound to stay three years, and Heavenrich Bros. & Co. could not be bound to keep him three years, and for want of such mutuality the plaintiff could not recover; and he directed a verdict for the defendants.

The conflict of authority upon questions of the kind raised upon this record is truly bewildering, and the cases are incapable of being reconciled with each other; a large and respectable class holding that a contract which the Statute of Frauds declares shall not be valid unless in writing and signed by the party to be charged therewith, need only be signed by the party defendant in the suit, and that it is no objection to maintaining such suit and recovering upon such contract,

that the other party did not also sign and was not bound by its terms. 2 Kent's Com. 510; 2 Stark. Ev. 614; *Smith's Appeal* 69 Penn. St. 480; *Tripp v. Bishop* 56 Penn. St. 428; *Perkins v. Hadsell* 50 Ill. 217; *Old Colony Railroad Corporation v. Evans* 6 Gray 31; *Williams v. Robinson* 73 Me. 186. Another and equally respectable class of jurists hold that unless the party bringing the action is bound by the contract neither is bound because of the want of mutuality. *Lees v. Whitcomb* 3 C. & P. 289; *Sykes v. Dixon* 36 E. C. L. 366: 9 Ad. & El. 693; *Krohn v. Bantz* 68 Ind. 277; *Stiles v. McClellan* 6 Col. 89. And see also as bearing upon the question *Hall v. Soule* 11 Mich. 496; *Scott v. Bush* 26 Mich. 418; *Liddle v. Needham* 39 Mich. 147; *McDonald v. Bewick* 51 Mich. 79. The cases above cited are not intended to be exhaustive on either side of the proposition.

I shall not attempt a reconciliation where reconciliation is impossible; but as the question is new in this State, the Court is left to adopt such view as appears to rest upon principle. It is a general principle in the law of contracts, but not without exception, that an agreement entered into between parties competent to contract, in order to be binding, must be mutual; and this is especially so when the consideration consists of mutual promises. In such cases, if it appears that the one party never was bound on his part to do the act which forms the consideration for the promise of the other, the agreement is void for want of mutuality. *Hopkins v. Logan* 5 M. & W. 241; *Dorsey v. Packwood* 12 How. 126; *Ewins v. Gordon* 49 N. H. 444; *Hoddesdon Gas Co. v. Haselwood* 6 C. B. (N. S.) 239; *Souch v. Strawbridge* 2 M. G. & S. 808; *Callis v. Bothamly* 7 Wkly. R. 87; *Sykes v. Dixon* 9 Ad. & El. 693; Addison on Contracts § 18; Parsons on Contracts 449; *Utica &c. R. R. Co. v. Brinckerhoff* 21 Wend. 139; *Lester v. Jewett* 12 Barb. 502.

Such was the case here. The consideration consisted of mutual promises of the parties, not to be performed within a year from the making thereof. The defendants' promise was in writing, and signed by them; but the plaintiff's promise does not appear in the writing signed by the defendant, nor

was any note or memorandum made and signed by him promising to labor for defendant three years or any length of time. Plaintiff was never bound by the agreement. There never was, then, any consideration to support defendants' promises. The agreement was void for want of mutuality. The plaintiff was under no legal obligation to work for defendants a moment longer than he chose, and the defendants were under none to keep him in their employment. The plaintiff could neither revive nor make a contract with defendants after he was discharged by them without their consent and concurrence. The letter written after he was discharged was of no avail.

The judgment is affirmed.

The other Justices concurred.

Lucy A. Hoard v. David F. Stone.

Reformation of lease—Laches—Judicial notice—Sunday contract.

1. Ten years' delay in filing a bill for the reformation of a lease that was based on an oral agreement, is grave laches.

2. Judicial notice will be taken that the date of a lease in suit falls on Sunday, though neither party calls attention to it.

3. A lease, though dated on Sunday, will be considered to have been delivered and taken effect at the date of the acknowledgment of its execution.

4. A lease based on an oral arrangement stated the rental to be "five dollars." *Held*, that a bill to reform it so as to make the rent "five dollars annually" was properly dismissed where the parol negotiations did not clearly support complainant's claim and where complainant, after raising the question, had delayed ten years in filing the bill and had meantime made certain payments to defendant without claiming offset.

   But reformation was allowed to the extent of limiting the tenancy to such time as defendant should occupy the premises for the particular purpose which both parties evidently had in view when the lease was made and which was the apparent inducement for making it.

Appeal from Lapeer. (Stickney, J.) Oct. 15.—Jan. 6.

BILL to reform lease. Complainant appeals. Reversed.

C. P. Black and *S. B. Gaskill* for complainant. Where suits have been dismissed for laches it is because important witnesses have passed away or innocent third parties have acquired rights: *Campau v. VanDyke* 15 Mich. 371; *Russell v. Miller* 26 Mich. 1; *Harlow v. Lake Superior Iron Co.* 41 Mich. 583; but where defendant is not placed in any different position by lapse of time laches will not be considered: *Allore v. Jewell* 94 U. S. 506; *Sullivan v. Railroad* id. 811; *Wollaston v. Tribe* L. R. 9 Eq. 44; *May v. LeClaire* 11 Wall. 217; *Hatch v. Hatch* 9 Ves. 292.

Geer & Williams for defendant. As to the evidence necessary to overcome the certificate of an acknowledging officer: *Monroe v. Poorman* 62 Ill. 524; *Marston v. Brittenham* 76 Ill. 611; *Crane v. Crane* 81 Ill. 165; *Lickmon v. Harding* 65 Ill. 505; *McPherson v. Sanborn* 88 Ill. 150; deeds of conveyance, leases or other written evidences of title will not be changed by proof of a verbal agreement, excepting in very clear cases and where the contract is proved to the entire satisfaction of the court and beyond a reasonable doubt: *Case v. Peters* 20 Mich. 298: *Tripp v. Hasceig* 20 Mich. 254; *Ludington v. Ford* 33 Mich. 124; *Hunter v. Hopkins* 12 Mich. 227; *Vary v. Shea* 36 Mich. 388; *Reynolds v. Campbell* 45 Mich. 529; where a party with full knowledge of all the facts sleeps upon his rights for a long time without asserting his equities, and no sufficient excuse is shown for the delay, his laches will be such as to present a bar to relief in a court of equity: *Rogers v. Simmons* 55 Ill. 76; *Carpenter v. Carpenter* 70 Ill. 457; *McVicker v. Filer* 31 Mich. 304; *Hastner v. Walrod* 83 Ill. 171; *Wright v. Peet* 36 Mich. 213; *DeArmand v. Phillips* Wal. Ch. 186.

CHAMPLIN, J. The bill was filed in the court below on the 19th day of July, 1883, to compel the reformation and correction of a written lease executed between the parties and bearing date April 14, 1872. Complainant alleges that on or about the 14th day of April, 1872, she entered into an oral contract with the defendant, in which she agreed to lease to him, for five dollars a year, a certain lot of land, twenty by thirty feet in size, situated in Lapeer county, for and

during the time he personally occupied the building as a physician's office, at an annual rental of five dollars; that if, at any time thereafter, the defendant desired to sell said building, the complainant was to have the first right to purchase the same; but if she should not then be able, she was to sell said land to said defendant for such a price as they might agree upon; and if they could not agree, then they were to select three competent persons to decide for them; that the defendant was to employ a competent person to reduce said agreement to writing, and when so reduced to writing, to bring the same to her for her signature and acknowledgment; that the person so employed, either by mistake, or in consequence of the fraud of the defendant, omitted to provide in said writing for the payment of the said five dollars annually as the consideration of said lease, and also omitted the further provision that the defendant was to hold said land while he occupied the building thereon as a physician's office; that afterwards the said defendant brought the said writing to the said complainant, and she, not knowing what terms should be employed in such a contract, and having faith and confidence in the said defendant's honesty, and fully relying upon his statement that said paper was correct in all particulars and embraced the terms of their said agreement, she signed said writing without knowing that it did not embrace the terms of their agreement; that said defendant is in possession of said premises, and has been since the making of said contract, and that the said contract, if reformed, is worth over one hundred dollars, and that said land is worth over one hundred dollars, and complainant asks that said contract be reformed and specifically enforced. The defendant answered, fully denying the allegations of the complainant that he was to pay five dollars annually and that he was to have the premises as long as he occupied it as a physician's office; also the value of the land as alleged by complainant; and replication was filed and evidence taken by stipulation, upon which the court dismissed complainant's bill.

The testimony is conflicting, and no useful purpose will be subserved by a review of the testimony given by the different

witnesses. The complainant owned and kept a hotel at Metamora, in Lapeer county. The defendant was a physician in good practice at that place. He boarded at the hotel, and occupied one of the rooms for an office. The treatment of his patients, and the administration of anæsthetics in the house, became a source of annoyance to complainant, and resulted in her leasing defendant a piece of ground upon which he had erected the office in question, under an agreement before made for such lease. He had desired to purchase the land, but she refused to sell, saying she preferred to lease. The lease was drawn by a Mr. Townsend, who testifies that he received his instructions as to its terms from defendant, in the complainant's presence, and made a memorandum of it at the time, and drew the lease three or four days later. The complainant denies being present or hearing any instructions given, and says that the first she knew of the lease defendant presented it to her, and requested her to sign it, in the kitchen of the hotel; that she was busy, and requested him to leave it until she could look it over with her husband, but he insisted on her signing it then and there, and upon his assurance that it had been drawn in accordance with their agreement she signed it, without reading it or knowing its contents. She says that shortly afterwards defendant paid her five dollars, and told her it was for the rent upon the lease; that she had settlements with defendant as often as once a year for board, and after they had settled in 1873 she asked him for five dollars for rent on the lease, and he denied owing her, and said the lease did not provide for his paying five dollars annually, but only five dollars as a consideration for the lease, and refused to pay it. She therefore was informed at this time that the lease was not drawn as she now claims it should have been, and no excuse is shown for delaying ten years before taking steps to have it rectified.

But aside from this, I think she has failed to show conclusively that the five dollars was to be paid annually. Her own statement of the verbal contract is this, as elicited by her counsel on her examination in chief:

"*Question.* Now you may state, Mrs. Hoard, what the terms of that verbal contract were.

Answer. Well, he wanted to lease a piece of land. He had been for two or three years, or a year or two, boarding with us; and I remember, before this building was put up, of picking berries—strawberries—there, and he came over there and marked off the ground. That was the summer before. 'I suppose,' says he, 'if I set my office here I would want it to come back as far as this.' I says: 'You would like, then, to set your office on the strawberry bed?' And he says, 'You are going to take it up?' And I says, 'Yes.' And he went on, and wanted to know every little while what I would take to let him put his office there. 'Now, Mrs. Hoard,' he says, 'it rests waiting for you to say what you will take for land enough to set my office on.' He wanted, I think, twenty by thirty feet; and I asked him to set it a little below where it is now. There was a barn in the corner of the lot, and he objected to it on account of the barn; and then he come in, and he says: 'I can get lumber and shingles of those that owe me, and all I would have to buy would be my glass and nails and paint; and if I can get the land to set it on, I will build it.' Well, we talked, as we had several times before; and I says: 'Dice Clark got five dollars for setting a blacksmith shop on the corner of that field over there [telling him where], before the railroad was built.' The railroad has now cut the end of the field off; it is used for a garden. 'Well,' he says, 'now will you take five dollars?' I said: 'Yes, we will take five dollars, and you can put up your office.' 'All right,' says he. Well, it run along, and he went and got his material together, and put up his office the next spring."

It will be noticed that nothing is said here about its being five dollars annually. In the next question she is asked what this five dollars was for, and she then says the use of the land was to be five dollars annually. In appears that in the years 1875 or 1876 the complainant and her husband rented a portion of this building from defendant, and complainant paid him forty-five dollars for the use thereof, without making any claim that she had an offset by way of rent for the use of the land. Nothing further need be said upon the subject of the rent. As before stated, the lease bears date the 14th day of April, 1872. The court will take judicial notice that this

was Sunday, although no mention is made of this fact by either party. On the 7th day of January, 1873, the execution of the lease was duly acknowledged by complainant, and was afterwards recorded, and it may be considered as having been delivered and as taking effect from the date of the acknowledgment.

I am satisfied from the evidence that the consideration of the lease was to be merely nominal, and that the particular inducement for complainant to enter into the lease was the benefit which she expected would accrue to her in her business of hotel-keeping, in providing for and entertaining as guests those who visited the defendant from a distance for treatment. The facts on this point are that Dr. Stone was a physician of large practice, having many patients from a distance. He had, for several years prior to 1872, had his office at complainant's hotel, and boarded there, and his patients, during that time, generally stopped at this hotel while being treated by him. In 1872 his business was increasing, and he concluded to build an office, and wished to buy the land in question, which is near to complainant's hotel, and on the same lot, for the purpose of erecting his office on it. Complainant did not wish to sell the land, and Dr. Stone then opened negotiations for the purchase of a piece of land near another hotel in the village of Metamora, known as the "Ackerman House." Complainant was anxious that Dr. Stone's office should not be located where his patients would naturally stop at the other hotel, and the arrangement was then made that she would lease this land to the defendant for a nominal consideration so long as he continued to use the building erected on it as an office. The real consideration for the leasing of this land was the benefit that complainant would derive from having defendant's office located where his patients would naturally lodge at complainant's hotel.

But these facts, in connection with the testimony, are also conclusive to my mind that there is a mistake in the written lease in the term limited thereby. The lease reads that the land is demised "for and during the time the said building shall be owned by the said party of the second part." This

would give the defendant the right to use it for a blacksmith shop or a saloon or other purpose foreign to the design of the parties when they entered into the agreement under the circumstances stated. The word "owned" should be erased, and the words "occupied as a physician's office" should be inserted in lieu thereof, in order to conform to the contract as actually made between the parties. It appears that this defect was not discovered until complainant's husband procured a copy of the lease from the register's office in 1877.

The decree of the court below must be reversed, and a decree entered here reforming said lease in the particular above specified. The complainant will recover her costs in this Court.

The other Justices concurred.

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FREDERICK GARDNER v. MICHIGAN CENTRAL R. R. Co.

Railroad injury—Uncoupling cars.

1. A switchman who had been strictly cautioned against having anything to do with coupling cars tried to uncouple some while the train was moving, and had his foot caught where the planking had been for some time slightly broken, though the defect had not been seen by him as yardman and the railroad company had no notice of it. *Held*, that he could not recover for the injury resulting to him.

2. A railroad employee takes the ordinary risks of the work for which he hires; and if the company has used proper diligence in choosing competent servants it is not liable in damages for an injury to one of them caused by the carelessness of another.

Error to Berrien. (A. J. Smith, J.) Oct. 15–16.—Jan. 6.

CASE. Defendant brings error. Reversed.

Edwards & Stewart and *Ashley Pond* for appellant.

O. W. Coolidge and *Edward Bacon* for appellee. A railroad company must furnish and keep its track in such condi-

tion that it can be safely used by its employees: *Chic. & N. W. Ry. Co. v. Bayfield* 37 Mich. 205; Cooley on Torts, 561; *Swoboda v. Ward* 40 Mich. 420; *Snow v. Hous. R. R. Co.* 8 Allen 441: Wood on Master and Servant 695; *C., M. & St. P. Ry. Co. v. Ross* 112 U. S. 377; *Hough v. Railway Co.* 100 U. S. 219; *C. & N. W. Ry. Co. v. Swett* 45 Ill. 197; Wharton on Neg. § 232*a*; *Flike v. B. & A. R. R. Co.* 53 N. Y. 549; *Ford v. Fitchburg R. R. Co.* 110 Mass. 240: 1 Redfield on Railways 521; *Plank v. N. Y. C. & H. R. R. R. Co.* 60 N. Y. 607; *R. R. Co. v. Keary* 3 Ohio St. 210; *Gilman v. Eas. R. R. Co.* 13 Allen 440; *Thompson v. Dymela* 1 N. W. Rep. 255; *Brabbits v. C. & N. W. Ry. Co.* 38 Wis. 293; *Lewis v. St. Louis & I. M. R. R. Co.* 59 Mo. 495; as a corporation must necessarily act through agents, the negligence of its employees in the discharge of duty is attributable to itself: *C. & N. W. Ry. Co. v. Jackson* 55 Ill. 492; *Condon v. Mo. P. R. R. Co.* 78 Mo. 567; *Crispin v. Babbitt* 81 N. Y. 521; *Fuller v. Jewett* 80 N. Y. 52, 53; *Durkin v. Sharp* 88 N. Y. 227; *Wedgwood v. R. R. Co.* 41 Wis. 483; *Solomon R. R. Co. v. Jones* 30 Kans. 601; a master is bound to apprise his servant of unreasonable risks and the existence of places dangerous to work upon, which cannot be considered in the contemplation of the employee as a part of the usual and ordinary risks and perils of his employment: Wood's M. & S. 713, 714; *Coombs v. New Bedford Cordage Co.* 102 Mass. 572; *Gibson v. Pacif. R. R. Co.* 46 Mo. 163; a railroad company cannot avoid liability for injuries caused by defects of which it might have known by ordinary care: *Noyes v. Smith* 28 Vt. 59; *Ryan v. Fowler* 24 N. Y. 410; *Cayzer v. Taylor* 10 Gray 274; *Seaver v. Boston & Maine R. R. Co.* 14 Gray 466; *Hayden v. S. M'g Co.* 29 Conn. 548; *Walsh v. Peet Valve Co.* 110 Mass. 23; a master is bound to use proper care to see that his premises are not only fit and proper for the carrying on of his business, but that they are kept so: *Chapman v. Erie R. R. Co.* 55 N. Y. 579; *T. W. & W. R. R. Co. v. Ingraham* 77 Ill. 309; *I. B. & W. R. R. Co. v. Flanigan* 77 Ill. 365; if a railway employee is directed by an agent of the company to do an act, the latter is justified in obeying and cannot be charged with contributory negligence, although the act should be one which, apart from this circumstance, would be deemed negligent: Shearman & Redf. on Neg. 547; *Warren v. F. R. R. Co.* 8 Allen 227; *Sweeny v. O. C. & N. R. R. Co.* 10 Allen 368; *Newson v. N. Y. C. R. R. Co.* 29 N. Y. 383; *McIntyre v. N. Y. C. R. R. Co.* 43 Barb. 534.

SHERWOOD, J. This is an action of trespass on the case, brought by the plaintiff to recover damages for injury sustained by him on the morning of the 16th day of May, 1882, at the city of Niles, while attempting to uncouple cars in a moving train, and while in the service of the defendant. The cause was tried at the Berrien circuit, before Judge Smith, by a jury, at the February term, 1884, and a verdict was rendered for the plaintiff for $5000 damages. Defendant brings error.

No question is raised upon the pleadings. From the record it appears that in the city of Niles, Fifth street, running north and south, crosses the Michigan Central Railroad tracks. At this crossing, besides the main track, there are, of all kinds, six others. These several tracks occupy a large portion of defendant's right of way at this crossing, and thirty-two feet of the traveled part of Fifth street was very well planked between the tracks by the company with pine planks, three and one-half inches thick, and which were laid new the fall before the injury complained of occurred. The company's station-house, dining-hall and freight-house, and other depot buildings at Niles, were located at this point, and a large number of trains were arriving and departing during the day and night. The services of a number of men in the yard and freight-house, and about the grounds, were required to look after and do the business at this station. Mr. Gregg was station agent during 1882 at Niles, and had been for more than thirty years. E. D. Bachelor was yard-master, and had been years before. He had control of all the help in the yard, but was not at the station much during the night; and when he was absent he left one of the men employed in the yard, named Etzcorn, in charge. It further appears that near the southeast corner of the planking in Fifth street, and about twelve or fifteen feet therefrom, stood a switch. This switch moved the track south in adjusting it for the passage of trains, and at some time previous to the morning the injury occurred to plaintiff (the exact time, however, is not shown by the record), owing to the failure of a proper adjustment of the switch, a car-wheel had struck the end of a plank next to the rail of

the track, breaking it and crushing it down, making a hole in the surface seven or eight inches long and between three and four inches wide. This appears to have been the only defect anywhere in the planking or grounds about the station or yard. It further appears that it was the duty of the yardmen to examine and make discovery of any defect in the planking or other places in the yard, and at once repair the same, and call on the track-master for the necessary materials for that purpose, when they were not on hand at the station.

The plaintiff was a resident of Niles, and had been for eighteen years at the time he received his injury; was forty-five years of age, and had been in the employ of the company continuously in various capacities for twlve years. He had worked with a gravel train, and afterwards at the freight house and yard at Niles for ten years, and immediately previous to the accident, had for six months been one of the yardmen working under the direction of Mr. Bachelor, the yard-master. His immediate business at the time he was hurt was that of night switchman, working from six o'clock in the evening until seven o'clock in the morning, and he was employed most of his time at the east end of the yard from Fifth street east. His work was to 'tend switches for trains going east and west, and see that they got water, and when his work was done he had orders from Bachelor to help the other men make up trains. The plaintiff says, in his testimony, when he went to work upon the yard, Bachelor employed him as night switchman; that there was no danger about that business; that Gregg, on the 16th of May, 1882, had general charge of the station, but not of the yard; that on the 17th of February previous, Gregg told him "not to undertake to couple cars;" that on the morning of that day he was helping a brakeman, and got caught by a car, and Bachelor and Gregg both came to him, and told him that was not his business,—that he should let the cars go, and attend to his business; that at about half-past five o'clock in the morning of the 16th of May, 1882, and about five minutes before he was injured, Etzcorn was coming out of the freight house with an engine and five cars, and had cut off the end car and

got up on top of it to hold it. Plaintiff then asked him where he wanted those cars. Etzcorn replied, "One in and one out;" to which plaintiff answered, "Then set the switch over, and motion the engineer ahead," and stepped in to uncouple the cars, pulled the pin, and laid it on the dead-wood. The cars were in motion at the time, going west, and he moved along between them as the cars moved, until he got ready to come out, when his right foot caught in the hole in the planks before mentioned, and held him. He looked back to see what held it, but did not have time to get his foot out before the brake struck him and knocked him down, and after being carried several feet, the car-wheel came upon his left leg, crushing it to the thigh, rendering amputation necessary. It further appears from the testimony of the plaintiff that at the time of the accident it was light; that he could see pretty well; that he did not know of the defect in the plank—if he had, he could have seen it; that he might have passed it a hundred times, and not have seen it; that it was of such a character, if his attention had not been called to it, he could not have seen it; that he never discovered any defect in the planking at that crossing before; that he had always regarded it as a good and proper crossing for the purpose and place; and that he was familiar with the station grounds. The foregoing facts were all uncontroverted by the plaintiff, and most of them appeared in the plaintiff's own testimony.

The other testimony went strongly to show that the existence of a defective plank was known only to two of defendant's yard hands, and they both swear that they never had made the fact known to the company or to the yard or station masters; and Mr. Bachelor testifies that when he hired the plaintiff he gave him express instructions what he wished him to do; "directed he should not pull pins, or do any coupling in any way;" that he forbade his doing this again in November following, and that he never countermanded that direction; that there was other business in the yard for the plaintiff to do.

The plaintiff now seeks to recover the damages he has sus-

tained in the loss of his limb, alleging in the declaration negligence on the part of the defendant in suffering the defect in the plank described to continue unrepaired until it occasioned his injury, and averring no neglect on his part contributing to the accident.

The defendant, in making its defense, claimed

(1st) That the defect in the planking was a very slight one, not known by the company to exist at the time the injury occurred; that the plaintiff was an employee of the company; that his duties in the yard required him to look after such defects when they occurred, and that his particular business, and its locality, furnished him with as good, if not better, opportunities to have known of the defect complained of than the occupation and duties of any other employee of the company.

(2d) That such defect, if one existed, in the planking, which caused his injury, if the result of negligence at all, was that of a fellow-servant, and of which the company had no previous notice, and was therefore a part of the risks which the plaintiff assumed when he entered the employment of the company as incident thereto.

(3d) That it was negligence on the part of the plaintiff to attempt to do what he did while the cars were in motion, and that such negligence was really the cause of the injury.

(4th) That what he did was in actual disobedience of the orders of the yard-master, under whose control and direction he was required to serve, as well as those of the station agent, and without the request of any one. That for these four reasons the plaintiff ought not to recover.

The undisputed proofs show in this case that the defect in the planking complained of was one which might occur any day from slightly misplacing a switch, or the accidental derailing of a truck-wheel, or from various other causes purely accidental; that the injury to the plank was so small as to escape the notice of all the persons in the yard except two, and even that of the plaintiff, who was daily within ten or twelve feet of it, from once to a dozen times a day, and it would appear that even the two persons who did see it did

not deem it of consequence enough to report it to the yard-master, or repair it themselves, it being their duty so to do if it was dangerous, and there is no pretense that the company had actual notice thereof.

There is no testimony to show, or tending to show, that any of the persons were careless, incompetent or unskillful when they were employed by the company and placed in charge of its business at Niles station; but on the contrary the undisputed evidence is that they were all very competent men, who had had long experience in all branches of the business. It would seem that the defendant had done its whole duty in the premises, and it is quite clear, I think, that the only ground upon which plaintiff can rest his claim must be that of negligence of a fellow-servant engaged in the same employment; and the rule is well settled that when the company uses due diligence in the selection of competent, skillful and trusty servants, it is not answerable in damages to one of them for any injury received by him in consequence of the carelessness of another, while both are engaged in the same service of the common master. *Farwell v. Boston & Worcester Railroad Corporation* 4 Met. 49: 2 Thompson on Negligence 924. A person "who engages in the employment of a railroad company for the performance of specified duties and services, for compensation, takes upon himself the natural and ordinary risks and perils incident to the performance of such service," and these include the perils arising from the carelessness and negligence of those who are fellow-servants, or engaged in the same employment, and it is of little consequence of what grade the servants may be, except (as is well said by Chief Justice Cooley in his work on Torts) "as superior authority may render the negligence more dangerous, and consequently increase at least the moral responsibility of any other servant, who, being aware of the negligence, should fail to reprove it," (Cooley on Torts 544); and this doctrine is fully supported by the following authorities, among others: 2 Thompson on Negligence 927; *Gallagher v. Piper* 16 C. B. (N. S.) 679, 694; *Wigmore v. Jay* 5 Exch. 354; *Felt-*

ham v. England L. R. 2 Q. B. 33; *Chicago &c. R. Co. v. Murphy* 53 Ill. 336; *Summersell v. Fish* 117 Mass. 312; *O'Connor v. Roberts* 120 Mass. 227; *Zeigler v. Day* 123 Mass. 152; *Warner v. Erie Ry. Co.* 39 N. Y. 468, 470; *Coon v. Syracuse etc. R. Co.* 5 N. Y. 492; *Columbus &c. R. Co. v. Arnold* 31 Ind. 174; *Hard v. Vermont & Canada R. Co.* 32 Vt. 473; *O'Connell v. Baltimore & Ohio R. Co.* 20 Md. 212; *Ryan v. Cumberland Valley R. R. Co.* 23 Penn. St. 384; *Pittsburgh &c. R. Co. v. Devinney* 17 Ohio St. 197; *Morgan v. Railway Co.* L. R. 1 Q. B. 149; *Gilman v. Eastern R. Corp.* 10 Allen 233; *Lawler v. Androscoggin R. Co.* 62 Me. 463; *Quincy Mining Co. v. Kitts* 42 Mich. 34; *Michigan Cent. R. Co. v. Austin* 40 Mich. 247; *Day v. Toledo, C. S. & D. R. Co.* 42 Mich. 523; *Crispin v. Babbitt* 81 N. Y. 516: *Brick v. Rochester, N. Y. & P. R. Co.* 98 N. Y. 211; *McCosker v. Long Island R. Co.* 84 N. Y. 77; *Wright v. New York Cent. R. Co.* 25 N. Y. 565. It is said by Mr. Chief Justice Shaw, in speaking upon this subject: "We are not aware of any principle which should except the perils arising from the carelessness and negligence of those who are in the same employment. These are perils which the servant is as likely to know, and against which he can as effectually guard, as the master." *Farwell v. Boston & Worcester Railroad Corporation* 4 Met. 49.

Especially is this true in this case, under the circumstances disclosed in this record; for it is shown to have been a part of the duty of the plaintiff to have discovered the defect in the planking complained of, and to have repaired the same, as well as that of the track-master.

I think it must be conceded that had the defendant not gone in between the cars while they were in motion, he would not have received his injury. He was not required to do this by any person, and it was most certainly no part of his duty so to do. It is claimed by counsel for plaintiff that plaintiff was acting under the direction of Etzcorn at the time the injury occurred. The evidence, however, does not support this claim. Etzcorn was that morning, he says, doing his own coupling and uncoupling; and the plaintiff says that he

(plaintiff) asked Etzcorn, as he was making a change of cars, "What next?" and Etzcorn replied, "One car in and one car out," and that this is all that was said; and Etzcorn says he did not ask plaintiff to do anything that morning,—did not ask him to help him. Clearly this talk shows no direction to plaintiff to uncouple the cars.

Usually the movement of cars while the brakeman is attempting to couple or uncouple them is under his direction, and contributory negligence on his part in his endeavor to make the coupling while the cars are in motion, or in failing to regulate the movement of approaching cars when it is within his power to do so by the exercise of ordinary care, has been held sufficient to prevent his recovery for injuries received. *Muldowney v. Illinois Cent. R. Co.* 36 Iowa 462; *Williams v. Iowa Central R. R. Co.* 43 Ia. 396; *Marsh v. South Carolina R. Co.* 56 Ga. 274, 277. I am inclined to the opinion, however, that the correct view is taken upon this subject in *Snow v. Housatonic R. Co.* 8 Allen 441. In that case the court held that if a brakeman cannot easily uncouple cars when the train is standing still, and in endeavoring to uncouple them when the train is in motion, he steps between the cars, and there meets with an injury which is caused by a want of repair in the road-bed, it cannot be ruled he is careless, as a matter of law, but the question is then one for the jury. *Belair v. Chicago &c. R. Co.* 43 Iowa 662.

We are relieved from further consideration of this subject, however, in the present case. It clearly appears by the record that the plaintiff's duties were those of switchman, and that when hired, and subsequently, he was ordered by those who had the authority to direct him what to do,—not to attempt to perform the kind of service in which he received his injury,—and that, in open violation of these orders, and without the direction of any person, he undertook to perform the hazardous work of uncoupling, which was fraught with such disastrous results. Under the circumstances and testimony undisputed, I think it must be held that the plaintiff necessarily took the risk; that it was his own voluntary act,

and the defendant cannot be held liable upon the facts appearing in this record.

These views render discussion of the other points made, unnecessary.

The judgment must be reversed and a new trial granted.

CAMPBELL, C. J. and CHAMPLIN, J. concurred.

MORSE, J. dissenting. I think this case was properly submitted to the jury, and that the verdict should not be disturbed. From the plaintiff's evidence, as I read the record, it appears that after he was ordered not to couple cars, he was told by the yard-boss, under whose orders he was acting on the 7th of May, that he "must help the boys in the morning;" that he wanted him to help John Etzcorn. Plaintiff says to the yard-boss: "All right: you told me once that I should not do this work,—I had nothing to do with it." The boss replied: "I cannot help it now. The trains don't get off in the morning. The South Bend train is late pretty nearly every morning. We have not got men enough to get the cars ready. You must help them." This seems to be a plain command to plaintiff to do this work whenever the trains were late, and did not confine him to a single morning. Plaintiff then helped the boys every morning, coupling and uncoupling cars, until the accident.

The testimony introduced on the part of the plaintiff—and we have nothing to do with the evidence on the behalf of the defendant in considering the question whether the case should have been submitted to the jury—tended to show that this defect had existed for a month. That it was a dangerous break the sequel shows. I think it was the duty of the yard-master to see to it that this track and the others, being almost constantly used in moving cars and coupling them in this yard, was in a safe condition, so that the lives of the men who were compelled to do the coupling on this ground by their employment, were not endangered, or their persons put in peril; and being in charge of the yard, with this duty

incumbent upon him, his negligence would be the negligence of the company.

The question whether he was negligent was, under the plaintiff's proofs, in my opinion, a question for the jury, as was also the negligence of the plaintiff.

The plaintiff, under his proofs, was entitled to go to the jury. The question as to whether he or the defendant's witnesses should be believed was also a matter for them to determine. They found in his favor, and I can find no error in the record.

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The People v. Kittie Sessions.

Criminal information—Joinder of counts.

1. Whether counts for murder and for statutory manslaughter cannot be joined in the same information in a case of the fatal procurement of an abortion, and where a preliminary examination, as for murder, involved all the circumstances of the homicide—Q.

2. *It seems* that expert testimony should be confined to scientific questions, and not deal with matters that are within the scope of common knowledge.

Exceptions before judgment from Allegan. (Arnold, J.) October 22, 1885—January 6, 1886.

Manslaughter. Respondent was convicted. Reversed.

Attorney General *Moses Taggart*, and Prosecuting Attorney *C. R. Wilkes* for the People. Death resulting from an attempted abortion is murder: 2 Bish. Cr. L. § 641; *People v. Lilly* 38 Mich. 270; the information in the case of murder of any degree is in the same form, the verdict of the jury determining the degree: *People v. Doe* 1 Mich. 457; *People v. Tully* 6 Mich. 273; and there is no error in joining a count therefor with one for manslaughter: *People v. Sweeney* 55 Mich. 586; manslaughter is a minor offense and examination for murder covers a count for manslaughter: *Hanna v. People* 19 Mich. 316; *People v. Annis* 13 Mich. 511; *Turner v. People* 33 Mich. 372; *People v. Lynch* 29 Mich. 274.

Padgham & Padgham for respondent. A charge of murder in an information will not warrant conviction of a statutory manslaughter: *People v. Olmstead* 30 Mich. 439; *People v. Jones* 24 Mich. 217; *People v. McMillan* 52 Mich. 627; experts cannot give opinions on matters of common observation: 1 Whart. Ev. § 436; *Phillips v. Starr* 26 Ia. 240; *Newark v. Liverpool Ins. Co.* 30 Mo. 130; *People v. Bodine* 1 Den. 281.

SHERWOOD, J. On the 21st day of January, 1885, John Peck and his wife were living in the village of Wayland in the county of Allegan. The family consisted of Mr. Peck, his wife and one child, a small girl about five years of age. The wife was pregnant, and had been for from three to four months. On that day she suddenly died, during the absence of her husband and child from home. The respondent was then and had been for many years previous a resident of Wayland, and the prosecution claim she was an abortionist and on the day mentioned attempted to produce an abortion on Mrs. Peck resulting in her death. The next day after her death a coroner's inquest was held and post mortem examination of the body was made by Dr. Turner and Dr. Ryno of Wayland, and resulted in such disclosures as were deemed sufficient to warrant the arrest of Mrs. Sessions for the offense stated. She was accordingly arrested on the 24th day of January, 1885, upon the complaint of the prosecuting attorney of said county, charging her with the crime of murder. The warrant was issued by a justice of the peace, who, upon the examination had before him, found the offense charged had been committed, "and that there was probable cause to believe the respondent was guilty thereof, of murder in the second degree," and she was bound over to answer the charge at the circuit.

At the opening of the term, the prosecutor filed an information, charging the respondent in two counts. The first was for murder, and the second for the statutory offense of manslaughter. Before pleading to the information, the respondent's counsel moved to quash the second count, for the reason that there had been no complaint or examination before the magistrate for such offense. He also moved to quash the

first count, upon the ground that the allegations contained therein constituted no more than a misdemeanor under the statute. To sustain the motion as to the second count, counsel for respondent relied upon the statutory provision, that "No information shall be filed against any person for any offense, until such person shall have had a preliminary examination therefor, as provided by law, before a justice of the peace or other examining magistrate or officer, unless such person shall waive his right to such examination," etc. How. Stat. § 9555.

The offense charged in the first count in the information was the one contained in the complaint and warrant, and upon which the respondent had her examination before the magistrate. At common law life is not only sacred but it is inalienable. To attempt to produce an abortion or miscarriage, except when necessary to save the life of the mother under advice of medical men, is an unlawful act and has always been regarded as fatal to the child and dangerous to the mother. To cause death of the mother in procuring or attempting to procure an abortion is murder at common law. 4 Bl. Com. 194; 2 Bish. Cr. L. (7th ed.) § 691; Foster on Homicide 261; *Ann v. State* 11 Humph. 159; *Rex v. Martin* 3 C. & P. 211; *Com. v. Parker* 9 Met. 263, 265; *State v. Moore* 25 Iowa 128; 1 Hale's P. C. 429, 430; *Com. v. Keeper of Prison* 2 Ashm. (Penn.) 227; also *Tinckler's Case*, cited in East's P. C. ch. 5, § 17, p. 230. We think the first count in the information charges the crime of murder against the respondent. Inasmuch, however, as the case was not submitted to the jury under the first count, it will not be necessary to consider further the questions raised under it, except as they bear upon the exceptions taken to the rulings made under the second count. This we may properly do. *People v. Lilly* 38 Mich. 270.

We do not regard the objections to the second count as tenable. There are no reasons why the two counts should not be joined in the same information. The crime charged in the second count grew out of the same transaction—the same facts—as in the first. If the allegations of fact stated in the count for murder were those relied upon for a convic-

tion under the second count, no misjoinder can be claimed, especially if they were sufficient to convict of the statutory offense charged. If it was proper to join in the same information these two counts charging the same offense in different degrees, springing out of the same transaction, then the examination had under the count for murder must be held sufficient for the lesser offense contained in the second count. And it can make no difference whether one or both counts stated common-law offenses or not: the higher offense included the minor charge. They were both for the unlawful killing. *Hanna v. People* 19 Mich. 316; *Annis v. People* 13 Mich. 511; *Lightfoot v. People* 16 Mich. 507, 512; *People v. Lynch* 29 Mich. 274; *Turner v. People* 33 Mich. 363; *People v. Sweeney* 55 Mich. 586. We do not think any error was committed in overruling the motion of respondents' counsel to quash. The case comes within the authorities above cited. Neither was any error committed by permitting any proper evidence to be given in support of the second count.

The cause was tried in the Allegan circuit, and the jury returned a verdict of guilty of the offense charged in the second count. There is now before us for review the record and bill of exceptions in the case, containing the substance of all the testimony. Upon the trial the following question was proposed to each of the witnesses for the People, Drs. Turner and Ryno: "From the examination you made there, what was your opinion as to the cause of Mrs. Peck's death?" —which was objected to for the reason that no sufficient foundation had been laid for it; that the examination made by these witnesses of the deceased was too limited. The court allowed the witnesses to answer in substance that it was caused by an attempt to produce an abortion, in which an instrument had been used. No question appears to have been made as to the qualifications of the physicians. They had held a post mortem examination of the body, and attended the coroner's inquest. We think they had had sufficient opportunities to qualify them, and their standing as persons learned in medical science rendered their

opinions as experts competent. No error was committed in receiving their testimony.

After Dr. Ryno had stated to the jury that, in the post mortem examination made, he was satisfied that he had discovered the cause of Mrs. Peck's death; that the fœtus was intact and well developed; that it was four and one-half months gone; that there was slight irritation of the stomach, which appeared to be of a recent nature; that they found the womb congested, the placenta badly lacerated and torn forcibly by something from the womb; and that in his opinion death was produced by a shock to the nervous system —he was then asked by counsel for the people: "What, in your opinion, was the cause of the shock?" Objected to as incompetent and immaterial. The objection was overruled, and the witness was allowed to answer: "In my opinion, the cause of the shock was the injury done to the uterus or the womb; that death is the result of the shock, I suppose." The objection was properly overruled. The question was one falling clearly within the province of a medical expert, and was material as tending to establish the cause of death.

The doctor then testified that he did not think the injury to the placenta, just as he found and discovered it at the time, was self-inflicted. Counsel for the prosecution then asked the witness the following question: "I ask you whether, from the extent of the injury as you found it there, if Mrs. Peck was found, at the time of her death, in the bed-room, lying upon her back, and her hands by her side, and her limbs straight, and her clothes down, alone; and if two hours before, she was alive, and seemingly well; that death was caused by the shock resulting from the injury to the placenta, and that she never came out of the shock,—what do you say as to the injury being self-inflicted—whether it might have been self-inflicted under these circumstances?" Counsel for respondent objected, on the grounds "that the question does not sufficiently embody the facts as they have been testified to in the case, especially as to the appearance of the stomach; that there are some matters in the question which place the witness in the situation of the jury, rather than as

a witness giving expert testimony, and upon the further ground that the premises are not properly laid as a foundation for the question." We think the question not obnoxious to these objections. It was not necessary to exclude any fact contained in the question, because it had not previously been testified to; but unless there was some testimony given tending to establish such fact before the cause was finally submitted to the jury, it would have been the duty of the court to strike out the answer given to the question. We think there was, however, given in the case testimony bearing upon and tending to establish each fact assumed in the hypothesis, either direct or circumstantial. The facts stated in the question furnished a sufficient hypothesis to allow the question to be answered, and did not infringe any rule relating to expert testimony, under the facts appearing in this case; the evidence being mainly circumstantial. The witness answered: "I don't think it could."

Dr. Kedzie was called and sworn in the case, in behalf of the People, and upon a hypothetical question (which will be found in the margin)[1] was asked as to the cause of death. The question was objected to on the ground that nothing had been shown as to the healthy condition of the vital organs. We think enough appeared to warrant the assumption made in the question upon that subject in the testimony of Drs. Ryno and Turner. They had both testified as to the appearance of these organs at the post mortem examination.

Nancy Hall testified, in behalf of the People, that she lived but a short distance from Mrs. Peck's house, and in sight of the same; that on the day Mrs. Peck died she (witness) saw Mrs. Peck's little girl come across the road from

[1] *Question.* Assuming that Mrs. Peck was thirty-three years old, in a fair condition of health, and was pregnant from four to five months along; that she was left by her husband at about one o'clock alive and apparently well, and that he found her about two or three hours afterwards, in the bed-room, alone, with a pillow under her head, lying upon her back, her arms straight at her side, her limbs straight, and her clothes straight down over her limbs; and that from the post mortem examination it was discovered that the placenta had been detached, about two-thirds of the lower portion lacerated, and that upon examination of the other vital organs no cause for death was found—what, in your opinion, would be the cause of death in that case?

Mrs. Lamson's house; saw her again later in the afternoon on the sidewalk, coming to her house. It was very cold, and the girl had no overshoes or leggings on. The prosecuting attorney then asked the witness: "What did the little girl say when she came there?" Objected to as incompetent, irrelevant and hearsay. At this time the respondent was not present. The question was subject to the objection that it was hearsay, and the court erred in receiving it. It was admitted by the court as constituting a part of the transaction at the witness' house; but it is not easy to see that what the girl said or did at the house, not in the presence of respondent, could be of any materiality. It certainly was hearsay. The testimony was admitted by the circuit judge with some reluctance, and its tendency was to prejudice the right of respondent before the jury. No testimony the admissibility of which is doubtful, in a criminal case, should ever be permitted to go to the jury. The humanity of the law requires a strict adherence to this rule.

The testimony of four of the People's witnesses relating to respondent's possession of instruments to produce an abortion, and her use of them, and her knowledge upon the subject, and that she held herself out for the performance of such service, with the instruments, for hire, was given on the part of the prosecution. It consisted of conversations of respondent had with these four persons, extending through a period of four years previous to the death of Mrs. Peck, wherein the respondent stated to one that she had the instruments with which to produce abortion; had herself got rid of a number of children, and showed her the instruments; at the same time saying to the witness, if she wanted any help, she could help her. To another she stated that she had committed abortions, and could do it again; that she had the instruments to use in doing it. To another she stated her terms for performing such service, which she then proffered to the witness, who was in the family way, and told her she had the instruments for the purpose. This testimony was all objected to by counsel for the respondent, for the reasons—*first*, that it was incompetent and immaterial; *second*, it

was too remote; *third*, that the conversations, to be relevant to the issue, should have occurred after the offense charged. We are not able to agree with the learned counsel for respondent upon this point.

It is true, as claimed by him, that the general rule, as stated by Mr. Justice Christiancy in *People v. Jenness* 5 Mich. 320, is well settled in this State. It is: "That [in criminal cases] the commission of other, though similar, offenses, by the defendant, cannot be proved for the purpose of showing that he was more likely to have committed the offense for which he is on trial, nor as corroborating the testimony relating to the commission of such principal offense." *People v. Schweitzer* 23 Mich. 301; *Lightfoot v. People* 16 Mich. 507. And to the same effect are several cases in the state of New York. *Coleman v. People* 55 N. Y. 81; *People v. Corbin* 56 N. Y. 363; *Copperman v. People* id. 591. But we do not think the rule is infringed in this case. The testimony was offered only to show knowledge and intent, and the possession of the necessary means to accomplish the act in her own chosen way, and for the purposes offered the testimony was competent. The tendency of the testimony was to prove facts within the issue. *People v. Doyle* 21 Mich. 227; *People v. Marble* 38 Mich. 123; *Com. v. Briggs* 5 Pick. 429; *Osborne v. People* 2 Park. Cr. Rep. 583; *State v. Harrold* 38 Mo. 496; *Mason v. State* 42 Ala. 537; *Brown v. Com.* 76 Penn. St. 319; *Weed v. People* 56 N. Y. 628; *People v. Henssler* 48 Mich. 49; *United States Life Ins. Co. v. Wright* 33 Ohio St. 533; *Coleman v. People* 55 N. Y. 81; *Com v. Shepard* 1 Allen 575; *Com. v. Price* 10 Gray 472; *People v. Clark* 33 Mich. 112; *People v. Brewer* 27 Mich. 134; *Boyce v. People* 55 N. Y. 644. The testimony cannot be considered too remote when it appears that the respondent is shown, by her own statements, to have had the very instruments in her possession which it was claimed she used in producing the death of Mrs. Peck, during the entire period covered by the testimony, and was offering her services to aid those who desired to commit the offense of abortion. The testimony was clearly warranted by the facts and

circumstances appearing in the record, and no error was committed in receiving it. *People v. Niles* 44 Mich. 607.

The people's witnesses, Drs. Bills and Calkins, were each asked the following hypothetical questions, viz.: Assuming that Mrs. Peck, on the twenty-first day of January last, was about her household duties up to about one or two o'clock P. M. apparently well; that she was in a condition of pregnancy from four to five months along; that about four o'clock P. M. she was found in her room dead; that a post mortem examination revealed that the lower two-thirds part of the placenta had been detached from the interior walls of the womb, in a lacerated manner; that some blood was found in the womb, somewhat frothy in appearance: that no evidence of blood was found on the clothing or in the vagina; that a further examination made of the lungs, spleen, heart and liver showed those organs were in a normal condition; and when the body was found, spots were discovered on the face, of a purplish color, from the size of the end of your finger to a kernel of wheat, over her face; that a subsequent examination of the brain revealed no clot or injury to that organ; and that a chemical analysis of the stomach revealed no mineral or other poisons, except ergot; that a microscopic examination of the interior walls of the stomach showed no inflammation or ulceration—what, in your opinion, was the cause of death?" This question was objected to by counsel for respondent, on the grounds that "there is no foundation laid upon which to base it; that it does not embrace the important elements of the testimony in the case; that there is no proper statement in the question of the examination made of the other medical witnesses." The objection was overruled by the court, and the witnesses' answers were both, in substance, that, in their opinion, the death was caused by shock or syncope, occasioned by the injury to the womb and placenta. We think the facts stated, if true, were sufficient to enable the witnesses to give their opinion upon the subject queried after, and there was no error in allowing the answer made. *People v. Brown* 53 Mich. 531; *Filer v. New York Cent. R. R. Co.* 49 N. Y. 42.

We see no objection to the question put to Dr. Bills: "How did you find the placenta?" "In what manner had it been detached?" Nor to the answer given by the doctor thereto.

When Dr. Calkins was upon the stand, after he had answered the long hypothetical question above stated, in answer to a question put by the prosecution, he testified that the shock producing death might be produced in various ways, among which were, "fright, and dread of sudden peril." The witness was then asked: "Would it be more likely to occur to persons if they were fearing an injury?" and the witness answered: "Yes, sir; a person dreading an operation." The question was objected to by respondent's counsel, and the objection should have been sustained. There was really no testimony in the case upon which to base the question. It was not shown by any witness, nor any circumstance, that Mrs. Peck had any fear or dread of the attempt to perform the act which is charged to have been the cause of her death. The tendency of this testimony was mischievous. It left the jury to make unfavorable inferences against the defendant, from causes of the existence of which there was no proof in the case. We think this was error.

Dr. Charles Russell, of Allegan, was called as a witness on the part of respondent, and testified that he had heard the medical testimony of the other witnesses with reference to the placenta attachment to the womb, and its location, and made a diagram of the position of an impregnated uterus at five months, and then explained the same to the jury, and further testified as to the course and direction an instrument like that claimed to have been used in this case by respondent must take to reach the after-birth, located as this was claimed to have been by the other testimony, and the difficulty in reaching and disturbing the placenta with such instrument.

Dr. Thomas, who had heard all the testimony, was then called by respondent, and testified that the diagram made was correct as to the position of the uterus at five months, and that it correctly represented the placenta attachments;

and, among others, was asked the following question: "What do you say as to the possibility of getting an instrument to the placenta without rupturing the membrane in a uterus, at five months, like that is?" *Answer.* "I don't think it could be done." On the cross-examination by the prosecuting attorney, he produced a book containing a diagram of the parts, with a fœtus six months gone, showing their relative positions, and was allowed to use this diagram before the jury, and, against the objection of counsel for respondent, was examined at length as to the feasibility of introducing the instrument at a certain place pointed out, without injury to the membranes of the uterus, when the fœtus was that far gone. The competency and ability of this physician were unquestioned, and the interrogatories were not put to test either. It was not a fœtus of that age to which the other testimony in the case related, or to the relative position of the parts at that time, but to a five months' fœtus. The situation, or what might be done in the one case, was relevant and proper; and in the other it would have been proper upon one question only. Upon that there was no contest, and hence it was unnecessary. It also appeared in the testimony that the relations and situations of the various parts being considered differed in the different stages of pregnancy. The effect of the testimony objected to was to furnish ground from which the jury would make an unfavorable comparison, to the prejudice of the respondent, and this should not have been permitted. The testimony was really irrelevant under the circumstances appearing upon the record. It was not the fact that the diagram about which the objectionable testimony was given was found in a medical or other book that rendered the testimony objectionable, but because the testimony related to a case and state of facts which were not those claimed by the parties on either side under the issue being presented.

Dr. Amsden was examined at some length on the part of the respondent, and on being cross-examined by the prosecution, was asked the following question: "My question was this: Whether, if a professional abortionist should

use an instrument to rupture the amniotic sac, they would be quite likely to have used ergot to prevent excessive hemorrhage, and assist in removing the fœtus after the sac was ruptured?" *Answer.* "They might, and might not." He had already stated that, among persons practicing abortion by the use of instruments, it was common for them to use ergot. This testimony, and the question above, were objected to by respondent's counsel as inadmissible, and not applicable to this case. The grounds of objection are not very clearly stated, but are sufficient to include immateriality.

Respondent's counsel also moved to strike out the testimony after the same was given by the doctors. The court, however, ruled that it should stand. We think the ruling was erroneous. The testimony did not show the respondent, or tend to show her, a professional abortionist; neither does it show, or tend to show, that she administered the drug to Mrs. Peck the evidences of which the post mortem examination disclosed. The probabilities of what a professional abortionist will do under any state of facts cannot be allowed in the scale, in a criminal case, to make evidence for or against the respondent.

The remaining questions presented for review relate to the charge given by the court, and the refusals to charge. Substantially the requests made by respondent's counsel to charge were given, and we find no error in failing to give what was omitted.

With a single exception, the charge of the learned circuit judge was full, clear, and without fault. The testimony in the case was so largely made up of circumstances that whatever was said upon that subject, and of the sufficiency of this class of evidence, cannot be too carefully guarded, that the language of the court may not be misunderstood nor misconstrued.

The court said, in commenting upon this class of testimony: "Circumstantial or presumptive evidence is allowed in all cases when direct and positive evidence of the respondent's having committed the offense cannot be procured.

Where the fact itself cannot be proved directly, that which comes nearest to it is the proof of the circumstances that necessarily and usually attend such facts, and from which it is inferred or presumed, until the contrary is shown." This is the rule in civil cases; but in criminal cases not only must each of the facts from which the inference is drawn be proved beyond any reasonable doubt, but the inference itself must be such as admits of no other rational conclusion. This rule was substantially given by the circuit judge in a later part of the charge, but we think there would have been less danger had it been given in immediate connection with the clause above quoted.

We have now noticed everything which we think might possibly have been to the prejudice of the respondent; and while it is quite possible that they did not affect the result, it is our duty to adhere to the rule of safety.

The judgment will therefore be reversed and a new trial granted.

CAMPBELL, C. J. and CHAMPLIN, J. concurred in the result.

CAMPBELL, C. J. As I concur in the result arrived at by my brother Sherwood that there should be a new trial, I deem it necessary only to refer to some points on which I do not entirely concur in his views. I agree with him that the only questions on which the verdict should be disturbed are such as arose on the trial, and that the examination before the justice, inasmuch as it involved all the circumstances of the homicide, was sufficient to sustain the statutory information on which respondent was convicted, and that it was not improper to combine the counts for the homicide on different theories of murder and statutory manslaughter. Under our decisions she can only be re-tried for manslaughter.

There were several questions put to expert witnesses and others, calling for opinions on hypotheses which involved questions concerning facts which were not physiological, and on which no scientific result could be based. There were also some questions put calling for general conclusions as to the

cause of death, which belonged to the jury, and not to witnesses, to answer. Some of these questions involved the presence of various articles, the arrangement of clothing and similar extraneous facts. It is of the greatest importance to confine expert testimony to facts beyond the scope of the common knowledge of the jury and ordinary witnesses. The difficulty of putting any expert in as good a position to draw conclusions as those who saw what he is asked to interpret without seeing it, is so great that, if allowed to swear at all, it should be known beyond any question upon what precise facts he frames his theories, and they must always be facts on which the inference is one of special skill, and not matters open to all persons for conclusions.

The principal errors complained of were alleged on rulings upon testimony, and in several instances similar rulings allowed testimony of opinions which involved more than scientific conclusions, which I think was improper. I do not think any hypothesis should be permitted which varied from the facts shown, unless possibly to test the theories or the knowledge of the witness, or to determine what facts were material and what not significant. And all theories received should be confined to scientific deductions, and not allowed to pass upon common facts, suspicions or motives.

MORSE, J. I do not think this woman can be legally tried upon the information filed against her. She has not had or waived any examination upon the charge embodied in the second count. She was arrested upon a complaint and warrant for murder, which averred, in the statutory form, that she "feloniously, willfully, and of her malice aforethought did kill and murder one Collista C. Peck, contrary to the statute in such case made and provided," etc. The warrant does not name the manner or means of the commission of the crime. Upon this warrant a preliminary examination was had before a justice of the peace, who found that the offense of murder had been committed, and that there was probable cause to believe the respondent guilty of the same in the second degree, and ordered that she enter her recognizance

in the sum of $1200 for her appearance at the next term of the Allegan circuit court for trial thereon.

The prosecuting attorney filed an information in the circuit court, in two counts: *first*, charging respondent with murder, setting forth the manner and means of the killing, by attempting to commit an abortion; and in the *second* count alleging nearly if not the same manner and means of commission, and charging manslaughter under the statute. How. Stat. § 9107. The counsel for respondent moved to quash the second count, upon the ground that there had been no complaint or examination before the magistrate for that offense. This motion should have been granted. It was conceded, upon the argument here, that this statutory offense is not contained in the first count of the information, or in the warrant upon which the examination was had; and this view is clearly supported by authority. This offense, for which respondent was tried and convicted, and the only offense with which she can be charged under the statute, upon the evidence, was not contained in the warrant, as decided in this Court. *People v. Olmstead* 30 Mich. 431. Nor can it be contained in the first count, under the same principle, which is a common-law information or indictment for murder. The opinion by Justice Campbell in *People v. Olmstead* is so plain that a further reference to authority is unnecessary.

The respondent has had an examination upon a charge of murder, which did not include this statutory crime of manslaughter. It cannot be said, therefore, that she has ever had an examination upon the second count of this information. Granted that abortion, or attempt at abortion, causing death, was murder at common law, it is nevertheless certain that it is not murder in this State. The Legislature has seen fit, wisely or unwisely, to make this offense manslaughter. The circuit judge correctly informed the jury that respondent could not be convicted under the first count, and it would seem from his remarks that the prosecution acquiesced in his views. But if his charge in this respect was not good law, yet the result has been an acquittal of the respondent upon the first count, and as to that she cannot be put in jeo-

pardy again. 1 Bish. Cr. L. § 1005; *State v. Tweedy* 11 Iowa 350; *State v. Martin* 30 Wis. 216; *State v. Belden* 33 Wis. 124: Cooley's Const. Lim. 328; *State v. Smith* 53 Mo. 139; *State v. Boyle* 28 Iowa. 522; *Brennan v. People* 15 Ill. 511; *People v. Comstock* 55 Mich. 405.

The whole case, then, must stand upon the second count. I cannot agree in the proposition that, because the evidence upon the examination tended to show, or even established, a state of facts consistent with her guilt of this statutory offense, she can be put upon trial in the circuit when the warrant did not charge her with, or embrace within its charge, the crime stated in the second count. With the same propriety, if the evidence on the examination had disclosed that when the respondent was seen leaving Mrs. Peck's house, she carried away personal property, with intent to steal the same, she might have been informed against in the circuit for larceny. She was arrested for murder, and bound over for murder in the second degree. Under the plain language of the law she was tried for an offense totally different. She had a right, on the examination, to be clearly informed by the warrant, of the offense she was to meet there and in the circuit. If she was examined upon a warrant which charged the crime of murder, and the evidence, as it plainly did, tended to show another offense, having no relation whatever in law to the murder charged, and establishing, if true, an offense different from and not contained within it, she had a right to rest at the end of the People's proofs, and, without offering any exculpatory or rebutting evidence, demand a discharge; and, failing to receive from the magistrate her release from the charge of murder, she also had the right, when informed against for the same offense in the circuit, to ask her discharge there. If the warrant issued by the justice had set forth the crime upon which she was tried in the circuit, she might perhaps have made a satisfactory defense upon the examination. But she was not bound to anticipate, or defend herself against, any charge of crime that might arise in the testimony, or be deducible therefrom, unless the same was clearly set forth, or contained by implica-

tion of law in the process that brought her into court. An examination cannot be made a legal drag-net for fishing after and catching, for the purpose of filing information in the circuit court, any offense or number of offenses that may be hinted at or even established by the testimony elicited before the examining magistrate. The case is a plain one. It is the same as if an information had been filed in the circuit court embracing the charge contained in the second count in the record before us, without any previous legal arrest, or any examination at all.

Neither can I concur in the opinion filed by Justice Sherwood as to the competency of some of the expert testimony allowed upon the trial. While this kind of evidence is most important, it is also most dangerous if not closely hedged and confined within its legitimate province. The disagreement of medical witnesses upon matters that are clearly scientific in their nature—a disagreement too often marked by the line that separates the sides upon which they are employed—clearly calls for the strict enforcement of the rule preventing their speculations and opinions upon matters not scientific, but plainly within the range of common observation or knowledge.

The question asked and answered by the medical witnesses, as to their opinion whether Mrs. Peck could have herself inflicted the injury supposed to have caused her death, embraced within it, as the most important factor, the hypothesis that she was found lying upon her back, her hands by her sides, her limbs straight, and her clothes down. Any legitimate inference to be deduced from these facts was, in my opinion, one that the jury could draw; and the assistance of physicians was not necessary to get at the bearing of these facts upon the point at issue, and could only serve to prejudice the jury against the respondent, if the medical witness should give, as he might, an opinion colored by the bias that sometimes does exist. One physician, at least, based his opinion that the injury was not occasioned by Mrs. Peck's own act entirely upon the fact that she was "found lying with her clothes all lying in order." I can see no good rea-

son for calling in a physician to explain or deduce inferences from these facts. The jury were competent to determine for themselves the relation of these facts to the question whether Mrs. Peck, or some one else, attempted abortion. It was clearly error to allow medical experts to determine this question.

Nor do I assent to the proposition that a state of facts not yet proven, or offered in evidence, can be made the basis of a hypothetical question propounded to an expert, and his answer be taken, to be held as competent and to stand, if afterwards, in the course of the trial, testimony tending to show such facts shall be introduced. It is in the case when it ought not to be; and if not subsequently supported by the proofs, the striking of it from the case cannot remove from the minds of the jury the prejudice it has fostered. The only safe course is to prove the facts before the inference or opinion of a medical expert is given upon them.

There were, to my mind, numerous errors in the admission of the expert testimony, under the former rulings of this court in *People v. Hall* 48 Mich. 482 and *People v. Millard* 53 Mich. 63, but with the views I hold upon the information I do not deem it necessary to particularize them.

The testimony of the witnesses in relation to what respondent said to them about having instruments or an instrument with which to commit abortion was improperly received. There was no evidence tending to show that the instrument spoken of by respondent, and shown by her, as claimed, to one witness, was the instrument used in Mrs. Peck's case. None of the declarations came within eight months of the alleged commission of this offense, and some of them extended back four years. Evidence that respondent claimed that she had committed abortions upon herself and others was not competent, and its admission was necessarily to the great prejudice of her rights. If the fact that a woman has committed an abortion upon herself, or her admission of that fact, can be used against her upon a trial for the killing of another by abortion, in view of the great prevalence of this practice among women in every community will there not

be great danger of an innocent person being convicted of this crime? It seems to me that this evidence comes clearly within the rule that the commission of other or similar offenses by the defendant cannot be given to show the likelihood of the commission of the crime charged.

I concur in other matters pointed out by Justice Sherwood by reason of which a new trial should be granted; but, as heretofore shown, in my opinion the respondent should be discharged from any further custody or constraint under the proceedings as they now stand.

JOSEPH MORGAN v. MARY ANN MORGAN, OSCAR MORGAN, JOS. H. MORGAN, AARON BARK AND JNO. B. ELLSWORTH.

Husband and wife—Title to land—acquiescence.

A man and his wife who had contentedly lived together for more than forty years fell out about the title to some land which the wife's father had contracted to deed to the husband but had, in fact, deeded to the wife apparently with the husband's consent, and which the wife held, at any rate, for twenty years without objection from him. She then sold it and with the proceeds bought other lands the title to which, with his acquiescence, she took in her own name, though the husband claimed to have acquiesced under a misapprehension. *Held*, that after all this time the Supreme Court would not attempt to interfere with her title, without a clearer showing against it.

Appeal from Eaton. (Hooker, J.) Nov. 4.—Jan. 6.

BILL to remove cloud. Complainant appeals. Affirmed.

Sagendorph & Powers for complainant.

Pennington & Dean for defendants.

MORSE, J. This is a controversy mainly between an aged couple, husband and wife, as to the ownership of a farm in Eaton county, purchased and taken in the name of the wife, Mary Ann Morgan, in September, 1875. October 19, 1882,

she deeded the premises to defendants, Oscar and Joseph H. Morgan, sons of herself and complainant. Bark and Ellsworth hold a mortgage upon the land executed by Mary Ann Morgan in February, 1882.

From the testimony it appears that complainant married the defendant Mary Ann Morgan, in Summit county, Ohio, in 1841, having himself less than $200 in property, and she nothing. In 1844 they moved from Ohio to the state of Illinois, where they remained until 1850. Chauncey Gilbert, the father of complainant's wife, owned a farm of 138 acres in the township of Norton, Summit county, Ohio, and about this time, by verbal message and letter, invited them to return to Ohio, and move upon said farm, which they did. Gilbert executed and delivered to complainant the following contract, which was also signed by complainant:

"This agreement made between Chauncey Gilbert, of Norton, Summit county, Ohio, am held and firmly bound unto Joseph Morgan, of the same place, in the sum of one thousand dollars, to be paid to the said Joseph Morgan, his executors, administrators or assigns. I bind myself, my heirs, executors, administrators, and each of them, firmly by these presents to make unto the said Joseph Morgan, within one year from date, a good and sufficient title to the following described premises, to wit: Fifty-eight acres in lot No. 7, and eighty acres, it being the north half of lot No. 8 in Norton township, Summit county, Ohio, and bounded, the east by land owned by Richard Carpenter; the north by township line and Peter Learch and R. Van Evra; on the west by R. Van Evra and H. Sparhawk, the south by Pheneas Barnes; containing one hundred thirty-eight and twenty-five one-hundredths,—in consideration of the said Joseph Morgan paying to the said Chauncey Gilbert the amount of a certain mortgage due Joseph Doman, two hundred dollars, on the above-described premises.

In witness whereof, we have hereunto set our hands and seals this ninth day of May, A. D. eighteen hundred and fifty.

CHAUNCEY GILBERT. [Seal.]
JOSEPH MORGAN. [Seal.

Sealed and delivered in presence of
T. H. WESTFALL.
JOHN ROBERTSON."

No deed of the premises was ever made, under this contract, to complainant, but some time in 1853 a deed of the same land was executed by Chauncey Gilbert to Mary Ann Morgan, and antedated to the 24th day of October, 1851, for the purpose, no doubt, of barring the wife of said Gilbert of her rights in the premises. Gilbert, having married between the date and the actual making of the deed, and fearing trouble with his wife, took this step to protect his daughter and her husband in their rights to the premises as against his wife. Complainant claims that this deed was made to his wife without his consent, and in fraud of his rights, and that she held the title to the same in trust for him. His wife claims that the deed was executed and delivered to her in consideration of the love and affection of her father for her and with the full and free consent of her husband, who was present. Upon this farm they lived in apparent happiness and accord for twenty-five years, when it was sold, and the proceeds, or a part thereof, invested in the Eaton county farm. It is admitted that the deed to this farm was taken in the name of the wife, with the full consent of the complainant.

It is pitiful that these two old people, now both past the age of sixty years, after living so long together, rearing a family, some of whom are over thirty years of age, and by their joint labor acquiring this property, could not have passed peacefully down the decline of life to the end. And it is impossible to do entire equity between them. It seems to us that the children, who are divided in the quarrel between them, are at the bottom of this trouble and censurable for their conduct. The consequences of this folly or greed, unless amended by the future conduct of the parties, will be most sad in any event. If the prayer of the complainant be granted, and the bitterness now existing continues, the old lady will be left without anything except charity to save her from want; and if his complaint is denied, the old man will also depend upon the charity of his wife or the world. We cannot, however, divide this property between them; the return of the mutual love and respect of their early married

life alone can make provision for both; and the restoration of affection, with a forgetfulness of this unseemly strife, can place them both beyond want. We must decide where the title belongs, and we are constrained to hold that it is now in the defendants Oscar and Joseph H. Morgan, to whom their mother conveyed it.

There is a great mass of evidence presented to us by the record, but the main facts and the real truth are to be found in the testimony of the complainant and his wife. The complainant's own evidence does not satisfactorily establish, in our minds, that the title to the Ohio farm was not taken, held, and used by his wife, with his full and free consent. At least for a period of twenty years and upwards, he acquiesced in such holding and use by her. In 1864, Sophronia Gilbert, widow of Chauncey Gilbert, brought suit in Summit county, Ohio, for her dower in this farm. The complainant and his wife filed an answer to her petition in the court of common pleas for said county, in which the complainant, under oath, averred that the deed from Chauncey Gilbert to his daughter Mary Ann Morgan, was executed to her "by the direction and consent of the said Joseph Morgan," the complainant in this cause; and that said deed was executed to her partly from love and affection that the said Chauncey Gilbert bore to his daughter. When the Ohio farm was sold, the unpaid purchase money was secured by a mortgage running to said Mary Ann Morgan; and the deed of the land now in controversy here was taken in her name, without the least objection on the part of the complainant. His excuse for the deed being made to her is that he then supposed the decision in the suit brought by Sophronia Gilbert established the title to the Ohio land in his wife, and that as soon as he learned this was not so he began to move to recover the Eaton county premises. But, in view of his own and his wife's testimony, it seems to us, with all the other facts in the case, that the true reason for bringing this suit is found in the separation of the parties, and their quarrels resulting therefrom. At any rate there is not that clear preponderance of testimony needed to give him the relief asked. There is not enough to

warrant us in now changing the title to this farm. If the evidence of the wife is to be believed, and it is certainly as consistent and reasonable as that of the complainant, she obtained the title to the Ohio property by his consent, as it is undisputed she did the land now in question. Nothing has since occurred in equity to divest her of it. She has clearly now the same rights as she had when this farm was purchased, and we do not feel disposed, at this late day, to take away from her what was given her by her father, and held for twenty-five years with the consent and acquiescence of her husband. It is evident that but for the unhappy quarrel originating through the children about the time of the beginning of this litigation, the complainant would still have been perfectly content with the title in his wife.

The decree of the court below must be affirmed with costs.

The other Justices concurred.

THADDEUS DENSMORE, DE WITT GROW AND ELISHA P. GROW v. SALMON S. MATHEWS.

Interference by levy with possession of mortgagees—Partnership—Attachment—Evidence of value.

1. A first mortgagee can waive his priority and let the second in upon the same footing with himself, so that in taking possession on default they become tenants-in-common of the securities and the goods therein specified. And they can jointly bring trespass for interference with the goods.

2. The existence of a partnership, as between the parties, is a question of fact for a jury. And it is negatived by a verdict permitting recovery if there could be no recovery otherwise.

3. Attachment proceedings cannot properly rest on the ground merely that the debtor's mortgagees in possession are, with his assent, selling his stock at private sale instead of at auction, as provided in the mortgage, and are closing out the remnant by barter.

4. Creditors who levy subject to a mortgage are in position to require the mortgagee to pursue the methods prescribed in the mortgage as to the mode of sale and the disposition of the proceeds.

5. In an action by mortgagees against a marshal for interference with their possession while disposing of the goods, it is proper to show that they were realizing the best prices that could be obtained and failed to get enough to pay the mortgages, and that the deficiency exceeded the value of the goods taken by the marshal.

6. The damages to mortgagees in possession from a wrongful levy is the market value of the goods at the time of the levy; and the appraisal made at that time is some evidence of their value.

Error to Ingham. (Gridley, J.) Nov. 5.—Jan. 6.

TRESPASS. Defendant brings error. Affirmed.

Julian G. Dickinson and *Isaac P. Christiancy* for appellant. There can be no joint right of action for trespass in the seizure of goods where there is no joint right to them: *Warne v. Rose* 5 N. J. L. 809; *Barry v. Rogers* 2 Bibb. 314; *Sweetzer v. Mead* 5 Mich. 107; *Giovanni v. First National Bank* 51 Ala. 177; *St. L. R. R. Co. v. Linder* 39 Ill. 433: 1 Suth. on Damages 210, 241; the authorities that sustain joint action in trespass are cases against naked trespassers, having no justification, as in *Duncan v. Spear* 11 Wend. 54; *Sickles v. Gould* 51 How. Pr. 24; *Paddock v. Wing* 16 How. 547; proof tending to show partnership would be sufficient to enable the jury to find there was such partnership: *Lyell v. Sanbourn* 2 Mich. 109, citing Story on Partnership 22–30 and 3 Kent's Com. 28; *Merritt v. Dickey* 38 Mich. 41; *Way v. Stebbins* 46 Mich. 296; *Parshall v. Fisher* 43 Mich. 529; *Stecker v. Smith* 47 Mich. 14; *Hutchinson v. Dubois* 45 Mich. 143; *Hatzenbuhler v. Lewis* 51 Mich. 585; *Beecher v. Bush* 45 Mich. 188; *Hinman v. Littell* 23 Mich. 484; *Sager v. Tupper* 38 Mich. 258; *Rice v. Shuman* 43 Penn. 37: Pars. Part. 63.

Huntington & Henderson for appellees.

CHAMPLIN, J. In the fall of 1877 one Frank Gates engaged in business at Dansville, Michigan, retailing ready-made clothing and dry goods. He made purchases from time to time of different dealers, and among others, from Grow Brothers of Bay City, consisting of De Witt Grow and Elisha P. Grow, two of the plaintiffs in this suit.

Thaddeus Densmore of Mason, Michigan, is an uncle of Gates, and he had given to Gates a letter of credit to different firms in Detroit, upon the strength of which Gates had purchased goods upon credit.

Some time about September, 1878, Gates entered into negotiations with one Horace Marler, who was then residing at Bay City, for a copartnership. He solicited Marler to take an interest in his business as a partner, and invest his money therein. Marler expected to receive money from his parents in England. He went with Gates to Dansville, looked over the location, and concluded to go into partnership with Gates, and put in his money against the stock on hand belonging to Gates. No inventory was taken at this time, and the exact amount in value of the stock on hand belonging to Gates was not ascertained. The terms of the partnership were arranged, and Marler was to return to Dansville and enter into the partnership business as soon as he received his money. It was likewise arranged that Gates should purchase some goods for the new firm, which was to be called Gates & Marler.

Pending the arrival of the money, Mr. Eastabrook, who was a salesman for the firm of Simons, Hatch & Whitten, of Boston, Massachusetts, was in Bay City, Michigan. He testifies that about the first of October, 1878, he met both Marler and Gates in Bay City, and Mr. Gates informed him that they had formed a partnership under the name of Gates & Marler, and intended carrying on business at Dansville, and that Marler was going to put some money into the business, so as to make the concern more reliable; that he then gave an order for Gates & Marler, which he sent on to Simons, Hatch & Whitten, in Boston, with directions as given him by Gates to ship the goods to Gates & Marler, at Dansville, Michigan; that Marler was present a portion of the time in the room while the matters of partnership and the order for the goods were being talked about, and joined in the conversation, so that the various transactions were talked over by the three of them while he was present. Mr. Gates testifies that he never had any conversation with Eastabrook in the pres-

ence of Marler; that he told him in regard to the matter that had been talked of in regard to Marler, and he said he would ship the goods to Gates & Marler, Dansville, and that he (Gates) said: "Yes; and I will want them any way, whether this arrangement is perfected or not,"—and he said, "All right,"—and the goods came. The goods were shipped to Gates & Marler, and were received by Gates, and placed in the store at Dansville. Gates rented another store than that which he was occupying, and he exhibited in the window of this store a placard, stating that the firm of Gates & Marler would occupy the store after a certain date. He also had printed and distributed hand-bills announcing the new firm of Gates & Marler. He purchased goods from different firms in Detroit in the firm name of Gates & Marler, and had the goods shipped to Gates & Marler, at Dansville. He removed his goods to the store he had rented for the occupancy of the firm of Gates & Marler, and received the goods ordered in the firm name, and placed them in stock in such store; but Marler never, in fact, put in the agreed capital, and never came to Dansville, and took no part in the partnership affairs after the purchase of the goods from Simons, Hatch & Whitten.

Gates continued the business after the above purchases in his own name, but never notified the parties from whom he purchased that the partnership with Marler had fallen through. One firm in Detroit, learning of the fact, sued out a writ of replevin, but before it was served the claim was settled by Mr. Densmore; who also settled with or assumed the claim of the other Detroit creditors, until the claims thus guaranteed or assumed amounted to about $3000. To secure Densmore for the claims thus assumed by him, Gates, on the 21st day of October, 1878, executed a chattel mortgage upon his entire stock of goods and books of account then in his store at Dansville, together with all goods, wares and merchandise that might at any time thereafter be placed in said store, or added to said stock for the purpose of merchandising. The mortgage was conditioned to pay $1000, on or before sixty days from the date of the instrument; $1000, on or before four months,

and the balance of $1000, on or before six months, with interest at the rate of ten per cent. per annum. If default was made in the payment, or if the mortgagor should sell, assign or dispose of, or attempt so to do, the whole or any part of the goods, or remove or attempt to remove the whole or any part thereof from the village of Dansville, without the written assent of the mortgagee, the latter was authorized to take possession of the goods, and sell them at public vendue, after giving six days' notice, and retain the money due, and pay over the surplus to the mortgagor. The mortgage was filed in the township clerk's office the same day at seven o'clock and forty minutes A. M.

Later in the day Gates executed another chattel mortgage to Palmer Grow and De Witt Grow, copartners, of Bay City, Michigan. This mortgage covered the same stock and property as the mortgage to Densmore and all additions made to said stock from time to time, and contained a warranty that the property was free and clear from all liens, conveyances and encumbrances and levies, except chattel mortgage to Thaddeus Densmore. This mortgage was conditioned for the payment of $2307.85, with interest at ten per cent., in three equal payments, due sixty days, four and six months, respectively. If default was made, it authorized the mortgagees to sell the goods at public auction after the like notice as is required by law for constable's sales. This mortgage was filed October 22, at three o'clock and forty-five minutes P. M. It is stated in this mortgage that Frank M. Gates, the party of the first part, being justly indebted to Palmer Grow and De Witt Grow, copartners, of Bay City, of the second part, in the sum of $2307.85, have, for the purpose of securing payment of said debt and the interest thereof, and being desirous of procuring goods, wares and merchandise of the said second party upon credit, and any indebtedness growing out of purchases hereafter made as aforesaid, granted, etc. This mortgage was given for goods which had been sold to Gates when he started in business at Dansville, and no sales were made to him after the date of the mortgage. On the 2d of January, 1879, Densmore and Grow Bros. took possession of the goods

under their chattel mortgages. The goods were turned over to them by Gates, and Densmore and Grow Bros. entered into an agreement that, in selling the goods, of the proceeds of the sale Densmore was to have three-fifths and Grow Bros. two-fifths thereof, until the mortgages were paid. They proceeded to sell the goods at retail and at private sale, and every Saturday they sold at auction to the highest bidder.

On the 2d day of January, 1879, Simons, Hatch & Whitten commenced suit by declaration against Gates & Marler in the circuit court of the United States for the Eastern District of Michigan; and on the 13th day of January, 1879 they sued out an attachment in said suit, which defendant, as United States marshal, levied upon a portion of the stock of goods in the possession of Densmore and Grow Bros. on the 16th day of January, 1879, for which the plaintiffs brought this action of trespass against the defendant on the same day.

Defendant pleaded the general issue, with notice that he would prove that he levied upon the goods in controversy at the time they were alleged to have been taken by him, January 16, 1879, under and by virtue of a writ of attachment issued out of the United States circuit court for the Eastern District of Michigan, in an action of assumpsit therein duly commenced by declaration, January 2, 1879, wherein Stephen B. Simons, Cornelius P. Hatch and Henry C. Whitten, citizens of the state of Massachusetts, are plaintiffs, and Frank Gates and Thomas Marler, citizens of the State and Eastern District of Michigan, are defendants; that said writ was delivered to defendant, as United States marshal for said district; and that said goods were subject to levy under said writ.

On the 13th of April, 1879, before said suit in trespass was brought on for trial, the said suit in the United States court proceeded to trial, and the said Simons, Hatch & Whitten recovered a final judgment in the sum of $677.16, including costs against the said Gates & Marler, copartners, as charged in the declaration. The goods in the mean time remained in the custody of the said United States marshal, under

and by virtue of his said levy; and on the 4th day of April, 1879 a writ of fieri facias duly issued upon said judgment from said United States court, under and by virtue of which the marshal levied upon said goods, and sold the same at judicial sale under said writ for the sum of $489.75. The said writ, on the return-day, was returned unsatisfied for the remainder of the money. The said suit in trespass, however, was prosecuted against the United States marshal, and came to trial October 21, 1879. By reason of certain rulings of the court below on said trial, whereby the said marshal was prevented from introducing in evidence his said writ of attachment, and showing that he had pursued its mandate, plaintiffs recovered judgment, and the judgment, on error to this Court, was affirmed. 43 Mich. 461. On writ of error to the Supreme Court of the United States the said judgment of affirmance was reversed, and the cause remanded to this Court for further proceedings in this cause in conformity to the opinion and judgment of the United States Supreme Court. 109 U. S. 216. The case was again tried in the circuit court on the 18th of March, 1885, and resulted in a verdict and judgment for the plaintiffs.

The principal questions raised by the record for our consideration are the following:

First. Can a joint action in trespass be maintained by plaintiffs under the facts disclosed in the record?

Second. Were the mortgages held by the plaintiffs void as against the attachment levied by the defendant?

Third. Was the evidence introduced upon the subject of damages proper and admissible?

The action was rightly brought in the names of the plaintiffs jointly. Under the arrangement made between the mortgagees and the mortgagor, the plaintiffs held joint possession of the goods. Densmore had the right to waive his priority which he had acquired by being the first mortgagee, and when he did so, and agreed with the mortgagees in the second mortgage that both mortgages should stand upon an equal footing, the two instruments became of the same legal effect

as if they had been executed at the same time; and the mortgagees in both instruments, after default and taking possession, became tenants-in-common of the securities and the property specified therein. *Howard v. Chase* 104 Mass. 250; *Welch v. Sackett* 12 Wis. 243; *Phillips v. Cummings* 11 Cush. 469; *Gilmore v. Wilbur* 12 Pick. 120. This agreement was neither fraudulent nor illegal. A similar agreement was enforced in *Bradshaw v. McLoughlin* 39 Mich. 480.

The defendant claims that these mortgages were void as against the creditors of the firm of Gates & Marler. He claims that there was a partnership existing between Gates and Marler as to parties dealing with them as such; and he claims further that the evidence shows that such partnership did in fact exist, and the stock of goods in the store of Gates went into the partnership as part of the stock, and the goods purchased in the firm name were also a part of such stock; that such being the fact, Gates could only mortgage his interest in the partnership to pay his individual debts; and this interest would not be the corpus of the partnership property, but only such interest as he might have after the winding up of the concern and payment of the partnership debts; and that, as creditors of the firm, the plaintiffs in the attachment could levy upon the goods in question as partnership property. Whether a partnership had actually been entered into between Gates and Marler, the testimony was conflicting. Gates testified that an agreement to enter into partnership had been made, which was to take effect upon Marler's putting money capital into the concern, but that it never was perfected. The testimony of Eastabrook showed that a partnership had been formed, and the acts of Gates in making purchases of goods in the firm name tended to show that it had been launched. Upon the whole it was a question of fact for the jury, and was left to them under instructions of the court, and they have found that issue in favor of the plaintiffs. It appears, therefore, from this record that, as between themselves, there was not a partnership entered into between Gates and Marler; and it follows that Gates had a

right to mortgage his goods to secure his creditors, the plaintiffs in this suit.

As to the particular goods sold and shipped by the plaintiffs in the attachment suit to the firm of Gates & Marler, the court instructed the jury the plaintiffs in the attachment suit might levy their attachment upon them, and left it to the jury to deduct the value of such goods, if they found a verdict in plaintiffs' favor, from the goods seized by defendant. The evidence showed that, of the whole goods seized by the marshal, there were nineteen dollars' worth of such goods that were shipped by Simons, Hatch & Whitten to Gates & Marler, at Dansville.

Complaint is made of the manner in which the plaintiffs were proceeding to sell the stock at private sale instead of public auction, as provided in the mortgage, and of the manner in which the balance of the stock was finally closed out by barter. But it was shown that such action on the part of the mortgagees was had with the consent or assent of the mortgagor; and, in any event, it afforded no just ground for seizure under the attachment. Had the parties whom the defendant represents seen fit to treat the mortgages as valid, they might have levied upon the entire stock subject to such mortgages; and then they would have been in a position to require the mortgagees to pursue strictly the authority contained in the mortgages as to the mode of sale and disposition of the proceeds. As it was, the testimony tended to show that they realized the best prices that could be obtained for the goods, and that they failed to realize sufficient to pay their mortgage debts, and that such deficiency exceeded the value of the goods taken by the defendant. This testimony was received against defendant's objection; but its admission was proper, for the reason that the plaintiff's mortgages were merely security, and it was proper to show the extent of the injury to them by reason of the wrongful act of the defendant.

The only evidence of the value of the goods seized by defendant was the appraisal made at the time the attachment was levied, and that of witnesses that the goods were worth

at least five per cent. more than they were appraised at. Defendant insists that this is no evidence of value or damage to plaintiffs, and that it was improperly received as evidence. The damages the plaintiffs suffered by the wrongful taking of the goods by defendant was the market value of the goods taken at the time of the trespass. The appraisal was some evidence of the market value, and was admissible. *Worthington v. Hanna* 23 Mich. 530; *Walrath v. Campbell* 28 Mich. 117; *Hunt v. Strew* 33 Mich. 89; *Dyer v. Rosenthal* 45 Mich. 588.

The charge of the court, covered fairly the issues presented in the case, and we think is unexceptionable; and in so far as the requests to charge the jury presented by counsel for defendant were not covered by the charge as given, they were properly refused.

Exceptions were taken to the admission and exclusion of testimony on the trial. We have carefully considered them, and find no prejudicial error in the rulings of the court thereon.

The judgment is affirmed.

The other Justices concurred.

THE MANISTIQUE LUMBERING CO. v. JOHN L. WITTER, TOWNSHIP TREASURER.

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58 634
61 581
58 625
94 198

Taxation of lumber piled on docks.

Where a lumber company had its principal office in a metropolitan city, but had no yard, and paid no taxes there, it was proper to tax its lumber in the remote township where, by contract with a company that had its mill and storage-room there, it was manufactured and piled on the latter's docks, from which, after remaining until it was seasoned, it was taken by purchasers Act 9 of 1882, sec. 10.

Error to Schoolcraft. (Steere, J.) Nov. 13.—Jan. 6.

Replevin. Defendant brings error. Reversed.

Collins & Blackwell, *J. F. Carey* and *F. O. Clark* for appellant.

Charles R. Brown for appellee, cited as bearing on the statute, *Putman v. Fife Lake* 45 Mich. 134; *McCoy v. Anderson* 47 Mich. 503; *Torrent v. Yager* 52 Mich. 506; *Monroe v. Greenhoe* 54 Mich. 9; *Osterhout v. Jones* id. 228; "storage" does not mean temporary deposit: *Campbell v. Machias* 33 Me. 419; *Desmond v. Machias Port* 48 Me. 479; *Lee v. Templeton* 6 Gray 579; *Ryerson v. Muskegon* 57 Mich.

Champlin, J. Plaintiff is a corporation organized under the laws of Michigan for manufacturing purposes. Its principal office for the transaction of business is located in the city of Detroit. It is the owner of large quantities of pine, located on the Manistique river and its tributaries. It neither owns nor hires a mill to manufacture its logs into lumber. Its operations consist in cutting logs and running them down the Manistique river to Manistique, where they are manufactured into lumber under the following contract:

"Detroit, Mich., May 19th, 1883.

Mr. Abijah Weston, President of the Weston Lumber Co. and the Chicago Lumbering Co., Present—Dear Sir: As we have heretofore talked, we submit the following as an agreement between your company hereinbefore named, and the Manistique Lumbering Company, concerning the booming and sawing of logs, and piling of lumber from the same, for the said Manistique Lumbering Company.

The Manistique Lumbering Company are to deliver the logs in the jam, the head of which shall be designated by your company, to the Manistique river, and your company are to take the logs from such jam and saw them into lumber in a merchantable, workmanlike manner, and pile same on your docks in a convenient place for shipping, at $3 per thousand feet, board measure. Your company is to have the mill culls for the saw bill, or we to have them and pay the saw bill, at our option; said lumber to be cross-piled in proper form for seasoning and to save the same from staining. The amount to be cut per year to be thirty million, or

whatever of said amount we may deliver as aforesaid during 1883, and about forty millions during 1884, and from forty to fifty million feet per annum thereafter, while the timber of the Manistique Lumbering Company on the Manistique river and its tributaries lasts, as the Manistique Lumbering Company may elect; but they shall give your companies written notice in September of each year of the amount they propose to furnish for the following year, said notice to be mailed to the Weston Lumber Co., at Manistique, Mich. Of course, should you be prevented by reason of fire or other unavoidable accidents from cutting so much, we shall not expect your companies to saw beyond their capacity. Payment for sawing to be made in two months from the end of the month in which the sawing is done.

If this is in accordance with the understanding of our agreement heretofore made, please acknowledge the receipt of this letter at your convenience, and we will consider the contract for sawing closed.

The $3 per thousand feet saw bill before mentioned to cover costs of piling lumber, use of dock, and all other charges upon said lumber. The Manistique Lumbering Co. to take said lumber from the piles hereinbefore mentioned.

Yours, very truly,

THE MANISTIQUE LUMBERING CO.,

[Signed] By R. A. ALGER, President."

"DETROIT, MICH., June 1, 1883.

The Manistique Lumbering Co., Detroit, Mich.—GENTLEMEN: Your letter of the 19th ult., addressed to the Weston Lumber Co. and the Chicago Lumbering Co., concerning sawing for the Manistique Lumbering Co., has been received and duly considered.

The Weston Lumber Co. accepts the proposition for sawing as named by you, reserving the right to manufacture into shingles such of the Manistique Lumbering Co.'s logs as may be deemed, in their judgment, the most profitable to do, and will charge therefor their regular rate per thousand feet for manufacturing the same.

THE WESTON LUMBER COMPANY,

[Signed] By ABIJAH WESTON, President."

The lumber was placed in piles upon the dock, and marked with plaintiff's name, and remained there for the purpose of becoming seasoned, which took from three months to a year, according to circumstances. The Manistique Lumber-

ing Company had no lumber-yard in Detroit, and paid no taxes in Wayne county. The Weston Lumber Company is a corporation engaged in the manufacture of lumber, and its mill is located on the west side of the Manistique river, near its mouth, in the township of Hiawatha. It has extensive piers and dockage facilities situated in that town. The Chicago Lumbering Company is also a corporation owning and operating a saw-mill located in the township of Manistique, near the mouth of the river of that name, and it likewise has extensive piers and docking facilities on the east side of the river. This company has an office for the transaction of its business, situated in the township of Manistique.

Mr. James McCaul testified that he was a stockholder, director and secretary of the plaintiff company, and that all the business of the corporation is directed from Detroit; that the buying of supplies, directing of the operations in the woods, and the selling of the lumber are attended to in Detroit; that all the business of the company is done there; that contracts for the sale of lumber are made there; and after the contracts are made for the delivery of the lumber, it is taken away; the corporation plaintiff delivers it to vessels; that, as it happened, all plaintiff's contracts for sale of lumber have been made to A. Weston & Sons, of Tonawanda, New York. Their vessels, the Tonawanda Barge Line, have, in most cases, taken the lumber. That when plaintiff makes a sale of lumber in its Detroit office, it notifies the Weston Lumber Company of that fact; that no written notice ever has been sent, but informally, giving the quantity that has to be shipped. At the last sale the representative, Mr. Mercereau, was present in the office, and he was notified that the lumber was sold to A. Weston & Sons. This witness also testified that the Manistique Lumbering Company had no other place in the State where it stored its lumber; that the Weston Lumber Company make reports to the Detroit office of shipments.

John Mercereau testified that he had resided in Manistique nine years, and is the only local director of the Manistique

Lumbering Company in the county; that he made reports to the office in Detroit of shipments of lumber made by him under the direction of the office in Detroit; that he also made a like report to A. Weston & Sons. They were made from the shipments, as it was measured onto the vessel. The scaler in the yard makes the measurements, and the books from which the scales are kept are in the office. This witness was the secretary and treasurer of the Weston Lumber Company, and the treasurer of the Chicago Lumbering Company, and a director of both companies. Aside from being the secretary and treasurer of the Weston Lumber Company, he had charge of the office work. He further testified that when he received notices from Detroit of lumber to be shipped he merely filed them in his office as reference for the price that the lumber is sold for, and that was all. He never notified anybody to carry out these orders and directions he received. The means whereby they were carried out were that A. Weston & Sons ordered the lumber as they wanted, "and we filled their orders." They send their orders to the Chicago Lumbering Company usually, and the superintendent of that company attends to the shipping of the lumber. He has charge of shipping all the lumber manufactured at the mills. It appears from the testimony of this witness that the Chicago Lumbering Company keeps an account of all the sawing done at each of the mills, as well its own as the two mills belonging to the Weston Lumber Company, and also the expense of tallying, and the amount of lumber shipped at Manistique sold by the plaintiff, the amount of lumber piled in the different piles, and the quantity, when known. Everything is entered upon the books of the Chicago Lumbering Company, and from these books the reports are made to the plaintiff at Detroit, monthly; and at the end of the year the expense of tallying is settled up. A. Weston & Sons notify and direct the Chicago Lumbering Company from Tonawanda the kind and dimension, as well as quantity, they desire shipped at Manistique of the lumber purchased from plaintiff, and this company fills the order from plaintiff's lumber on the dock, it enters the shipment upon its

books, and sends plaintiff a copy thereof, and another copy to A. Weston & Sons.

The witness, William H. Hill, who was the superintendent of the Chicago Lumbering Company, gives a very clear and distinct statement of the mode of operations at the mills, and the piling and shipment of lumber. He says that he has charge of shipping the lumber belonging to the Manistique Lumbering Company cut at the mills of the other two companies; that he receives his directions as to shipping principally from A. Weston & Sons of Tonawanda—sometimes by letter and sometimes verbally from Mr. Weston, when at Manistique—and he ships according to those orders; that the lumber is stacked up for seasoning before shipment. The average time would be three months, if before navigation closes; after that it would be six, nine months, or a year. That which is made in the latter part of the season remains over until the next shipping season.

It is an admitted fact in this case that the plaintiff had quite a large amount of lumber and logs in the township of Manistique, upon which a tax of $2317.74 had been assessed for the year 1884, and by virtue of the tax-roll and warrant, the defendant, as township treasurer, had seized the lumber replevied in this case; that plaintiff refused to pay the tax, claiming that it was not liable to be taxed upon said logs and lumber.

The statute (Act No. 9, Sess. Laws 1882) under which the property of plaintiff was assessed, reads as follows:

"Sec. 10. All personal property, except as hereinafter provided, shall be assessed to the owner in the township of which he is an inhabitant, on the second Monday of April of the year for which the assessment is made.

Sec. 11. The excepted cases referred to in the preceding section are as follows, viz.: *First.* All goods and chattels situate in some township other than where the owner resides shall be assessed in the town where situate, and not elsewhere if the owner or person having control thereof hires or occupies a store, mill, place for sale of property, shop, office, mine, farm, storage, manufactory or warehouse therein, for use in connection with such goods and chattels."

Another section provides that all corporations not paying a specific tax shall be assessed the same as natural persons, and their residence shall be deemed to be where their principal office for the transaction of business in this State is located.

The defendant claims that the personal property of the plaintiff which was assessed in the township of Manistique was properly and legally assessable there, and not elsewhere, for three reasons, specified in the statute above quoted, namely:

First. It hires and occupies a place for the storage of its lumber in Manistique township.

Second. It has a place for sale of property in that township; and

Third. The plaintiff, or person having control of its personalty, has an office in the township of Manistique.

The contract for sawing the logs which plaintiff runs down the Manistique river, and for piling the lumber on the docks, and the testimony relative to the disposition of the lumber so piled, strongly impresses me with the correctness of the first position taken. In the first place, in regard to the logs, which constituted a portion of the property assessed. They had reached their destination when delivered into the store booms of the Weston Lumber Company. They were then in control of the Weston Lumber Company, to be manufactured under the contract, and it occupied these booms as a place of storage, and used it as such in connection with the logs. I think, while these logs were stored in the booms of the Weston Lumber Company, they were legally assessable as the personal property of the plaintiff in that town. Of course, it is understood that I allude to such logs as were delivered to the Weston Lumber Company, and were stored in its booms, at the time the law requires property to be assessed for taxation, in the township of Manistique. As to the lumber there piled on the docks, the case is much clearer in favor of the legality of the assessment. By express stipulation between the parties to the contract, "the $3 per thousand feet saw bill, before mentioned, to cover costs of piling

lumber, use of dock, and all other charges upon said lumber; the Manistique Lumbering Company to take said lumber from the piles hereinbefore mentioned." Here, by the contemplation and intent of the parties, the lumber was to be stored upon the dock where piled, and compensation for the use of the dock for that purpose was included in the three dollars called the saw bill. It was piled upon the dock, and was to remain there until seasoned and fitted for market, precisely the same as it would be had plaintiffs rented or occupied a distinct and separate mill-yard for the same purpose. They sold the whole cut of their logs to A. Weston & Sons, of Tonawanda, but plaintiffs were to deliver the lumber to them at Manistique, on board their vessels, and from these piles. Weston & Sons directed as to the manufacture of the lumber, and they selected from the lumber so piled the kind and particular lumber to be delivered, under orders which they drew as they desired, in just the same manner as they would in making purchases from any other lumber-yard. The law required the supervisor to assess all property to the owner on the second Monday of April of the year in which the assessment is made. The proofs showed that lumber not sufficiently seasoned for shipment at the close of navigation was stored in piles on the docks until the next season of navigation opened. The lumber, therefore, which the supervisor found to assess had been upon the docks at least six months. During all the time it remained on the docks the title and possession of the lumber remained in the plaintiffs. It did not pass to A. Weston & Sons until delivery on board their vessels. The Chicago Lumbering Company acted for the plaintiffs in making such delivery. It received the orders from A. Weston & Sons; caused the lumber to be shipped according to those orders, at plaintiff's expense; furnished to plaintiffs and to A. Weston & Sons a bill of lading or statement, showing the quality, kind and price. It entered every transaction upon its books, which were the recognized source of information to all parties concerned in the lumbering business at that point. The number of the piles of lumber, and

the time when each was capped or completed, was made and kept, in form of a chart, by the Chicago Lumbering Company. In all these things the Chicago Lumbering Company acted as the agent of the Manistique Lumbering Company.

The facts appearing in the record are abundant to show that the Chicago Lumbering Company was the agent of the Manistique Lumbering Company, and, aside from making contracts for sawing and sale of lumber, its business was carried on through its agent at Manistique. This portion of its business was local in its character, and permanent in duration, so long as the business is or shall be carried on under existing arrangements.

These facts plainly distinguish this case from the former decisions of this Court, which are relied upon by the counsel for the plaintiff as sustaining its claim that the assessment upon which the tax was levied was illegal; and calls for a decision contrary to those. By so holding, no injustice is done to the corporation plaintiff. It is not denied that it owned the property assessed. Neither is any claim made that its property was overvalued. It was assessable therefor either at Detroit or Manistique; and it was not assessed in Detroit. We refrain from passing at this time upon the question as to whether this is the appropriate or even permissible remedy under the statute regulating the action of replevin, as no point is made upon it, and the parties have stated in their stipulation that it is their desire to litigate only the question of the liability of the plaintiff to be taxed in said township upon logs and lumber.

Under the facts disclosed in the record we hold that the plaintiff is liable for the tax assessed in the township of Manistique, and therefore

Reverse the judgment of the circuit court, and order a new trial.

CAMPBELL, C. J. and MORSE, J. concurred. SHERWOOD, J. concurred in the result.

MANISTIQUE LUMBERING CO. v. FRANCIS H. GRISWOLD.

Error to Schoolcraft. (Steere, J.) Nov. 13.—Jan. 6.

REPLEVIN. Defendant brings error. Reversed.

J. F. Carey and *F. O. Clark* for appellant.

Charles R. Brown for appellee.

CHAMPLIN, J. This case only differs from the case of the same plaintiff against *John L. Witter*, ante, p. 625, in the fact that the Chicago Lumbering Company had no office in the township of Hiawatha, which, under the facts, we think is immaterial. In all other respects the records in the two cases are the same, and the decision in that case necessarily rules this. For the reasons stated in the opinion in that case, the judgment of the circuit court is

Reversed, and a new trial ordered.

The other Justices concurred.

GEO. D. SISSON, FRANCIS LILLEY, HARVEY C. TAFT AND JNO. VERCADE v. EDWIN R. HOLCOMB AND WM. S. MOORE.

Builder's lien.

A builder's lien will not attach to any interest in real estate which defendant did not have when materials began to be furnished (How. Stat. § 8377); nor will filing notice of the lien operate retrospectively: the lien will not, as against bona fide purchasers, attach to property that has been transferred to them before the filing of notice.

Appeal from Kent. (Montgomery, J.) Nov. 18.—Jan. 6.

BILL to enforce lien. Complainants appeal. Affirmed.

Birney Hoyt for complainants. A builder's lien may be good where title is obtained after the building began: *Mountain City Market House v. Kearns* 103 Penn. St. 403; *Bell*

v. Cooper 26 Miss. 650; *Rollin v. Cross* 45 N. Y. 766; the lien relates back to delivery of material if notice of the intent to claim it was filed: *Dunklee v. Crane* 103 Mass. 470; *Gale v. Blaikie* 126 Mass. 274; *Morse v. Dole* 73 Me. 351; *Goble v. Gale* 7 Blackf. 218; *Chadbourn v. Williams* 71 N. C. 444; unless otherwise provided by statute: *Cotton v. Holden* 1 McArthur 463; *Ritchey v. Risley* 3 Or. 184; *In re Hoyt* 3 Biss. 436; purchasers subsequent to the beginning of building must take notice of the rights of those who furnish materials: *Reading v. Hopson* 90 Penn. St. 497; *Miller v. Kauffman* 14 Md. 173; *Mellor v. Valentine* 3 Col. 258.

Stuart & Sweet for defendant Moore.

CAMPBELL, C. J. This was a proceeding under the lien law, to establish a lien on a lot in Grand Rapids for lumber furnished defendant Holcomb, to be used in a house to be built on that lot. The building contract was made with a firm known as Bennett, Osburn & Co., and Holcomb agreed with them to furnish the lumber to be used by them The lot was owned by Edwin F. Sweet and between them there was a mere verbal understanding which never took written shape until December 27, 1883, when Sweet conveyed to Holcomb and took back a purchase-money mortgage for $1800, which included $1150 which he was to advance to help pay for the building. These papers were to be retained by Sweet to secure the completion of the work. No money was paid to Sweet, the whole purchase money being left on credit. In January, 1884, Holcomb desired to sell, and Sweet made a sale for him to defendant Moore, for $1000 over and above the mortgage, for which sum the property was to be taken with the building completed. To secure this, $338.50 was retained until adjustment, and on April 4, 1884, the whole balances were adjusted, and the business closed up. On the same day the deeds and mortgage were recorded. After the money had all been paid, and papers delivered, Sweet was first informed that complainants set up a claim for lumber furnished. On the same day complainants filed their notice of claim of lien, but this was done after the other papers were recorded.

Upon all the facts it is very doubtful whether complainants would have had any claim had Holcomb made no sale. Their contract is shown to have been made on or before December 1, 1883, and lumber was then furnished, and we are not satisfied that it was made upon any reliance but Holcomb's personal obligation. No reference was made to the lot by any description which could identify it. But at that time Holcomb had no right, either at law or in equity, to the land. There was, at most, a vague verbal understanding which at that time was not partly performed to any such extent as would create an equitable title. It was not until December 27 that anything definite existed, and at that time the larger part of the lumber had been furnished. The statute only gives a lien upon such interest as the owner had when materials began to be furnished. How. Stat. § 8377.

But there is a more serious difficulty. By section 8378 it is provided that no lien shall attach unless the claimant shall file a written notice of the claim under his contract, which may be for what is to be furnished as well as what is already furnished; and a copy of this notice is to be served on the parties interested in the land. The filing and service (it is provided by § 8379) shall not bind the landowners or parties interested in the land beyond the sum then due or to become due thereafter; and of such amounts notice and proofs must be given, as required by § 8380. And it is declared by § 8379 that the indexing and filing of the notice of intention to claim a lien "shall have the same effect as to notice as the recording of a mortgage."

It is impossible under this statute to hold that the Legislature meant to so far deviate from the long-settled policy of the laws as to allow the title to real estate to be hampered and clouded by claims of which no one has means of knowledge. The fair meaning of § 8378 is that until the proper notice is filed no lien shall attach to the land. Otherwise it would be open to the unreasonable construction that a lien might exist in the mere intention of the contractor, although remaining dormant and unheard of, and that on the last day allowed for filing the notice it could be filed and given retro-

active effect in fraud of all intermediate claimants. This is not a natural construction. It is definitely destroyed by the clause declaring the effect of the record. It is thereby put on the same footing as the recording of a mortgage, and under the recording laws, such a record could not affect previously vested rights obtained in good faith without notice of it.

Moore was clearly shown to be a bona fide purchaser, without notice, of the fee-simple of the land, and the lien as to him is void. The court below took this view of the matter and rightly dismissed the proceedings with costs.

The decree must be affirmed, with costs of this Court.

The other Justices concurred.

ELIZABETH NOBLE v. JAMES FAIRS, GEO. H. WHITE AND CHAS. B. JUDD. [58 637 / 58 641]

Suggestion of claim for mesne profits—Value.

1. The trial judge's finding of mesne profits, upon the suggestion of a claim therefor, is conclusive as to amount, if not excepted to, in a review on case made.

2. The suggestion of a claim for mesne profits (How. Stat. § 7831) is in effect a declaration in assumpsit for use and occupation, and may not only be made before defendant has received any payment but is not limited to the payment received.

3. The amount of rent paid may be shown as bearing upon the value of the use and occupation.

4. The suggestion of a claim for mesne profits is filed in a case already in court (How. Stat. § 7830) and the record in that case sufficiently shows the claimant's right to the premises, and identifies the judgment in his favor.

Case made from Kent. (Montgomery, J.) November 18, 1885.—January 6, 1886.

Claim for mesne profits. Claimant had judgment. Affirmed.

John E. More for claimant. The Supreme Court has nothing to review on case made if the record does not show what errors are relied on: *McMillan v. Cheese Factory* 23 Mich. 544; *Wilkinson v. Earl* 39 Mich. 626; and if a statement of them was not filed and served as required by Circuit Court Rule 84: *Tuxbury v. French* 39 Mich. 190.

Benj. C. Girdler and *Jas. A. Rogers* for appellant.

SHERWOOD, J. On the 28th of August, 1883, the plaintiff brought ejectment against the defendants to recover lot 6 in Boynton & Judd's Lake addition to the city of Grand Rapids, and on January 31, 1884, judgment was rendered in her favor. On the 18th of June thereafter, the plaintiff filed in the case, in pursuance of How. Stat. § 7829, a suggestion of claim against defendant Charles B. Judd, for mesne profits of the lot in question for the time he occupied it or controlled possession thereof. The issue joined on this suggestion was tried before Hon. Robert M. Montgomery, presiding in Kent circuit, without a jury; and on the 24th day of April, 1885, he rendered a judgment in favor of the plaintiff and against the defendant Judd for ten dollars damages, and costs of the suit. This judgment we are asked to reverse.

The proceedings at the circuit are now before us for review upon a case made containing, besides the record proper, the evidence taken upon the trial and the findings of the circuit judge thereon. From the findings of fact it appears: (1) Plaintiff was the owner of the lot in question from May 8, 1882, up to the time her suggestion was filed. (2) From May 8, 1882, until September 20, 1883, defendant Judd occupied the lot by his tenant, James Fairs, and enjoyed the mesne profits thereof during that time. (3) The value of said mesne profits for the time stated was ten dollars. (4) Judd did not receive any part of the sum due him from Fairs for the rent of the lot until after plaintiff filed her suggestion of claim for mesne profits. From these findings, the circuit judge's conclusion of law was that plaintiff was entitled to recover from Judd the said sum of ten dollars

and costs of suit. Judd took no exceptions either to the findings of fact or the conclusion of law.

Circuit Court Rule No. 89 provides that, within four days after the filing of the completed finding of facts and conclusion of law, any party aggrieved may allege in writing his exceptions to the matters of law embodied in such finding, and such exceptions shall be settled in the same bill, which may contain the exceptions taken during the trial, and in the same manner with bills in other cases. The defendant has, however, made and filed the statement of errors relied on as required by Rule 84, and we must therefore look into the record to ascertain what foundation may exist for those presented to this Court by counsel for defendants.

Defendants' counsel claims that plaintiff's proofs are not such as will authorize a recovery. The testimony as to the value of the annual use of the property was from one of the defendants, to whom the defendant Judd rented the property, and is very strong. The court in his findings places it at the lowest sum testified to, and his finding, not having been excepted to, is conclusive upon that subject.

Defendant further insists that the rents, not having been received at the time the action was commenced or suggestion made, no recovery could be had. This view, however, cannot be sustained. The suggestion authorized by the statute is, in substance, a declaration in assumpsit for use and occupation. How. Stat. § 7831. It is for the value of the use of the premises, while withheld by the defendant, that the plaintiff is entitled to recover, and what he may have received for such use. While it is proper testimony upon the subject of its value, it is neither controlling nor binding upon the plaintiff. She would certainly be entitled to recover that amount and as much more as she could show the value of the use of the premises to be worth. Our statute providing for the recovery of mesne profits is taken from the New York statute on the same subject. See 2 N. Y. Rev. St. (4th ed.) 570, §§ 43–51. Section 47 of our statute (How. Stat. § 7833) is in exactly the same words as section 47 of the New York statute. The New York courts hold that the

action for mesne profits under the statute is substantially an action for use and occupation. *Holmes v. Davis* 19 N. Y. 488, 495; *Woodhull v. Rosenthal* 61 N. Y. 382, 394. In the latter case the court say: "The action for mesne profits is now, in substance, an action for use and occupation, and the complaint is to be drawn on that theory; and the court is to render judgment, as in actions of assumpsit for use and occupation."

The first finding of the court determined the right of the plaintiff to the rental value, and the length of time she was entitled to the same, and this finding can not be disturbed by this Court.

There is nothing in the objection that the suggestion does not sufficiently describe the judgment in ejectment. The statute requires it to be filed in that case, and it becomes a part of the record thereof. How. Stat. § 7830. That record shows the plaintiff's right to the premises, and no other testimony than that contained in the record was necessary in this case, to show her expulsion therefrom.

Upon the facts and findings appearing in this record, we think the judgment was fully warranted, and it must be

Affirmed, with costs.

CAMPBELL, C. J. and MORSE, J. concurred.

JULIA NOBLE v. JAMES FAIRS ET AL.

Case made from Kent. (Montgomery, J.) Nov. 18.—Jan. 6.

Claim for mesne profits. Defendant had judgment. Affirmed.

John E. More for claimant.

B. C. Girdler and *J. A. Rogers* for defendants.

SHERWOOD, J. This is an action for mesne profits. The judgment in ejectment was rendered January 31, 1884, in Kent circuit. On the 18th day of June following plaintiff filed in the cause, pursuant to How. Stat. § 7830, a suggestion

of claim against defendant Charles B. Judd for the mesne profits of the lot in question, enjoyed by him. The issue joined on this suggestion was tried before Hon. Robert M. Montgomery, without a jury; and on the 3d day of November, 1884, judgment was rendered in favor of plaintiff and against defendant Judd for $73.63, and costs of suit. It is this judgment that this Court is now asked to reverse.

The facts in this case are so nearly the same as those in the case of *Elizabeth Noble v. James Fairs et al.*, ante, p. 637, decided at the present term of this Court, as to raise no questions of law not already considered and disposed of in that case, which clearly rules this; and

The judgment will therefore be affirmed with costs.

CAMPBELL, C. J. and MORSE, J. concurred.

MATTER OF OPENING FIRST STREET, IN GRAND RAPIDS.

(GRAND RAPIDS v. GRAND RAPIDS & INDIANA R. R. CO.)

Street opening across railway track—Condemnation proceedings—Vicinage—Jurors—Parties—Damages—Estoppel.

1. A street opening law is not made unconstitutional by the omission to provide that before proceedings can be taken thereunder, there must be some attempt to get the permission of the owners of property to be affected.

2. The objection that before proceedings to open a street were taken no attempt was made to obtain the consent of property owners cannot be raised on review in the Supreme Court if not made at an earlier stage.

3. The "vicinage" from which a jury of freeholders in a street opening case must be drawn (Const., Art. xviii, sec. 2) may be limited by statute to the municipality instead of including the county at large; but in such case the whole municipality will be within it.

4. The presumption is against the existence of any such bias on the part of a street opening jury as will make its verdict unfair.

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5. The essential duty of a jury in a street opening proceeding is to pass on the necessity for the work, and not merely the necessity of taking the land for it.

6. Act 124 of 1883 for taking land for streets (1 How. Stat. pp. 1295–1300) is not clearly open to the objection that it does not require the necessity of the improvement to be determined by a jury. And if the provisions for special taxation districts are invalid, they do not invalidate the entire act, since a general tax is also contemplated.

7. The incompetency of some of the jurors returned by the sheriff does not affect the array if those sworn were competent.

8. The mortgagees of the franchises and easements of a railway company need not be made parties to a proceeding to condemn a right of way across its track for a street, if the track is not disturbed and the company is left in control of the road.

9. The proper amount of compensation for land taken in condemnation proceedings cannot be sworn to by witnesses, but must be found by the jury from proper data.

10. Compensation for, rather than the value of, the land taken is what should be allowed in condemnation proceedings, and includes more.

11. The damage to a railroad from opening a street across it includes the expense entailed by the crossing, and may involve outlays for making it safe.

12. How far a city is estopped from opening a street across a railway track by its previous course in inducing the railway company to lay its track on the faith that the street would not be opened;—and how such estoppel, if any, is to be pleaded—Q.

Appeal from the Superior Court of Grand Rapids. (Parrish, J.) November 18, 1885.—January 6, 1886.

Proceedings to open a street. The Grand Rapids & Indiana R. R. Co. appeals. Reversed.

T. J. O'Brien and *Jas. H. Campbell* for appellant. Negotiations with property owners before taking proceedings to condemn their land are jurisdictional: *C. & M. L. S. R. R. Co. v. Sanford* 23 Mich. 418; *M. C. & L. M. R. R. v. Clark* 23 Mich. 519; *Arnold v. Decatur* 29 Mich. 77; *Morseman v. Ionia* 32 Mich. 283; *Whisler v. Drain Com'r* 40 Mich. 591; *Laue v. Saginaw* 53 Mich. 442; the oath administered to jurors in a street opening case must be co-extensive with their constitutional duty: *Powers' Appeal* 29 Mich. 504; *Bowler v. Drain Com'r* 47 Mich. 155.

City Attorney *J. W. Ransom* for appellee.

CAMPBELL, C. J. The appeal in this case is brought to review certain proceedings had under the general law and not under the charter of Grand Rapids, to open a street in extension of its original bounds. The law in question is one passed in 1883, to provide uniform methods for the appropriation of property in cities and villages, which was approved May 31, 1883, and is printed in 1 How. Stat. on pp. 1295–1300.

On the 22d of September, 1884, the common council of Grand Rapids adopted resolutions declaring the necessity of opening First street, and widening and extending it of a uniform width of sixty-six feet from the west line of Broadway to the west boundary of the city, including in the description of the land to be taken a part of appellant's railway, thirty-three feet by sixty-six feet. The city attorney was ordered to proceed in the Superior Court of Grand Rapids, and accordingly brought these proceedings.

The appellant appeared by attorney, and was represented throughout the proceedings. Upon December 30, which was the original day of hearing, various objections were made to the sufficiency of the steps taken to give jurisdiction, and also to the validity of the statute in question. A panel of twenty-four freeholders was ordered, from which six names were struck on each side. Of the remaining twelve, who were duly summoned, three were excused, and two were found not to be freeholders. Five competent talesmen were called, and the jury thus made up acted and found a verdict. Some challenges were made to jurors for remoteness.

Evidence was given by appellant of a trust mortgage of its road, and all its property and franchises, to secure the payment of bonds, which was in the usual form of railway mortgages, and retained to the appellant the ordinary control of its affairs until dispossessed. Objection was then made that until the trustees were made parties the proceedings were illegal. This was overruled.

Two witnesses were sworn upon the damages of appellant, and the questions asked and allowed against objection to be answered, were general as to "what amount of compensation"

ought to be paid to appellant, and the witnesses gave in reply each a single round sum,—one saying $300, and the other $125. The jury gave $200.

The jury viewed the premises, but were charged that in fixing the compensation they must be governed by the evidence and not by their own arbitrary opinions as to what should be awarded. Some further instructions were given on the general question, which are not important as to appellant. The effect of the charge on the duty of the jury in determining necessity will be referred to, as far as required, in considering that feature of the record.

After the verdict a motion for a new trial was made, based upon the legal insufficiency of the action of the common council, the disregard by the jury of the evidence, and upon a showing by affidavit that appellant was induced to maintain its track and build a station in that part of the city by an agreement made by the city in conformity with an understanding with the land-owners in the vicinity, that First street should not be continued across the railroad. This motion was also denied.

As the record stands and was presented, we do not think it proper to discuss any fundamental questions not necessary to a decision. While some suggestions are made which are not lacking in force, we are not disposed to enter ourselves, without a more exhaustive argument, upon a search and comparison of all the possible provisions of law that may have a bearing on possible cases. It is the duty of courts to see that no one is wronged by proceedings to deprive him of his freehold, and to this end the appellate power given by the statute is of the broadest character. But it is quite as important to construe laws, where it can be done fairly and without violence to their terms, in such a way as to give them operation for lawful ends, if practicable. And while some statutes are purposely made complete in themselves and independent of others, nevertheless most of them form part of a system, and may be construed in that view.

The present statute (No. 124 of 1883) was intended to provide a method applicable to cities and villages generally,

whereby lands may be condemned for public uses. It is a modification of two successive statutes passed in 1877 and 1882, to reach the same results. It provides, after the municipality has determined upon the policy of a public improvement, for a jury of freeholders from the municipality to determine the public necessity and the proper compensation for land, taken and it purports to exclude from the consideration of the jury any allowance of benefits to set off against the value. In this respect it is fairer than its predecessors. But it is claimed that the statute is not effectively framed to secure the just results intended.

It is first urged that no showing is required that attempts have been made to get private consent and failed. Many statutes have required the failure of such an attempt to be set out as a ground of jurisdiction, and it is certainly proper that proceedings in invitum should not be had unless necessary. But we are not able to find authority for holding a law unconstitutional for not expressly providing that this should be made to appear. How far it may become material in the subsequent inquiry we need not now consider. The objection was not made at an early stage of the proceedings and it cannot properly be made now.

It is claimed that the Constitution requires a jury of freeholders residing in the vicinity of the property, and that this vicinity means the county at large and not a part of the county. This statute requires the jury to come from the municipality. That certainly is more definitely the vicinage, according to common-law principles, than the county would be. And we held in *People v. Hurst* 41 Mich. 328, that in a municipal court the venue might lawfully be municipal. During the hearing below objection was made to some jurors as living too far away, although within the city. In our opinion the city was all within the vicinage. No question is raised concerning the existence of any bias in fact which would stand in the way of a fair verdict. It must be presumed no such difficulty appeared.

A more serious question is raised by the claim that the jury were not required to find the necessity for the opening

of the street, but only the necessity for taking the land in question for the street declared necessary by the council.

This is a practical difficulty which has caused much trouble. It has often happened that juries have been led or allowed to evade their own responsibility in passing on the necessity for the work itself. That is, as we have frequently pointed out, their most essential duty, because, if it is taken for granted the road is to be laid out, the position of the particular parcels on the line is fixed when the road is fixed. The object of the Constitution is to prevent all needless appropriations of private property, which are too often made for ends in which the public are in no strait, and for private fancy or emolument rather than the general welfare. If this statute bears such a meaning it would be difficult to uphold it.

The first section very plainly requires the uses to be within the Constitution, and the second requires a solemn declaration by the municipality of the necessity of the public improvement itself, as a foundation for proceeding further. The petition is to the same effect. Section 3. The oath of the jury is to determine "whether there is necessity for taking for the use or benefit of the public" the property described, which includes the whole parcel within the improvement. The form of verdict set out in the statute is not so definite as it might be, inasmuch as it adds "for the proposed public improvement." But when we take the whole statute together, it evidently means such a finding as the Constitution warrants. It requires the judge to instruct the jury upon the law of the case, and the charge ought to leave no doubt concerning the duty to be performed by that body. Any failure to make this clear might be made ground for objection and review, but we find no such defect in the statute as to render it void.

It is also objected against the statute that it provides no means for raising the money to pay for the lands taken. This is not, in our opinion, a well-founded objection. The statute (section 18) provides for laying before the city council evidence of the finding, when confirmed. It then provides that the council may, if they believe that a certain part of the city

will be benefited by the improvement, have the whole or any just portion, assessed on that part upon owners and occupants of real estate in proportion as near as may be to the advantages of each lot, which assessment shall be made as is provided in case of grading streets. But by section 16 the council is bound within a year to provide means in some way, and is authorized to do so by borrowing from other funds, or otherwise.

The objections made on the argument all apply to the provisions for laying the tax on a particular section of the city. But as it may be raised by general tax, and must be if not otherwise provided, the invalidity of these special provisions, if they are invalid, cannot affect the other parts of the act. If any special district should be set apart and assessed, the owners of the property so assessed may have occasion for a remedy, but no one else appears likely to suffer.

The sheriff having returned a summons of twenty-four qualified freeholders, the fact that some of the jurors turned out to be incompetent could not affect the whole array, any more than in other cases where challenges lie for incompetency. The jury sworn contained none but resident freeholders, and there is no fraud shown.

We are not satisfied that under such a mortgage as was made by the appellant, including franchises and easements, there was any necessity of bringing in the mortgagees. Nothing but a right of way across the track was condemned and the track is not disturbed, and we discover nothing which would entitle the mortgagees to share in the compensation, so long as appellant has control of the road.

The testimony of Tuttle and Page concerning the amount of compensation which should be given was clearly incompetent. That amount was the very thing which the Constitution refers to the jury, and they must make up their own conclusions from proper data. What data were laid before the jury we have no means of telling, but they had a right, if the charge was correct, and they evidently acted on it, to take the testimony of those two witnesses as a basis for their action, and they seem to have settled the conflict by substantially averaging it.

If counsel for the city correctly interprets the result, the land crossed was reckoned without any reference to anything but its value as isolated. But the statute in question has rightly discarded the term "value," sometimes used in similar statutes, for the term "compensation," which is the constitutional word, and means much more. The damage done to a railroad by having a highway run across it must necessarily include all the additional expense entailed by such a crossing, which in a city may involve a considerable outlay in making the crossing safe, and providing guards against accident. Under the Constitution there must be just compensation, and this cannot be denied by law or by verdict.

How far the action of the city in leading the appellant to lay out money and fix its location on the faith that First street should not be opened would estop the corporation from taking the present proceedings was not so presented or argued that we care to decide it on this record. The fact does not seem to have been brought to the notice of the court until after verdict. It might have been set up on the hearing whether a jury should be summoned, if relied on as a bar, or it might also have been shown on the hearing before the jury, when a proper charge could have been asked, and the court could have put the question in shape to be reviewed here, as a bar, in law, or as a fact negativing necessity, and possibly as bearing on the measure of compensation on account of enlarged expenditure. We give now no opinion on any of these points, as in case of a future hearing the subject can be more directly presented. Had there been no other defect, we might have felt bound to grant a new trial in order to have this defense considered, as counsel by affidavit explained the delay. But as other defects exist it is better to have the facts fully brought in and ruled upon.

We think the Superior Court had jurisdiction, so far as any objections argued before us are concerned, and therefore, in setting aside the verdict with costs, we send the case back for a new trial.

The other Justices concurred.

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TALCOTT A. SHAVER v. JNO. C. INGHAM, JNO. W. LESLIE ET AL.

Master and servant—Dismissal for disobedience—Evidence of conversations —Irresponsive testimony.

1. The fact of a conversation with a third person in the absence of the opposite parties to a case may be admissible to show the date of a negotiation with them when it would not be to show the terms of the negotiation itself.

2. It is not responsive to a question asking for a conversation held at a specified date, to add statements made by one of the participants to the other at a subsequent date.

3. The omission to strike out irresponsive testimony to which no objection is made and on which no exception is based is not ground for reversal, especially if the court has already refused to receive such testimony.

4. An employer has no arbitrary power to dismiss his employee for a disobedience to orders that involves no serious consequences and is not "willful" in the sense of being perverse, insubordinate or unreasonable; and its reasonableness is for the jury. Nor can disobedience be made a pretext for dismissal apart from the injury it causes. Whether even a menial or domestic servant can be dismissed for mere harmless disobedience—Q.

Error to Berrien. (A. J. Smith, J.) Nov. 19.—Jan. 6.

ASSUMPSIT. Defendants bring error. Affirmed.

G. M. Valentine and *Van Riper & Worthington* for appellants, as to the right to dismiss a servant: *M'Millan v. Vanderlip* 12 Johns. 165; *Lantry v. Parks* 8 Cow. 63; *Marsh v. Rulesson* 1 Wend. 514: 1 Pars. Cont. 521; *Jennings v. Lyons* 39 Wis. 553; *Leopold v. Salkey* 89 Ill. 412.

A. H. Potter and *N. A. Hamilton* for appellee.

CAMPBELL, C. J. Plaintiff sued and recovered damages for his unauthorized discharge as foreman of defendants' fruit package factory at Benton Harbor. His claim was that on the first of March, 1884, having been previously employed, a new arrangement was made for one year, at two dollars

and a half a day. Defendants claimed that he was not employed for any fixed period, but was given employment when needed. He continued in the place of foreman until September 11, 1884, when he went to Lawrence to look after the foundation of a house that was being built for his mother, and just before leaving for that purpose, which was expected to detain him less than a day, he was discharged. There is a conflict of testimony on the facts,—he stating that the discharge was without any cause mentioned, beyond the will of defendants, and defendants claiming that he was discharged for going away against their desire.

The two important issues were therefore—*first*, the character of his employment as fixed or optional, and *second*, the lawfulness of his discharge.

Upon the first of these issues the plaintiff in the course of his testimony fixed the time when the bargain was made by reference to negotiations he had carried on with various other persons, and among others one Colby, who had sought to employ him, and whose treaty was defeated by the new arrangement. It was in substance that on one of the latter days of February and first day of March, plaintiff postponed a final answer to Colby until he should come to some definite conclusion whether or not to continue work with defendants, and that on Monday the third day of March, after he came to such an arrangement, he gave Colby his final answer declining to serve him.

It was drawn out on cross-examination that plaintiff's mind had been recalled to the time of his contract by remembering negotiations with other parties who wished to employ him, and by the answers he gave them. On re-direct examination he was asked: "How are you able to fix the time of this contract with Mr. Leslie as being the first day of March, with reference to Mr. Colby?" This was objected to, and exception taken to overruling the objection. He answered: "By telling Mr. Colby that my time is out;—that my time was out. If I don't make an arrangement with them, I will commence with you. I will let you know on Monday. (This was Saturday.) My time was out yester-

day." The court had already ruled that the conversation with Colby concerning the nature of the engagement with defendants, being had in their absence, could not be received We can see no reason why the fact of a conversation was not proper, or why defendants could be damaged by such a statement. If it was not shown to refer to an agreement for a year, it amounted to nothing except as a question of dates, and as to that it was competent.

When Mr. Colby was placed on the stand he was asked: "What was the conversation the first day of March?" This was objected to, and exception allowed to overruling it. The court held it was admissible to fix the time. Colby's answer to this question, so far as stating what plaintiff said, was that, when Colby asked if he would work for him, plaintiff answered, "My time is out, but I cannot tell you till Monday." There was no error in this. Colby however went on without further inquiry and mentioned that on Monday or Tuesday plaintiff told him he had hired for a year. This was not responsive to the question, but defendants did not object to it, or ask to strike it out, and no exception is based on it. When Colby was asked by plaintiff's counsel to relate the conversation had on Monday or Tuesday, the court at once refused to allow it; and would no doubt have ruled out the volunteered answer, if asked to do so.

Exception was also taken to a further question, whether on Saturday plaintiff gave any reason why he could not tell Colby whether he would accept his offer of employment. The answer given was that he had not yet closed his bargain, but would let him know on Monday, or the first of the week. There was nothing in this which could prejudice defendants.

The other errors assigned relate to the refusal to charge as requested, concerning defendants' right to dismiss plaintiff.

Upon the facts of the discharge plaintiff and Leslie, one of the defendants, are the only direct witnesses, although there is some other testimony as to admissions. According to plaintiff's testimony Leslie told him that defendants had made up their minds they had got through with him, and

on being asked for reasons, answered: "No words or argument about it." According to Leslie, the plaintiff's desire to go on his errand was known to the defendants, as he told Leslie that morning about it. Leslie says he urged him to stay, saying they could not spare him. "It was a very busy time, and he insisted on going. Had some business at Lawrence, I think he said, that he must attend to. I went to the other members of the firm and talked with them." He saw Shaver again afterwards, and says: "I went to Mr. Shaver after that and asked him if he insisted on going. He said that he did. I told him if he insisted on going, if his business was more important than ours, that he must attend to it at the neglect of ours, that he could go and stay; that he could consider himself discharged under these circumstances, and he could go to the office and get his pay. He asked me some question in regard to it, and I told him I didn't wish to argue the question. That was the decision. I didn't wish to quarrel with him about it at all. It is not worth while to quarrel about it. It is the final decision of the case, and I turned and left him."

The court below left it for the jury to say whether the plaintiff was discharged without reasonable cause. No exception was taken to the charge as given, but defendants rest their case on the refusal to give two out of nine specific requests to charge, which were as follows:

6. If you should find that the plaintiff left defendants' employ without their consent, when his services were required, then you are instructed that that was a good cause for his dismissal.

7. If the plaintiff was informed on the day he left, by defendant Leslie, that if he went away that he might consider himself discharged, and if you find he did go, then he cannot recover.

It is somewhat questionable whether either of these requests is strictly borne out by the testimony. They must be read, in order to make them applicable at all, in accordance with Leslie's own showing. The going was no more than on an errand of short duration. There is no testimony tending to show a voluntary relinquishment of service, and if the sixth

request meant any such thing as that, it was not proper. But from the argument we understand that it was meant to cover the facts, and to apply to the temporary departure without leave.

Some cases were cited which are claimed to hold that the departure of a servant for a temporary purpose against the will of the master, authorizes dismissal without reference to the reasons existing. The case of *Turner v. Mason* 14 M. & W. 112, was one where a servant was dismissed for going to see her sick mother, who was supposed to be in danger of death. In that case the court called attention to the fact that it was not averred that the master was informed of the extreme character of the exigency, but the judges nevertheless expressed themselves in favor of his absolute right of dismissal whether so informed or not. No other case seems to go quite so far, but "willful disobedience" of orders is the general phrase used as justifying a discharge; and in some few cases the courts have gone quite far in requiring an extreme rule of duty.

But this doctrine, which is certainly a harsh, if not an inhuman one, has not received entire favor, and has been confined to menial domestic service. In employments not menial and domestic, the case has been left to the jury with more or less latitude for the exercise of good sense.

In *Fillieul v. Armstrong* 7 Ad. & El. 557, the failure of a teacher to return within a day or two after vacation, although it was strongly urged that the course of the school was seriously interfered with, was held not sufficient when set up in a plea to answer the case made by the declaration, and no ground to justify the discharge. The language of the court is clear on the insufficiency of the showing, and it was suggested that even if actual loss was shown, it would be the ground of a claim for deduction of wages, and not of discharge, where there was no serious moral wrong. In *Callo v. Brouncker* 4 C. & P. 518, the jury were told that there must be moral misconduct, pecuniary or otherwise, willful disobedience or habitual neglect, to justify dismissal from service for a year; and although both disobedience and ne-

glect of orders were shown in several instances, the court would not let the jury act upon them as serious enough to be sufficient. In that case the servant was a travelling courier. In *Edwards v. Levy* 2 F. & F. 94, where there was a single act of neglect accompanied by insolence, the court held the plaintiff's case should go to the jury, as this could not be held as matter of law ground for discharge.

The cases of *Cussons v. Skinner* 11 M. & W. 161, and *Smith v. Allen* 3 F. & F. 157, in addition to requiring disobedience to be willful, call attention to another element of decision which is especially applicable here. It is held not only that a sufficient cause must be shown, but also that the wrong was actually the real cause of dismissal, and not merely an ostensible reason.

Willful disobedience, in the sense in which the word is used by the authorities, means something more than a conscious failure to obey. It involves a wrongful or perverse disposition, such as to render the conduct unreasonable, and inconsistent with proper subordination. We are not prepared to hold that even in what is known as menial service every act of disobedience may be lawfully punished by the penalty of dismissal and the serious consequences which it entails upon the servant put out of place. No doubt domestic discipline may be closer than that in business employments. But there must be a limit to the arbitrary power of masters.

In such employments as involve a higher order of services, and some degree of discretion and judgment, it would in our opinion be unauthorized and unreasonable to regard skilled mechanics or other employees, as subject to the whim and caprice of their employers or as deprived of all right of action to such a degree as to be liable to lose their places upon every omission to obey orders, involving no serious consequences. It appeared in the present case that previous absences by permission had not created any confusion in the business, and it might have been thought and evidently was thought by the jury, if it was not so plain that they were bound to think so, that such a short absence as plaintiff desired could work no mischief and do no wrong. The fact that plaintiff was paid

by the day would furnish some aid in getting at such results. It is not pretended that a day's absence from sickness would be a serious drawback. (The only possible foundation for dismissal must rest on the idea that the spirit of insubordination was such as to show that plaintiff could not be relied on for substantially thorough service. The unreasonableness of his conduct was therefore properly for the jury to determine, if it could be left to them at all, and we have no doubt it could not be determined against the plaintiff by the court.) In the recent case of *Jones v. Graham & Morton Transportation Co.* 51 Mich. 539, we held that an employer cannot be the final arbiter in his own behalf whether a sufficient cause of dismissal has arisen, but in dismissing he must assume the responsibility of showing justification. That case is in point here, and the English cases cited, which go as far as any common-law authorities in favor of discipline, are not repugnant to it.

But we cannot overlook the other question. Upon the testimony of Mr. Leslie, standing alone, there is no conclusive showing that the occasion of plaintiff's visit to Lawrence was the moving cause, or anything more than an excuse for the summary and arbitrary course taken on his dismissal. Plaintiff's testimony is very clear that it was not the cause. The court could not have given either of the charges asked for, without losing sight of considerations which seem to us important and significant.

The judgment must be affirmed.

The other Justices concurred.

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4. An order for the sale of assigned property by a receiver is final and appealable where it provides for an entire disposal of the trust funds, and may affect the claims of creditors and others, and where also it contains special and unusual provisions as to notice of sale, and sale in large lots, and allows to some claimants but denies to others interested certain privileges of buying on credit, and allows sales without mortgage or other property security. *First Nat. Bank v. Barnum Wire Works*, 315.
5. An appeal in chancery can be dismissed for want of jurisdiction only. *Id.*
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3. Substituted service of a writ of attachment by leaving a copy with defendant's wife at his last place of residence will not give a justice jurisdiction over his person; and a personal judgment on such service is void. *Rolfe v. Dudley*, 208.
4. It is no bar to the dissolution of an attachment upon property the right to which defendant has not relinquished, that an execution has meanwhile been levied upon it in favor of a third party. Johnson v. DeWitt 36 Mich. 95 overruled. *Drs. K. & K. v. P. & T. Job Printing Co.*, 487.
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3. A motion to strike from the files is the proper procedure for getting rid of a document that is a nullity. *Id.*
4. A default for failing to file special bail may be disregarded if prematurely entered; and if an attempt in good faith to file such bail has been made, but the bail turns out to be a nullity, defendant should be allowed a farther reasonable opportunity to file it and to perfect it if excepted to. *Id.*
5. Where a convict's bail has been extended from time to time by successive orders suspending sentence and directing him to appear at a stated time to receive it, his sureties are released if court should not

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BANKS AND BANKING.

Where a draft is deposited in a bank without instructions that it shall be treated as a separate fund, and is forwarded by the bank to its correspondent for collection and deposit to its credits and the fund in the correspondent bank is continually changing by reason of drafts and deposits so that no specific moneys can be identified, the original depositor cannot, on the failure of the first bank, reclaim the entire amount of his draft from funds then remaining in the correspondent bank to its credit; nor can he recover more than his pro rata share like any other creditor. *Edson v. Angell*, 336.

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2. A lumberman's order in this form: [Date and address] Pay to the order of H. F. the sum of ten dollars, and charge the same to Camp 8. [Signature], is in essentials a draft, and must be accepted before it will sustain an action. *Id.*
3. Extension of a note for a consideration and without the consent of a surety thereon releases the surety if the creditor knew the fact of suretyship. *Stevens v. Oaks*, 343.
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BURGLARY.
An interval between two successive entrances of the same house on the same night by the same burglar does not prevent proof of what took place at the second visit in a prosecution for the crime; the two breakings constitute one continuous burglary, even though it began to be light before the burglar left the house the second time. But even if the second entrance were a separate transaction the fact could be shown by way of accounting for the whereabouts of respondent during the night. *People v. Gibson*, 368.

Capias—time to file special bail, 242 (1).
waiver of objections to affidavit for, 187 (1).
CARRIERS.
Passengers about to embark upon a boat and with little time to spare are justified in assuming, if they do so in good faith, that they may safely follow the directions of the officers of the boat in getting on, unless there is very obvious danger in doing so. And if it takes an expert to define the duty of the officers, the presumption in the passenger's favor is all the stronger. *Clinton v. Root*, 182.
Case made—conclusiveness of finding, 637 (1).
Cattle-guards—insufficient, injury from, 200 (1–3).
Certificate—of assessor or board of review, 49 (2).

of tax-purchase, as clouding title, 542 (2).
of tax-purchase, assignment of, 542 (3).
of testator, as to advances to heir, 152 (1).
CERTIORARI.
Certiorari does not lie to review proceedings under How. Stat. ch. 295, to compel a public officer to surrender the books and papers of the office to his successor, unless a want of jurisdiction appears, or a gross violation of the statute. *Curran v. Norris*, 512.
Character—of witness, judge's comments on, 368 (3).
Charge to jury—recital of facts in request, 424 (2).
refusal of requests, 58 (6).
to be considered as a whole, 507 (2).
Chattel—mortgage of, See MORTGAGE.
mortgage of vessel, replevin by, 288 (1).
Cities—See MUNICIPAL CORPORATIONS.
Claim—for mesne profits, 637 (2).
against estate, when need not be proved, 77 (2, 3).
Cloud on title—what creates, 542 (1).
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cannot be created by owner of title, 348 (3).
Commissioners—highway, letting contract, 245.
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Common counts—evidence of assignment excluded, 404 (1).
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Compensation—for land taken in condemnation proceedings, 643 (9, 10).
Compound interest—mortgage not re-instated to secure, 138 (2).
Condition—to conveyance, default in, 348 (4).
Confirmation—void guardian's deeds not confirmable, 280 (1).
Consent—of one partner to other's acts, 208 (4).
Consideration—burden of showing failure of, 274 (4).
for abatement of debt by mortgagee, 177 (1).
for assignment of certificate of tax purchase, 542 (2, 3).
CONSTITUTIONAL LAW.
1. Act 186 of 1885 "to prevent deception in the manufacture and sale of dairy products, and to preserve the public health," is unconstitutional in going beyond the title (1) by making such manufacture and sale a crime; (2) by providing that the State shall purchase the manufacturing machinery; (3) by requiring the Board of State Auditors to allow the sum judicially decreed to be paid for such machinery, and thereby interfering with its constitutional prerogative to pass on any claims against the State. *Northwestern Mnfg. Co. v. Wayne Circuit Judge*, 381.
2. Whether the use and manufacture of oleomargarine can be prohibited by the Legislature—Q. *Id.*
3. The constitutional provision which confines statutes to the purview of their titles is for the purpose of preventing the Legislature as well as the people from being misled as to their contents. *Bissell v. Wayne Probate Judge*, 237.
4. The constitutional provision that the provisions of an act must be covered by its title was mainly to protect the Legislature from passing laws not fully understood. *Thomas v. Collins*, 64.
5. The Legislature cannot extend the scope of the title of an act by so defining it in the body of the act as to make it cover more than the natural and proper meaning of the words will warrant. *Northwestern Mnfg. Co. v. Wayne Circuit Judge*, 381.
6. The Legislature cannot validate acts that are void for jurisdictional defects. *Houseman v. Kent Circuit Judge*, 364.
7. The three branches of government are to be kept as distinct as possible; and legislation is invalid that attempts to confer on one powers that under the Constitution belong to another. *Id.*

8. Matters of individual conscience, including opinions on political subjects, cannot affect a citizen in any of his legal and political rights. *Attorney General v. Detroit Common Council*, 213.
perpetuity of local municipal institutions, 213 (1).
political opinions not a condition to holding office, 213 (5).
popular power of choosing officers not to be delegated, 213 (5).
municipal right to local self-government, 213 (5).
Detroit election inspectors' act invalid, 213 (5).
"office or public trust" defined, 213 (5).
"test" for office, 213 (5, 6).
Construction—of commercial guaranties, 386 (5, 6).
of contracts, in light of circumstances, 386 (2).
of remedial statute, 156 (2).
of "expenses and interest," 441.
of will, costs to obtain, 533 (2).
of will, should carry out testator's intent, 494 (3).
Continuance – fees, how taxed as costs, 248 (15).
CONTRACT.
1. A contract is not vitiated by previous statements of one of the parties unless they were statements of fact rather than opinion and were made for the purpose of obtaining the contract, were relied on by the other party as a controlling reason for entering into it, and turned out to be false. *Berringer v. Cobb*, 557.
2. Contracts are to be construed in the light of the circumstances under which they were made and the subject matter to which they relate. *Columbus Sewer Pipe Co. v. Ganser*, 386.
3. In an action for services in driving logs the question whether such logs were to be driven as could only be supported by floats is for the jury in view of the circumstances under which the contract was made. It is also for the jury to say whether they could have been run with extra exertion, or run the next year, and when the defendant should have exerted himself to prevent as much damage as possible. And a charge assuming that defendant was entitled to no allowances for losses in these particulars is misleading. *Hudson v. Feige*, 148.
4. An undertaking to deliver the *best* quality of specified goods is fairly implied from a request for quotations of the *best*,—an answer giving quotations, but without specifying quality,—an order for a specified quantity of the *best*,—and a shipment in response. *Whiting Co. v. White Lead Works*, 29.
5. John and his sister-in-law Matilda owned land together, and Matilda and her husband mortgaged her share. On foreclosure sale Robert, who had advanced money to Matilda's husband, and bought her share, subject to the mortgage, bid it in, and John thereupon contracted to buy from him the undivided share he had thus obtained. The contract as drawn, provided that Robert should sell "in consideration of one thousand dollars over and above all expenses and interest," and John was to pay "the thousand dollars and all expenses and interest as aforesaid within six months from date." *Held*, that the term "expenses and interest" did not include what Robert had advanced to Matilda's husband; the consideration was a thousand dollars in addition to what it cost, with interest, to clear the title of the mortgage. *Montgomery v. Montgomery*, 441.
6. When one party to a contract has refused to take further steps in its execution the other need not wait for him to do so, especially if the subject-matter of it is spoiling in consequence of the delay. *Hudson v. Feige*, 148.
assumpsit for extra services, 226.
by husband, for his and wife's services, 503 (2).

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discretion to rescind, 528 (3).
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highway contract must be on sealed proposals, 245.
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of hire, statute of frauds, 503 (1).
of township board of health, 452.
of wife, as binding husband, 563 (4).
speculative damages for breach refused, 528 (4).
time, forbidden by city charter, 416 (6).
void for want of mutuality, 574 (1, 2).
Contribution—bill for, against corporation, 351 (8).
Contributory—negligence, risk voluntarily assumed, 437 (4).
negligence in approaching railway crossing, 264 (3, 4).
taking railway injury from jury, 264 (2).
Conversation—with third person, evidence, 649 (1).
irresponsive answer to question asking for, 649 (2).
Conversion—plaintiff without title cannot bring trover, 233.

CORPORATIONS.

1. Corporate property is liable for debts of the corporation, and so long as it can be traced, it may be followed into the hands of members in the manner provided by the organic law and the by-laws of the corporation. *Brewer v. Mich. Salt Association*, 351.
2. Stockholders in a corporation are not entitled, upon its dissolution, to any of its property, until its debts are paid; and they are estopped from denying that they are liable therefor to the extent of their interest. *Id.*
3. Demurrer to a bill against a corporation admits its allegation that there is no other creditor but complainant. *Id.*
4. Whether a bill against a corporation can be demurred to generally on the ground that it does not show that all the stockholders are brought into court—Q. And if it can, it is a sufficient answer that the bill alleges the fraudulent concealment of the records of the corporation and complainant's consequent inability to learn the names of all who should be made parties. *Id.*
5. General demurrer to a bill against a corporation will not lie for the failure to bring in all the stockholders as defendants if the bill purports to be filed against all and presents a sufficient excuse for not naming some of them. *Id.*
6. A decree in a suit against a corporation may be made against those stockholders only over whom the court has acquired jurisdiction, if the bill shows on its face that the rest are beyond it. *Id.*
7. One who has recovered judgment against a corporation can maintain a bill against it for discovery and contribution on showing that he is its only creditor; that it was solvent when dissolved; that execution has been returned unsatisfied and that the stockholders have the assets in their possession and refuse to apply them on the execution. *Id.*
8. Where a corporation has received the benefit of services it cannot repudiate its indebtedness therefor on the ground that its by-laws did not permit it to run in debt without the order of its directors, especially if the directors have never denied liability on that ground. *Donovan v. Halsey Fire Engine Co*, 38.

effect of judgment against, 351 (1).
notice to, of transaction with agent, 386 (4).
set-off by trustee of, against individual claim, 124 (1).
Correspondence—contract by, 29 (1), 30 (4).

COSTS.

1. Costs are not of right at common law, but only by statute. And the statute does not cover proceedings that were complete in themselves before its adoption. *Jeffery v. Hursh*, 247.
2. Costs that by order of court or under some statute have been paid during the progress of the case, cannot be recovered back nor taxed on the final disposition of the case. *Id.*
3. Continuance fees are not taxable as costs without showing that the case was continued on motion of the losing party or that it was not reached during the term. *Id.*, 248.
4. Costs were withheld where, on review, the court was equally divided. *Crookshank Assignment Cases*, 107.
5. Costs were withheld where error was due to the fault of the party complaining of it. *Capwell v. Baxter*, 571.
6. Costs were withheld on affirmance where error appeared which could not affect the result. *Finan v. Babcock*, 301.
7. The party who on appeal recovers final judgment in ejectment is entitled not only to his costs of the appeal but to such costs as are taxable of all previous trials, whether decided for or against him. *Jeffery v. Hursh*, 247.
8. Where an appellate court orders a new trial in ejectment the costs are in its discretion; but all that are not disposed of by its special order will abide the final result and will be taxable then. *Id*
9. An order for reversal and new trial with costs of both courts means the costs of that hearing in the appellate court and of the particular trial below wherein the judgment was reversed. It cannot, against objection, cover all previous trials below if there have been several. *Id.*
10. An affidavit for the taxation of witness fees as costs must state the residences of the witnesses as well as their names, the number of miles they have traveled and the number of days they have necessarily been in attendance. *Id.*
11. In taxing witness fees it is not to be assumed, without some showing, that unsworn witnesses were not properly summoned, if the affidavit to the bill of costs states that they were deemed necessary and were called in good faith. *Id.*
12. Witness fees and sheriff's fees for subpœnaing witnesses cannot be taxed as costs unless the affidavit for taxation shows that the sums claimed have been disbursed by the party claiming taxation or that the service has been performed for him. *Id.*, 248.
13. Defects in a bill of costs must be supplied, if at all, while the matter is before the taxing officer; no amendment can ordinarily be allowed on appeal from his action. The proper course would be to withdraw the bill and make a new application, or to ask for a postponement and supply the defects by the adjourned day. *Id.*, 248.
14. The jurors' per diem in a criminal case cannot be added to the fine and costs. *People v. Kennedy*, 373.

of construction of will, 533 (2).
of motion, on leave to withdraw petition, 448 (2).
on demurrer, when not appealable, 280 (3).
security for injunction bill, 281 (7).
solicitor's fee of complainant in divorce, 273.
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Counsel—advice does not enlarge client's rights, 187 (4).
Counts—abandonment of special count, 557 (2).

in declaration, election between, 187 (2).
joinder of, in information, 594 (1).
repugnant, joinder in declaration, 557 (3).
County clerk—omission to approve assignee's bond, effect, 331 (1).
COURTS.
1. Courts deal with legal questions, and not with abstract principles of public economy. *Northwestern Mnfg. Co. v. Wayne Circuit Judge*, 381.
2. Jurisdiction is not to be presumed in the absence of facts in the record to establish it. *Gould v. Jacobson*, 288.
3. A motion to set aside proceedings that are void for want of jurisdiction does not estop the moving party from objecting to their validity in a proceeding in which they are relied on by the opposite party. *Id.*
4. Statutory proceedings to take charge of and administer assigned estates are special and peculiar, and not like an ordinary suit in chancery. And they are not removable to a court of merely municipal jurisdiction from the court which is designated throughout the statute as the proper one to take cognizance of them. How. Stat. ch. 303. *Scott v. Wayne Circuit Judges*, 311.
5. Municipal courts are created only for the common judicial business of a municipal tribunal. *Id.*, 312.
6. A verdict and judgment in the circuit court in affirmance of a probate order appointing a guardian for an incompetent, may properly be remitted to the probate court for enforcement. How. Stat. § 6789. *Norton v. Sherman*, 549.
cannot control working of streets, 444 (1).
will not review discretion of public functionaries, 416 (3).
COVENANT.
Where a deed contains a covenant to convey certain swamp land when defendant shall have drained it, but does not fix the time within which to do so, neither the grantor nor person claiming under him can take proceedings to forfeit such contract, or compel specific performance until they have put defendants in default after reasonable demand that they shall fulfill the condition. *Bresler v. Pitts*, 348.
to pay mortgage, not implied against grantee, 171 (1).
Credibility—of witness, jury determines, 507 (3).
Creditors—bill by, against corporation, 351 (8).
bill to reach trust fund, 494 (6).
CRIMINAL LAW.
1. A warrant for the arrest of a person for a crime triable by a justice must state the offense, and, in cases of larceny, the value of the property stolen. *People v. Belcher*, 325.
2. Whether counts for murder and for statutory manslaughter cannot be joined in the same information in a case of the fatal procurement of an abortion, and where a preliminary examination, as for murder, involved all the circumstances of the homicide—Q. *People v. Sessions*, 594.
3. A respondent swearing to an alibi was cross-examined as to what he saw of an alleged procession in the town where he claimed to have been. *Held* proper to show by others what the facts were as to the procession as bearing on the truth of his statements. *People v. Gibson*, 368.
4. Evidence that tends to prove the commission of a crime or its immediate surroundings can hardly be treated as rebutting evidence. *People v. Quick*, 322.
5. The names of all witnesses for the prosecution in a criminal case must be indorsed on the information before the trial or as soon as discovered after it begins; the respondent is entitled to a chance to canvass their character whether they are examined in the main case or on rebuttal. *Id.*, 321.

6. The evidence on which the prosecution relies in a criminal case must all be put in, if possible, before the prosecution rests, though testimony that could not be had earlier may be admitted afterwards on cause shown. But none of that which properly belongs to the case in chief can be reserved until after the defense rests, to be then introduced as rebutting evidence. *Id.*, 321.
7. A public prosecutor has no right to urge to the jury that respondent's failure to discredit an adverse witness by the testimony of others, instead of relying alone on cross-examination, is significant against him, and that he could show the facts if they existed. *Id.*, 322.
8. A prosecuting attorney must be entirely impartial as between accuser and accused, and must act only in furtherance of justice; and he cannot be permitted to assert to the jury "under the solemnity of his official oath" his belief in the guilt of a respondent. *Id.*, 322.
9. General counsel for a bank cannot take part in a criminal prosecution for obtaining money therefrom by false representations to its president, especially if such counsel is also acting for the bank in a civil suit involving the same subject matter. The fact that complaint was made by the president and that the counsel was not retained by him personally makes no difference. *People v. Hendryx*, 319.
10. The right to pronounce sentence, if once lost, is not revived by the request of the convict's counsel for farther delay to enable him to prepare a case for review. *People v. Kennedy*, 372.
11. A trial judge can suspend sentence for a reasonable time for a proper purpose, such as to enable defendant to move for a new trial or take exceptions to the Supreme Court, or to enable the judge to inform himself as to what sentence he ought to inflict. *Id.*, 373.
12. A prisoner on bail awaiting sentence is on the same footing, so far as imprisonment goes, as if he were in confinement without bail; and if his sentence is delayed from time to time without his request until the full period of imprisonment to which he could be sentenced has expired, the court then loses jurisdiction to pronounce it and he is entitled to his liberty. *Id.*, 373.

closing saloons, 328.
excessive sentence reversed in part, 327 (1).
fees of jurors as costs, 373 (6).
horse-stealing, punishment for, 327 (1).
information for horse-stealing, 327 (2).
justice's jurisdiction by value, in larceny, 325 (2).
amendment of warrant for larceny, 325 (3).
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Cross-examination—held immaterial, 278 (2).
of assignor, as plaintiff's witness, 274 (1).
of plaintiff's witness, 274 (2).
of divorced wife, as to payments, 274 (5).
repetitions of questions excluded, 278 (3).
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to show unreasonableness of contract, 528 (2).
to show discretion to rescind, 528 (3).
Custom—excusing mining superintendent from paying rent, 557 (6).
as bearing on duties of river travel, 182 (2).

Dairy products—statute relating to, invalid, 381 (1).

DAMAGES.

1. Speculative damages cannot be allowed in an action for such a breach of contract as consisted in defendant's refusal to carry out his agreement to furnish the job of sawing his logs to plaintiffs; only such actual damages as result from defendant's non-performance are recoverable. *Petrie v. Lane*, 528.

2. Exemplary damages cannot be allowed in an action for trespass by animals, where the declaration claims no such damages, even though defendant has rescued the animals by force from the plaintiff's keeping. *Sherman v. Kilpatrick*, 310.
3. Defendant in an action on a contract is entitled to be allowed all the expense he has incurred and loss he has suffered from plaintiff's violation of his contract, so far as he can prove them. *Hudson v. Feige*, 148.
4. The cost of the barrels or cases in which merchandise is shipped does not stand on any different footing from that of the goods, in an action for their price. *Whiting Co. v. White Lead Works*, 29.
5. The damages to mortgagees in possession from a wrongful levy is the market value of the goods at the time of the levy; and the appraisal made at that time is some evidence of their value. *Densmore v. Mathews*, 617.
6. The proper amount of compensation for land taken in condemnation proceedings cannot be sworn to by witnesses, but must be found by the jury from data. *Grand Rapids v. G. R. & I. Ry. Co.*, 642.
7. Compensation for, rather than the value of the land taken is what should be allowed in condemnation proceedings, and includes more. *Id.*
8. The damage to a railroad from opening a street across it includes the expense entailed by the crossing, and may involve outlays for making it safe. *Id.*

allegation of amount of injury, in bill, 482 (3).
allowances for plaintiff's violation of contract, 148 (5).
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DEBTOR AND CREDITOR.
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identity of mortgaged goods, 108 (3).
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Declaration—abandonment of special count in, 557 (2).
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for injury from insufficient cattle-guard, 200 (1).
for injury from neglect to clean snow from track, 231 (2).
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on insurance policy, admission of averment, 278 (1).
Decree—against some stockholders, 351 (7).
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in foreclosure, fixes amount due, 429.
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DEED.
The long form warranty deed on paper folding like legal cap and with the description on one leaf and the attestation clause and acknowledgment on the other, is criticized as affording unusual facilities for fraud. *Crawford v. Hoeft*, 1.
boundary in, how to be fixed, 348 (2).
covenant to convey, forfeiture, 348 (4).
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Defeasance—deed and defeasance as mortgage, 246 (1), 247 (2–6).
Deficiency—issue of execution for, 429.
Delegation—of power of choosing officers, 213 (5).
Delivery—of official papers to successor, 511, 512 (1, 3, 5).
Demand—for fulfilment of condition in deed, 348 (4).
when unnecessary, before replevin, 567.
Demurrer—to bill against corporation, what admits, 351 (4).
for failure to bring in all stockholders, 351 (5, 6).
general, when to be overruled, 482 (1).
DEPOSITION.
Depositions lawfully taken and filed in an original suit may be used on an appeal. How. Stat. § 7472. *Hudson v. Feige*, 148.
admission does not exclude witness, 386 (3).
Deputy—auditor-general, may execute tax deed, 49 (1).
Desertion—divorce for, not sustained by bill, 299.
DEVISE AND LEGACY.
1. Advancements in a proceeding to determine the rights of legatees, are not to be treated as debts, but as gifts to apply as legacies. *McClintock's Appeal*, 152.
2. Circumstantial evidence is proper in determining whether advancements were made under a will; the omission of a precise man to enter a charge against his estate can be shown for what it is worth. *Id.*
3. No one legatee is estopped by a finding that has been set aside on the appeal of only one in a proceeding to determine the rights of all of them upon the distribution under the will. *Id.*
4. A will provided annuities for the testator's children, all of whom were under twelve years old at the time of his death, and it set aside certain real estate to be held "for the purpose of aiding in carrying out the trust." Otherwise it gave the executors a general power of sale. It also gives a residue to the children's children, after the death of all the children and on the majority of the youngest grandchildren, continuing the annuity of any deceased child to the children of such child until the division. *Held*, that as the reservation of the specified land and of the accumulations therefrom are void for any period beyond the minority of the youngest child (How. Stat. §§ 5553–4), the land goes to the heirs, by intestacy, subject only to the accumulations

so far as needed to pay the children's annuities, the rest, like the land, going to the heirs-at-law and not to the grandchildren. *Wilson v. Odell*, 633.

5. A testator's certificate that he has advanced to an heir a specified sum over and above all set-offs to date, is not admissible in evidence that such an advancement was made. But if the payment is otherwise proved, the certificate is admissible to show testator's purpose to treat it as an advancement. *McClintock's Appeal*, 152.

devisee as trustee, 494 (4).
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Discontinuance—of street, municipal power, 444 (2, 5).
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DISCRETION.
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merits not considered on motion for, 315 (5).
of appeal in chancery, grounds of, 315 (7).
of bill, for want of prosecution, 394 (7).
of servant, master's power, 649 (4).
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Dissolution—of attachment, effect of execution levy, 487 (1, 2).
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Divorce—attempt to defeat execution for alimony, 55 (1).
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Docket—of justice, what must show, 307 (1).
of justice, not to be varied by parol, 307 (2).
Draft—acceptance necessary to action on, 301 (2).
deposit of, liability of corresponding bank, 336.
DRAINS AND SEWERS.

How. Stat. § 1730 is invalid in so far as it seeks to authorize the enforcement of a drain tax that is void for want of jurisdiction to levy it, or to impose upon a court such administrative duties as the appointment of surveyors to examine the premises assessed for the purpose of enabling the court to re-levy the tax. *Houseman v. Kent Circuit Judge*, 364.

Education—of ward, how provided for, 268 (2).
EJECTMENT.

1. As, between the parties to a bill to abate a nuisance by encroachment, the complainant, being in possession of the invaded premises, cannot bring ejectment, it is for the party maintaining the nuisance to do so if he claims the right to them. *Wilmarth v. Woodcock*, 483.
2. Ejectment will lie where defendants' claim of title consists in his having recorded a tax-deed which he has obtained on the premises, unless before suit brought he has notified the holder of the original title that he disclaims any interest and takes steps to disaffirm the apparent claim asserted by such record. *Hoyt v. Southard*, 432.
3. Where land has been regularly sold under a mortgage the mortgager cannot, in an action of ejectment for it, attack the mortgage as

fraudulent, or as discharged before foreclosure. The remedy for such defects, if not lost by laches, would be in equity. *Yale v. Stevenson*, 537.

4. In ejectment any person in actual occupancy of the premises, and claiming adversely to plaintiff, must be made defendant (How. Stat. § 7791), and the fact that plaintiff has previously recovered against such person makes no difference so long as it does not appear but that the latter is entitled to a new trial. How. Stat. § 7822. *Hoyt v. Southard*, 432.
5. The trial judge's finding of mesne profits, upon the suggestion of a claim therefor, is conclusive as to amount, if not excepted to, in a review on case made. *Noble v. Fairs*, 637.
6. The suggestion of a claim for mesne profits (How. Stat. § 7831) is in effect a declaration in assumpsit for use and occupation, and may not only be made before defendant has received any payment but is not limited to the payment received. *Id.*
7. The suggestion of a claim for mesne profits is filed in a case already in court (How. Stat. § 7830), and the record in that case sufficiently shows the claimant's right to the premises, and identifies the judgment in his favor. *Id.*

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when unnecessary, against person in possession under forged deed, 2 (10).

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See VOTERS AND ELECTIONS.
Electricity—lighting city streets by, 416 (5), 417 (7).
Encroachment—by cornice projecting over boundary, 482 (2).
bill to abate nuisance by, 482 (2, 3), 483 (5, 6).
Entry—tortious, right to expel intruder, 188 (8).

EQUITY.

1. The "irreparable injury" alleged as a ground of equitable jurisdiction, is not necessarily such injury as cannot be measured by a pecuniary standard. *Wilmarth v. Woodcock*, 482.
2. The settlement of boundaries that are disputed and difficult of ascertainment is not on that account within the jurisdiction of a court of equity. *Bresler v. Pitts*, 347.
3. Rights are not lost by laches as against persons claiming under a forged deed. *Crawford v. Hoeft*, 1.
4. A court of equity cannot enforce a contract specifically unless it can be done mutually and completely and so as to secure substantially beyond question all that the parties contemplate. *Bourget v. Monroe*, 563.
5. A man agreed to let his married daughter and her family live on a lot he owned if she would support him during his life, and also promised that the land should be hers after his death. She and her children died in his lifetime, however, and the old man thereupon turned her husband off the premises. The husband as sole heir to his wife and children professed his readiness to fulfil the agreement to support him, and demanded specific performance or compensation. *Held*, that this bill therefor would not lie. *Id.*
6. A decree for specific performance is impracticable where the contract is for the support of a parent in consideration of his devising his land to the child, and involves continuous duties that a court of equity cannot regulate, and a conveyance by will, which no court can compel. *Id.*
7. A man bought a place and put his sister and her family in possession of it. After he died her husband, who was one of the commissioners

upon the estate, appraised the land as decedent's property, and the family took a long lease of it. Seven years later, when notice to quit was given for non-performance of its conditions, the sister filed a bill to compel her brother's son and heir to convey the land to her, alleging that her brother had promised her the land in the first place as an inducement to remain in the neighborhood; that it had always been his expressed intention to give her a deed of it, and that he had in fact had a deed prepared, which in his last illness he asked his wife to get, but which was not then nor afterwards produced. *Held,* that upon the facts the bill would not lie. *Defer v. Lockwood,* 117.

8. A cloud on title is created by an instrument which purports by its terms to be a conveyance from the original source of title to an adverse claimant, if extrinsic evidence is needed to show the invalidity of the instrument. *Stoddard v. Prescott,* 542.
9. A cloud upon title cannot be created by the owner of the title and exist by his grant. And rights that may accrue to him from the grantor's continued occupancy after deeding the property, are not to be enforced in equity if the bill does not aver such possession as by lapse of time or otherwise would legally extinguish defendant's claim. *Bresler v. Pitts,* 348.
10. On a bill to quiet titles held in severalty the owners, if not represented, will not be bound by an adverse decree. *Jenness v Smith,* 281.
11. A bill to quiet title cannot be filed by any person not interested in the title; and a suit by or against one who is only indirectly interested cannot bind other owners, who cannot be represented in his name. *Id.*
12. A judgment creditor's bill alleging the issue of execution and its return unsatisfied and the disposal of a large part of defendant's goods, may properly call for an accounting for the money received therefor, and is maintained, *it seems,* though it asks that encumbrances be set aside without establishing the existence of a lien on the property. *Krolik v. Bulkley,* 407.
13. A bill in aid of execution cannot affect lands in other counties than that in which it is filed. How. Stat. § 6612. *Id.*
14. The dismissal of a judgment creditor's bill may be without prejudice where the sole ground of dismissal is that lands sought to be reached by it were beyond the jurisdiction of the court. *Id.*
15. A general demurrer to a bill in chancery challenges the equity of the case therein presented, and must be overruled if it sets out any case for equitable relief, however imperfectly. *Wilmarth v. Woodcock,* 482.
16. Whether a defendant should be required to answer over, on exceptions, where the disclosure sought is matter of record—Q. *Cummings v. Corey,* 494.
17. Taking a bill as confessed notwithstanding the answer, is equivalent to admitting the truth of the answer, but denying its sufficiency. *Id.*
18. A decree dismissing a bill of complaint can only be made by the court; it cannot be entered as of course upon default in making answer. *Hammond v. Paxton,* 394
19. Damages are not recoverable in equity where no case for equitable relief is made out to which the damages would be applicable or subsidiary. *Bourget v. Monroe,* 563.

action at law by joint defendant, 77 (1).
authority over opening and closing of streets, 444 (1–5).
bill against heir holding in trust partnership interest, 281 (3).
bill to abate private nuisance, 482 (2, 3), 483 (5, 6).
bill against corporation for disclosure and contribution, 351 (8).
demurrer to bill against corporation, 351 (4–6).
decree against part of stockholders, 351 (7).

contest as to title, between husband and wife, 612.
effect of notice lis pendens, 393 (1), 394 (2–5).
hearing on injunction bill, 286 (1).
injunction, when not granted, 286 (2).
injunction by tax-payers against municipal contract, 416 (1).
interference of, with municipal contracts, 416 (4).
invalid decree of sale for taxes, 318.
issue of writs to enforce decrees, 2 (9).
personal liability of third person on foreclosure, 171 (1–3).
prohibited from proceeding under void act, 364 (4).
reformation of lease, laches, 578 (1, 4).
relief to be sought in, as to partnership interests, 280 (1).
security for injunction bill, 281 (7).
set off allowed as at law, 124 (2).
suit in, no bar to action at law, 77 (1).
will not interfere with legislative discretion, 416 (3).

ERROR.

1. A fact set up in an affidavit that has been made part of the record is taken to be true on review if no issue has been raised on the affidavit. *People v. Kennedy*, 372.
2. Where a question of fact is properly submitted and the finding thereon necessarily determines the result, an error of the judge in the theory on which he submits the case may not be such error as to require reversal. *Finan v. Babcock*, 301.
3. The Supreme Court will only consider questions of law in reviewing on error the proceedings had at the circuit on appeal from a probate order appointing a guardian for an incompetent. The sufficiency of the evidence to show incompetency is not such a question. *Norton v. Sherman*, 549.
4. Exceptions, though covered by assignments of error, will not be noticed on review if not made to the trial judge and noted in the bill of exceptions. *Cotherman v. Cotherman*, 466.

allowing improper testimony to remain, 188 (10).
client may waive errors, 454 (2).
counsel's unjustifiable remarks to jury, 424 (4).
exclusion of testimony as to claim withdrawn, 38 (2).
due to party complaining, no costs, 571 (2).
harmless, costs withheld on affirmance, 301 (7).
irregularities, when not considered, 528 (5).
not prejudicial, no new trial, 301 (1).
in taking case from jury, 264 (2).
placing burden of proof on defense, 157 (6).
to instruct jury as to effect of the evidence of a witness, 177 (2).

ESTOPPEL.

against stockholder, from denying liability, 351 (3).
by motion to set aside, 288 (7).
from opening street across railway track, 642 (12).
purchasing at tax-sale, 49 (3).
legatee not estopped by finding set aside, 152 (7).
on corporation, from repudiating debt, 38 (3).

EVIDENCE.

1. Neither court nor Legislature can have judicial knowledge of the merits or defects of oleomargarine so as to be able to declare its hygienic value. *Northwestern Mnfg. Co. v. Wayne Circuit Judges*, 381.
2. Judicial notice will be taken that the date of a lease in suit falls on Sunday, though neither party calls attention it. *Hoard v. Stone*, 578.
3. Business correspondence from which the terms of a contract are gathered are the best evidence as to any guarantee implied therein, and if such guarantee is implied parol evidence denying it is inadmissible. *Whiting Co. v. White Lead Works*, 30.

4. Evidence that an agent in defending his principal's possession, drew a revolver on a policeman who approached, was *held* irrelevant in an action against him by the intruder, as the act did not take place in the latter's presence. *Taylor v. Adams*, 187.
5. Identification of a lot as the one referred to in a lost document, states only a conclusion, if the witness cannot give the description and is insufficient to show the contents of the paper. *Id.*, 188.
6. Where the substance of a contract cannot be shown, evidence that a party has not forfeited his rights thereunder becomes immaterial, and on motion should be stricken out. *Id.*
7. The reputation of the house a witness rooms in is immaterial to the issue so long as the party in whose interest he is testifying is not responsible for it. *Id.*
8. In an action on the common counts for the value of labor and materials it is error to admit testimony that the prices set down in the bill of particulars are the same as are charged other people; this has no tendency to prove value. *Richmond v. Atkinson*, 413.
9. A plaintiff cannot be permitted to testify that his bill of particulars is a correct statement after he has testified that it does not refresh his memory as to items to which he cannot testify without it, and of which he has no personal knowledge. *Id.*
10. A mere recital of the amount left after striking balances is hardly admissible as evidence of money advances previously made. *McClintock's Appeal*, 152.
11. In an action for labor and materials furnished, a plaintiff was asked "How about the time?" and was allowed to answer "It was correct as given by my foreman." Another plaintiff who testified on the subject stated that he knew nothing about it except what the workmen had told him. It did not appear who the foreman was, and no excuse was given for not producing his testimony or that of the workmen. *Held*, that the evidence was hearsay and inadmissible. *Richmond v. Atkinson*, 413.
12. In an action on an assigned claim for log-driving, plaintiff sought to show by defendant's agent that while the drive was in progress the driver had tried to take in the rear; but it appeared that all the witness knew about it was what one of the driver's workmen had told him. Plaintiff moved to strike out the testimony as hearsay. *Held*, that it was objectionable in the light of an instruction that the driver should have had a chance to go back and take in the rear after the logs were taken out. *Hudson v. Feige*, 148.
13. The fact of a conversation with a third person in the absence of the opposite parties to a case may be admissible to show the date of a negotiation with them when it would not be to show the terms of the negotiation itself. *Shaver v. Ingham*, 649.
14. An injured person's statement to his physician as to the cause and circumstances of his injury is not admissible as res gestæ if not made until time enough has passed for him to be removed and to get the doctor. So *held* in an action against a township for fatal injury caused by a defective bridge. *Merkle v. Bennington*, 156.
15. *It seems* that expert testimony should be confined to scientific questions, and not deal with matters that are within the scope of common knowledge. *People v. Sessions*, 594.
16. In an action for negligent injury caused by a fire the fire marshal's opinion as to its cause is inadmissible; it is not a question for expert testimony. Nor can he testify to what he heard said next day at the scene of the fire; such things are not res gestæ. *Cook v. Johnston*, 437.
17. Ordinary care and prudence in common emergencies is not a question for experts; and unless there is conflict it may often be taken from the jury as a matter of universal judgment. *Clinton v. Root*, 182.

18. Passenger traffic on river steamers is not so exclusively a maritime business that sailors alone are qualified to testify as to its methods and duties, but usage may sometimes be shown as bearing thereon. *Id.*
19. Defendant denying liability on an obligation on the ground that the consideration had failed, has the burden of showing such failure. *Bulen v. Granger*, 274.
appraisal as evidence of value, 617 (6).
as to claim apparently outlawed, 465 (2).
as to good faith of transfer of goods, 89 (2, 4, 6).
as to intention of guarantor, 386 (5).
burden is on plaintiff to establish his case, 157 (6).
burden of proof of good faith, 1 (2).
circumstantial, as to advancements, 152 (6).
conflict between scientific and other testimony, 508 (5).
documentary, production of, on mandamus, 448 (1).
exclusion of facts equally known to decedent, 58 (1), 96 (1), 154 (2), 465 (1, 3).
exclusion of testimony, notice of set-off, 38 (2).
exhibiting model to jury, 413 (4).
for prosecution, when to put in, 321 (2).
heirs can testify as to advances, 152 (4).
impeachment of witness to alibi, 368 (2).
improper, should be stricken out, 188 (10).
in action by mortgagee for officer's wrongful interference, 617 (5).
indorsement of names of witnesses on information, 321 (1).
in replevin by chattel mortgagee, 377 (1), 378 (3).
irresponsive answer to question, 649 (2).
striking out irresponsive testimony, 649 (3).
judicial knowledge as to oleomargarine, 381 (3).
of acquiescence in contract of hire, 557 (1).
of attachment proceedings in replevin, 377 (2).
of custom excusing employee from rent, 557 (6).
of familiarities, in action for seduction, 507 (1).
of experts, jury must weigh, 508 (4).
of good faith of purchaser of goods, 424 (1).
of manner of sale under chattel mortgage, 378 (3).
of mutual assignment among plaintiffs, 404 (1).
of notes and mortgage, in action of replevin, 108 (1).
of partnership dealings, after replevin, 108 (2).
of right to official papers, 512 (3).
of settlement, giving note as, 465 (4).
of subsequent criminal transaction, 368 (1).
opinion as to insufficiency of cattle-guard, 200 (2).
out of its order, judge's discretion, 49 (2).
parol, inadmissible to contradict recital in bond, 247 (2).
parol, inadmissible to vary justice's docket, 307 (2).
parol, of signing by agent, 301 (3).
proof of fraud in civil cases, 89 (4).
rebutting in criminal cases, 321 (1, 2), 322 (5).
responsiveness of answer of witness, 157 (3–5).
testator's certificate as to advances, 152 (1).
that signer of note is a surety only, 343 (2).
to aid in interpreting guaranty, 385 (1).
to show mental incompetency, 549 (2).
verdict presumed to be warranted by, 208 (1).
weight of conflicting proofs is for jury, 263 (1).
weight of expert testimony, 508 (4).
will not be altered by unattested writing, 152 (2).
withdrawing motion to strike out, 58 (5).

Exceptions—client may waive, 454 (2).
how must be made, 466 (5).
requirement to answer over, on, 494 (1).
Exclusion—of evidence as to claim apparently outlawed, 465 (2).
of evidence known equally to decedent, 465 (1, 3).
EXECUTION.
Levy upon a remainderman's interest and the sale thereof on execution do not affect the right of the owner of a life interest to control and possess the property during his life. *Storrs v. Storrs*, 56.
bill in aid of, jurisdiction to file, 407 (2).
for alimony, attempt to defeat, 55 (1).
for deficiency on foreclosure, 429.
levy of, dissolution of attachment, 487 (1, 2).
no attachment for exempt property, 526.
of tax-deed, 49 (1).
purchaser estopped to let land be sold for taxes, 49 (3).
EXECUTORS AND ADMINISTRATORS.
1. The interest of the heirs of an intestate is the estate remaining after payment of debts. *Brown v. Bell*, 58.
2. The personal representative of a deceased person is his executor or administrator, whose interest, while it lasts, is the amount of the assets of the estate; for these he is responsible until the debts are paid, or he is otherwise discharged by order of court. *Id.*
3. Where an executor has given bond as residuary legatee, claims against the estate need not be proved in the customary way to make them a valid debt. *Wheeler v. Hatheway*, 77.
4. A claim against an estate need not be proved before commissioners if the executor, as residuary legatee, has conceded his liability for it if the debt should appear to have been assumed by the testator. *Id.*
5. An administrator de bonis non cannot bring suit to set aside a mortgage made by his decedent without averring a deficiency of assets in his hands and in those of his predecessors in the trust, to satisfy the obligations existing against the estate. How. Stat. §§ 5884–5. *Kellogg v. Beeson*, 340.
6. Executors' bonds are not such official bonds as will fall within the title of Act 179 of 1885, "to provide that all sureties upon official bonds shall make justification under oath, of their pecuniary responsibility." Nor are any probate bonds. *Bissell v. Wayne Probate Judge*, 237.
7. Costs of a necessary proceeding to obtain the construction of a will, are chargeable on the estate. *Wilson v. Odell*, 533.
8. Costs may be paid out of the estate where a finding as to the distribution under a will has been set aside on the appeal of one of the legatees. *McClintock's Appeal*, 152.
as trustee and beneficiary, 494 (5, 6).
advancements to heirs, 152 (1, 3–6).
exclusion of testimony of claimants against estate, 465 (1, 3).
Exemplary damages—must be claimed in declaration, 310.
from execution, no attachment, 526.
Expense—from plaintiff's violation of contract, 148 (6).
of testing and storing goods, 30 (3).
Experts—ordinary care not a question for, 182 (1).
testimony as to cause of fire, 437 (1).
testimony as to passenger traffic on river steamers, 182 (2).
testimony, to be confined to scientific questions, 594 (2).
testimony, weight to be given to, 508 (4).
Extension—release of surety by, 343 (1).

Fees—continuance, when not taxable, 248 (15).
of jurors, as costs in criminal cases, 373 (6).
solicitor's fee of complainant in divorce, 273.
witness, taxation of, 247 (12, 13), 248 (14).
Fences—railroad's negligence in maintaining, 458 (1, 3).
Filing—notice of builder's lien, 634.
Final—order for sale by receiver, 315 (6).
Finding—by judge, of mesne profits, conclusive, 637 (1).
of mental incompetency, 549 (3).
set aside, no legatee estopped, 152 (7).
Foreclosure—construction of "expenses and interest," 441.
execution for deficiency in, 429.
of married woman's mortgage, 537 (1).
of mortgage discharged by mistake, 138 (1).
personal liability on, 171 (1–3).
private sale of mortgaged stock, 616 (3).
sale in grass, of mortgaged lots, 537 (2).
sale of goods, rights of buying creditors, 617 (4).
Forfeiture—under covenant to convey, 348 (4).
Forgery—of deed, 1 (1, 3–7), 2 (8, 10).
release by party defrauded by, 2 (8).

FRAUD AND FRAUDULENT CONVEYANCES.

1. Actual participation by a purchaser in the fraudulent intent with which one makes a sale to defraud his creditors is not a necessary condition to its avoidance; if the purchaser is not a creditor it is enough that he knows what would put a prudent man upon inquiry as to the motive of the sale. *Bedford v. Penny*, 424.
2. In an action involving the good faith of a transfer of goods the transferee may properly show what he had been told as to the financial standing of the other party to the transaction, by way of rebutting any presumption that he knew it was bad. *Hough v. Dickinson*, 89.
3. Such a knowledge of facts as will put an ordinarily prudent man on inquiry will affect the good faith of one who takes a transfer of goods from an embarrassed dealer. Actual participation in the fraudulent intent of the latter is not necessary to defeat the transfer. *Id.*
4. The rule of the criminal law that the proof of fraud must be so conclusive as to leave no rational doubt of its existence does not apply in civil cases, where it may be shown by a preponderance of proof, and even by circumstantial evidence. *Id.*
5. It cannot be said that the transfer of property to pay a debt, if intended to cut off the redress of other creditors, cannot be made a fraudulent act by reason of delay and hindrance to which the others are subjected. *Id.*
6. Where the good faith of a debtor's transfer of goods is in question the relationship of the parties to the transfer is a fact for the jury even though the transferee is a creditor. *Id.*
7. Where a mother whose mind is weakened by age has dealings in reference to her property with a son who has control of it, and relies upon his integrity not to mislead her, the dealings must be characterized by perfect good faith, and the burden of establishing its fairness is on those whose claims are based on these dealings. *Crawford v. Hoeft*, 1.
8. Where the good faith of one who buys a stock of goods is in question in a contest between himself and an officer who has taken them under an attachment, the purchaser may properly testify that he bought them in good faith for what he considered a full consideration and with no other purpose than to get the stock at a fair price. *Bedford v. Penny*, 424.

concealment of records of corporation, 351 (5).
form of deed criticized as facilitating, 1 (4).
repudiation of settlement for, 1 (3).

FRAUDS, STATUTE OF.

1. An assignment of the claims of a laborer against a company which employs him need not be in writing. *Donovan v. Halsey Fire Engine Co.*, 39.
2. Where mutual promises are the consideration for a contract, it must be signed by both parties. *Wilkinson v. Heavenrich*, 574.
3. Contracts which are so drawn as to bind one party but not the other, and which are not to be performed within a year, are void for want of mutuality; and a written acceptance of their terms by the party not bound is useless after the other has refused to perform. *Id.*

contract of hire from year to year, 503 (1).
Freight—of goods rejected by vendee, 30 (3).
Funds—of ward, guardian's liability, 268 (2–4).

GARNISHMENT.

1. Garnishment proceedings may be pleaded in abatement of an action afterwards brought by the principal defendant against the garnishee. They are not an absolute bar, however, unless judgment has been obtained against the garnishee in the principal suit. *Grosslight v. Crisup*, 531.
2. Where defendant in a pending action is garnished in a suit brought by a third person against the plaintiff, he should as soon as possible plead the garnishment proceeding in abatement of the first suit, and he can do so at any stage before judgment therein. This can only be done by filing notice of the proceeding as a special defense under Circuit Court Rule 106, or by plea puis darrein. *Id.*
3. Jonathan and John are not in contemplation of law the same; and an amendment of proceedings in garnishment so as to substitute one for the other in the name of the principal defendant cannot be sustained as against an intervening claimant whose rights were acquired in good faith before the amendment was made. *Moore v. Graham*, 25.
4. A garnishee's disclosure, even if it does not positively confess liability, may establish it when aided by other evidence. *Lyon v. Kneeland*, 570 (1).
5. A garnishee's statement that he does not know whether he owes the principal defendant or some one else for certain work, and that the defendant told him he only wanted enough money to pay expenses, and that the rest was to go to another person, is not such a disclosure as will sustain a judgment against the garnishee. *Id.*

plea of, puis darrein, 531 (3).
Gifts—advancements to be treated as, 152 (5).
Good faith—burden of proof of, 1 (2).
of purchaser of goods, 108 (5), 424 (1, 3).
of transfer of goods, 89 (2, 3, 5, 6).
of son, in buying mortgaged land, 138 (1).

GUARANTY.

1. Where it is doubtful whether a mercantile guaranty was meant to be continuing or limited, it is proper to show by a surety what was said, when it was executed, as to the time it should run, if such showing does not contradict its terms but aids in its interpretation. *Columbus Sewer Pipe Co. v. Ganser*, 385.
2. A bond reciting that the principal "has arranged and is about to purchase on credit" certain goods, and declaring it to be void if he shall pay "for all goods purchased, or that he may hereafter purchase of [the obligee] according to the terms of purchase," otherwise to be "in full force and effect for the amount of his said indebtedness, not exceeding three thousand dollars" was *construed* as a commercial

guaranty limited to the amount of a single purchase, or at most to what was necessary for the completion of a particular transaction to which the sureties understood the guaranty to relate And they should have been allowed to show what credit was to be given, and what were the terms of the purchase as understood by them at the time the bond was given. *Id.*, 386.

3. A guarantor is not liable beyond the express terms of his contract; but in the case of commercial guaranties drawn by artless persons, unlearned in the law, the terms are not to be construed technically to the disadvantage of the sureties and contrary to their intent, *Id.*, 386.

implied from business correspondence, 30 (4).

GUARDIAN AND WARD.

1. It is a sufficient averment of the mental incompetency of a person whom it is sought to place under guardianship, to state in the petition for the appointment of the guardian that such appointment is necessary because, by reason of extreme old age and other causes, such person "is now mentally incompetent to have the charge and management of his property and has been mentally incompetent for some time past." *Norton v. Sherman*, 549.
2. In a proceeding for the appointment of a guardian for an incompetent, a finding by a jury that respondent "is mentally incompetent to have the charge and management of his property" is sufficient, though the further question of his inability to take care of himself has not been submitted to the jury, especially if such inability has been found by the judge. How. Stat. § 6315. *Id.*
3. In defense to an action purporting to be brought by a guardian, it may be shown that the guardianship has ceased; and if the plea does not set up such a defense an amendment which would permit such a showing should be allowed. *Chubb v. Bradley*, 268.
4. The proceeds of real estate belonging to a ward may be used by the guardian within proper bounds to enable the ward to be suitably brought up and educated; and such money may be turned over to the ward's adopted parents to aid them in its support, if necessary. *Id.*
5. A guardian who has paid over the proceeds of the ward's estate to a suitable person to aid such person in supporting the ward cannot maintain an action at law against him to recover back the amount so paid after it has been reasonably expended for that purpose. Whether, in case of fraud or an unreasonable disproportion between the support and the funds, such an action could lie—Q. *Id.*
6. A guardian's liability for the funds of his ward can seldom be passed on by a jury. *Id.*

review on error of appeal from appointment, 549 (2).
void guardian's deeds not confirmable, 280 (1).

HEALTH.

The authority of a township board of health to guard against smallpox (How. Stat. § 1647), extends to making contracts for the nursing of patients and to destroying infected clothing. And when they have allowed the accounts for such services rendered and property destroyed, the Board of Supervisors must pass such accounts, and can be compelled by mandamus to do so; they cannot refuse on the ground that the patients were themselves able to pay, or that sundry tax-payers considered the charges extortionate. *Elliott v. Kalkaska Supervisors*, 452.

Hearing—upon injunction bill, 286 (1).
Hearsay—as to correctness of bill of particulars, 413 (3).
evidence, as to time, 413 (1).
statement as to log-driving, 148 (1).
Heirs—can testify as to advancements, 152 (4).
holding in trust partnership interest, 281 (3).

interest of, what constitutes, 58 (2).
personal actions do not descend to, 563 (6).
Highway—commissioner, contract with bidders, 245.
illegal obstruction by freight train, 195.
injury from defect, negligence, 568.
municipal liability for injury from defects in, 41, 357 (2–5).
Hire—contract of, statute of frauds, 503 (1).
evidence of acquiescence in contract of, 557 (1).
Horses—injury to, on railroad track, 200 (2).
injury to, from defect in street, 41.
punishment for, 327 (1).
information for, what can include, 327 (2).
HUSBAND AND WIFE.
1. A wife's sole contract to support her father in her family, while living with her husband, if valid at all, cannot, upon her death, bind her husband against his will. *Bourget v. Monroe*, 563.
2. A man deeded land to his son, and the son and his wife deeded back a life estate. Trouble arose in the family and the son's wife got a divorce and a decree for alimony, to satisfy which she levied upon and sold her husband's interest in the land. The father filed a bill against the son, the divorced wife and the purchaser to compel a reconveyance, on the ground that there had been a parol agreement for his support which had not been fulfilled. It appeared, however, that no one had heard of this agreement before and that both father and son had repeatedly dealt with the land as if no such agreement existed, and that they were on friendly terms and the father's suit was apparently for the real purpose of defeating the wife's levy. *Held*, that his bill was properly dismissed. *Storrs v. Storrs*, 55.
3. A man and his wife who had contentedly lived together for more than forty years fell out about the title to some land which the wife's father had contracted to deed to the husband but had, in fact, deeded to the wife apparently with the husband's consent, and which the wife held, at any rate, for twenty years without objection from him. She then sold it and with the proceeds bought other lands the title to which, with his acquiescence, she took in her own name, though the husband claimed to have acquiesced under a misapprehension. *Held*, that after all this time the Supreme Court would not attempt to interfere with her title, without a clearer showing against it. *Morgan v. Morgan*, 612.
4. One who has engaged in his own name to furnish his own services and those of his wife can sue on the contract in his own name; as his wife is not a party thereto, and her earnings under it belong to her husband, she need not be joined as plaintiff. *Sines v. Superintendents of the Poor*, 503.
5. A wife living apart from her husband can bring replevin against him for her individual property after making due demand therefor. *White v. White*, 546.
6. No solicitor's fee beyond what had been previously allowed was included in the costs awarded complainant in divorce, upon reversing a decree dismissing her bill on demurrer, and directing it to be answered. *Van Driele v. Van Driele*, 273.
7. Where a bill of divorce against a wife is grounded on adultery it will not sustain a decree for desertion if the only allegations on that point are that defendant has lived away from her husband for a period of less than two years in adulterous cohabitation with a specified person, and that complainant has not voluntarily cohabited with defendant since the discovery of such adultery. *Powell v. Powell*, 299.
cross-examination of divorced wife as to payments, 274 (5).
foreclosure of wife's mortgage, 537 (1).

husband exceeding authority as wife's agent, 294.
will creating trust for husband's benefit, 494 (6).

Identification—of matter referred to in lost document, 188 (6).
of mortgaged portion of lumber, 108 (3).
Identity—of given names, 25.
Impeachment—of witness to alibi, 368 (2).
Implied—tenancy, in purchaser of lumber, 521 (2).
Imprisonment—on bail awaiting sentence, 373 (5).
Improvements—local, towers for electric lights are not, 417 (7).
Inadequacy—of price, as bearing on vendee's good faith, 138 (1).
Incompetency—of jurors, array not affected, 642 (7).
Incompetent—person, proceedings for appointment of guardian, 549 (1–4).
Indorsement—by payee in blank, right to sue, 297 (1).
of approval of assignee's bond, 331 (1).
of names of witnesses on information, 321 (1).
putting purchaser on inquiry, 294.
INFANTS.
A minor son, occupying land as tenant-in-common with his mother and sister, has no right in himself, without their authority, to give, sell or otherwise transfer the timber on the land to a stranger or assent to his entry on the land to remove it. And for such entry the tenants-in-common can maintain trespass. *Richey v. Brown*, 435.
license by minor to remove timber, 435.
Information—for horse-stealing, 327 (1, 2).
joinder of offenses in, 594 (1).
indorsement of names of witnesses on, 321 (1).
INJUNCTION.
1. Security must be filed with a bill to enjoin proceedings at law. How. Stat. § 6692. *Jenness v. Smith*, 281.
2. Injunction lies at the suit of one who has purchased a mill on the foreclosure of a mortgage thereon, to restrain the former owner from meddling with the dam and race to complainant's injury, if they are the only source of supply and remain on the latter's premises. *Curtis v. Norton*, 411.
3. A hearing upon an injunction bill cannot be had after the act has been done which it is the sole purpose of the bill to restrain; the remedy for any consequent injury is to be had, if at all, at law. *East Saginaw Railway v. Wildman*, 286.
4. Injunction will not lie for the purpose of passing on abstract rights or wrongs apart from some threatened injury to the person seeking relief, nor when such injury is remediable at law. *Id.*
5. Owners of taxable property can maintain a bill to enjoin the municipality in which it lies from executing a contract if its effect would be to increase their burdens by way of taxation to an amount sufficient to bring the case within the jurisdiction of equity. *Putnam v. Grand Rapids*, 416.
6. Complainants may properly join in an injunction bill where their grievance, though not joint, is common; and the cause thereof and the relief they seek is the same. *Id.*
7. A guardian obtained leave to sell lands in which his ward inherited an interest but the sale was not approved as required by How. Stat. § 6727. The title to the lands was on its face a tenancy-in-common belonging in equity to firms in one of which the guardian, the ward's ancestor, and the grantee were partners, and in the other the first two; and one of the transfers was made in pursuit of a partnership settlement with the grantee. The ward, on becoming of age, brought ejectment for the lands, and the grantee sought to enjoin the action and claims that the guardian's deeds should be made valid. *Held*, that the bill, which was dismissed without prejudice, was properly

dismissed; void guardian's deeds could not be confirmed as such, and though the lands were partnership lands and therefore liable to be used for partnership purposes, still, as they were held by tenancy-in-common, relief could only be worked out in equity unless the deeds were good. And the bill was hardly capable of amendment. The interests belonging to each firm and the condition of each should appear, so as to denote the liability of the different lands, and this can only be reached by some sort of accounting. The bill would probably not be multifarious in joining these titles. *Jenness v. Smith*, 280.

when lies against tax sale, 345 (1, 2).

Injury—allegation of amount of, in chancery bill, 482 (3).

irreparable, what is, 482 (4).

INSOLVENCY.

Insolvency may be mere inability to pay one's debts as they mature . the ordinary course of his business, even though the insolvent's assets exceed his liabilities. *Munson v. Ellis*, 332.

not necessary to validity of assignment, 332 (4).

Inspectors—of election, in Detroit, statute void, 213 (5).

Instructions to jury—as to effect of evidence of a witness, 177 (2).

to disregard improper testimony, 188 (10).

INSURANCE.

1. The averment in a declaration on an insurance policy, that it was made and issued to plaintiff as described, is admitted if not denied by affidavit filed with the plea. Circ. Court Rule 79. And in such case questions arising out of an alleged mistake in the name of the insured or relating to the ownership of the policy or the mode of its procurement are not open to consideration. *Simon v. Home Insurance Co.*, 278.

2. Where in an action on a fire insurance policy the plaintiff has testified as to the condition of her dress and her children's in escaping from the fire, cross-examination on this point is immaterial unless fraud is charged or the fire was wrongful. Nor can it be made a basis of impeachment. *Id.*

3. Where charterers of a vessel have insured it under an agreement with the owners that in case of its total loss the insurance money shall be paid over to them, and have had themselves named in the policy as the parties on account of whom insurance was taken though the loss was made payable to the owners, the latter have such an interest in the policy as will entitle them to sue upon it in their own name. *Rich. & Ont. Nav. Co. v. T. & M. Ins. Co.* 132.

on goods rejected by vendee, 30 (3).

Intent—of parties to chattel mortgage, 108 (4, 5).

of purchaser of stock of goods, 424 (1, 3).

of testator, to be carried out, 494 (3).

to defeat transfer by debtor, 89 (3).

Interest—compound, mortgage not reinstated to secure, 138 (2).

Intervening claimant—amendment cannot affect rights of, 25.

INTOXICATING LIQUORS.

1. A saloon is not "closed" within the meaning of the law requiring such places to be closed at certain times (How. Stat. § 2274), so long as it is possible for persons desiring liquor to get in peacefully whether by the outside entrance or any other, or so long as any customer who is inside at the time for closing remains inside. And it is not important that there is no one attending the bar, if the liquor is accessible, nor is it important that none is sold. *People v. Cummerford*, 328.

2. Mandamus will not issue to compel the approval of a liquor dealer's bond by the council of a village organized under the General Incor-

poration Law, which empowers such villages to suppress saloons, Act 52 of 1883. *Post v. Sparta*, 212.
3. The right of a municipality to a liquor tax collected therein becomes vested at the date at which the law requires the tax to be paid; and if not then paid the subsequent annexation of the territory to that of some other municipality before its payment, does not transfer to the latter the right to the money. *Springwells v. County Treasurer*, 240.
Irreparable injury—as ground of equitable jurisdiction, 482 (4).
Issue—in replevin, how determined, 108 (6).
not pleaded, request refused, 58 (6).
of writ to enforce decree, 2 (9).

Joinder—of counts in information, 594 (1).
of repugnant counts in declaration, 557 (3).
of complainants in injunction bill, 416 (2).
Joint—and several note; signer and surety, 343 (2).
judgment, set-off refused, 204.
JUDGMENT.
A judgment not only fixes the extent of liability but the party or parties liable; and if such party is a corporation, it is not merely individual members thereof that are held. *Brewer v. Michigan Salt Association*, 351.
affirming probate order of appointment, 549 (4).
against garnishee, disclosure to sustain, 570 (2).
on substituted service, when void, 208 (2).
void, trover for goods taken under, 208 (3).
Judgment creditors—bill to reach fund, 494 (6).
liability in trover for goods taken under void judgment, 208 (3).
Judicial—knowledge, as to oleomargarine, 381 (3).
notice of date of Sunday contract, 578 (2).
Jurisdiction—dismissal of appeal for want of, 315 (7).
dismissal without prejudice, for want of, 407 (3).
by substituted service of attachment, 208 (2).
in rem, how obtained against vessel, 288 (5).
justice's criminal warrant must show, 325 (2).
of justice, in larceny, depends on value, 325 (2).
motion to set aside for want of, 288 (7).
must appear from justice's docket, 307 (1, 2).
not presumed in absence of facts in record, 288 (3).
of bill to abate private nuisance, 482 (2, 3), 483 (5, 6).
allegation of amount of injury, 482 (3).
irreparable injury as ground of, 482 (4).
of proceedings to wind up assigned estate, 311 (1).
showing in proceeding to establish lien, 288 (2).
to entertain appeal, 315 (4).
to pronounce sentence, lost by delay, 373 (5).
to settle disputed boundaries, 347 (1).
JURY.
The incompetency of some of the jurors returned by the sheriff does not affect the array if those sworn were competent. *Grand Rapids v. G. R. & Ind. Ry.*, 642 (7).
conduct of counsel in presence of, 274 (3).
decides upon weight of testimony, 508 (4, 5).
determines weight of conflicting proofs, 263 (1).
determines effect of evidence of a witness, 177 (2).
determines as to credibility of witness, 507 (3).
determines reasonable time to remove lumber sold, 520 (1).
determines whether parties to a chattel mortgage knew what it was to cover, 108 (5).
determines good faith of purchaser, 108 (5).

discretion to allow visitation by, 413 (5).
duty of, in street opening, 642 (5).
exhibiting model to, 413 (4).
fees of, as costs, 373 (6).
finding of mental incompetency, 549 (3).
not to pass on guardian's liability for ward's funds, 268 (4).
presumption against bias of, 641 (4).
question of ordinary care, when taken from, 182 (1).
to determine as to agent's authority, 294.
to determine ownership of notes discounted, 294.
to determine questions as to log-driving, 148 (5).
vicinage of, in street opening case, 641 (3).
JUSTICES OF THE PEACE.
1. While a justice's docket entry is entitled to a fair and reasonable interpretation, it must nevertheless show by reasonable intendment that he had jurisdiction. And it must show affirmatively the day and hour of the appearance of the parties, and if defendant is absent that plaintiff appeared on the return day of the summons, and within one hour after the time fixed therein. Otherwise the judgment is void. *Mudge v. Yaples*, 307.
2. Parol proof is inadmissible to vary or explain a justice's docket so as to give him jurisdiction that does not appear on its face. *Id.*
amendment of declaration on appeal, 38 (1).
appeal after time expired, 571 (1).
jurisdiction by substituted service of attachment, 208 (2).
warrant for larceny, must state value, 325 (1, 2).
warrant may be amended, 325 (3).
Justification—of sureties on official bonds, 237 (1).

Labor—hearsay as to time of, 413 (1).
evidence of value, 413 (2).
claims, assignment of, 39 (5).
Laches—in filing bill to quiet title, 117.
in pronouncing sentence, 372 (2), 373 (3-5).
in seeking reformation of lease, 578 (1, 4).
in vacating discharge by mistake, 138 (2).
rights not lost against persons claiming under forged deed, 1 (5).
LANDLORD AND TENANT.
1. Ten years delay in filing a bill for the reformation of a lease that was based on an oral agreement, is grave laches. *Hoard v. Stone*, 578.
2. A lease based on an oral arrangement stated the rental to be "five dollars." *Held*, that a bill to reform it so as to make the rent "five dollars annually" was properly dismissed where the parol negotiations did not clearly support complainant's claim and where complainant, after raising the question, had delayed ten years in filing the bill and had meantime made certain payments to defendant without claiming offset.
But reformation was allowed to the extent of limiting the tenancy to such time as defendant should occupy the premises for the particular purpose which both parties evidently had in view when the lease was made and which was the apparent inducement for making it. *Id.*
3. The amount of rent paid may be shown as bearing upon the value of the use and occupation. *Noble v. Fairs*, 637.
4. The purchaser of lumber becomes presumptively the tenant of the owner of the premises on which it is piled if he does not remove it within a reasonable time and on being notified that he must take it away; and if such notice is accompanied by a statement that a specified rent will be charged for their occupancy, he is presumed to assent to the terms if he does not remove it. *Ducey Lumber Co. v. Lane*, 521.

5. A mining superintendent sued for his wages, and his employers claimed the rent of the house he occupied, as offset. *Held,* that unless there was proof of a custom that the superintendent should have his house free of charge, the set-off must be allowed; and *it seems* that the plaintiff's testimony that he never heard of a superintendent's paying rent for his house was enough to leave the question with the jury. *Berringer v. Cobb,* 557.

lease dated on Sunday, 578 (2, 3).

LARCENY.

1. In larceny triable by a justice the value of property stolen is of the essence of the offense and the averment thereof in the warrant a substantial allegation, for the jurisdiction depends on it and the warrant must show jurisdiction. *People v. Belcher,* 325.
2. A justice may, before trial for larceny, permit the warrant to be amended to show the value of the property taken; but if he does not the circuit court on appeal cannot allow such amendment. *Id.*
3. The punishment provided for horse stealing by How. Stat. § 9180 can only be imposed when the information or indictment is expressly based on the statute; and where that is not the case the excess beyond the ordinary penalty for larceny will be remitted on review by reversing the judgment to that extent. *People v. Seller,* 327.
4. Whether the theft of other property besides a horse can be included in an information based on the special statute imposing an excessive penalty for that offense—Q. *Id.*

warrant for arrest must state value, 325 (1).

Lease—bill to reform, 578 (1, 4).

dated on Sunday, 578 (2, 3).

Legatee—question of advancement, 152 (1, 3–6).

testimony as to facts known to testator, 96 (1).

Levy—of execution, dissolution of attachment, 487 (1, 2).

wrongful, damages to mortgagee, 617 (6).

License—by infant, to enter on land, void, 435.

LIEN.

A builder's lien will not attach to any interest in real estate which defendant did not have when materials began to be furnished (How. Stat. § 8377); nor will filing notice of the lien operate retrospectively; the lien will not, as against bona fide purchasers, attach to property that has been transferred to them before the filing of notice. *Sisson v. Holcomb,* 634.

of execution, not affected by dissolution of attachment, 487 (2).

on water-craft, for supplies, 288 (2, 4, 5).

upon partnership property, 297 (2).

Life interest—not affected by levy upon remainderman's interest, 56 (2).

LIMITATION OF ACTIONS.

1. Where the continuity of an action is interrupted by an interval between the return day of one writ of summons and the issue of an alias writ, the institution of the action will not bar the operation of the statute of limitations. *Johnson v. Mead,* 67.
2. The fact that a claim is apparently outlawed does not necessarily exclude evidence thereon; the question whether or not it is barred is one to be dealt with when the testimony is all in. *Cotherman v. Cotherman's Estate,* 465.

Liquor—bonds, approval of, 213.

tax, right to, 240 (1).

LIS PENDENS.

1. A notice lis pendens affects those only who afterwards and pending suit seek to obtain interests, as purchasers or incumbrancers, in the property it refers to; and one who has begun suit to establish an equitable lien thereon upon the basis of previous dealings with defend-

ant does not himself become thereby a purchaser or incumbrancer within the protection of the recording laws as against any rights acquired before the notice is filed. *Hammond v. Paxton*, 393.
2. A notice lis pendens is ineffective as against a mortgagee whose mortgage antedated the notice though it was not recorded until after the notice was filed. *Id.*, 394.
3. The operation of a lis pendens as notice lasts, if the suit is not abandoned, until it is closed by final decree, provided it is prosecuted with reasonable diligence and in good faith; otherwise a purchaser who has no actual notice is not affected by it. *Id.*, 394.
4. The purpose of a notice lis pendens is to prevent defendant from so alienating the property in dispute as to affect complainant's rights and to bind it wherever it may be when decree is entered. *Id.*, 394.
5. A suit is abandoned if before its completion another seeking the same relief is instituted and carried to decree in its place; and the effect of a lis pendens filed on the institution of the first suit is not transferred to the other *Id.*, 394.

Local—government, 213 (1, 5).
improvements, towers for electric lights are not, 417 (7).
Logs—assumpsit for extra services in running drive, 226.
hearsay as to driver's action, 148 (1).
questions under driving contract, 148 (5).
Lumber—chattel mortgage on, uncertainty, 108 (3).
reasonable time for purchaser to remove, 520 (1).
rent for storage of, 521 (2).
title to, under contract of sale, 521 (3).
taxation of, piled on docks, 625.
identification of mortgaged part, 108 (3).

MANDAMUS.
1. A relator or respondent who relies on official records to establish his right must produce such records or certified copies thereof with his petition or answer; it is not enough to refer to the originals. *Cronin v. Kalkaska Supervisors*, 448.
2. Costs of the motion were allowed respondent where relator had leave to withdraw his petition in order to attach to it the record evidence on which his claim was based. *Id.*

to review appointment of receiver 312 (3).
to compel approval of liquor-dealer's bond, 212.
to supervisors, to pass health accounts, 452
Manslaughter—procurement of abortion, information for, 594.
Maps—should be furnished in record, 412 (3).
Marine insurance—parties to suit on policy, 132.
Marshal—return of, reciting publication, 288 (6).
MASTER AND SERVANT.
1. Where, under a contract for a year's service the employee has gone on from year to year and at the end of a year is allowed to go on without objection, a presumption arises which will warrant a jury in finding that the parties to the contract have assented to its continuing in force for another year. And the Statute of Frauds does not apply to defeat it. *Sines v. Superintendents of the Poor*, 503.
2. In an action by a mining superintendent for his wages, evidence that a person impleaded as joint defendant had paid the employees of the firm, superintended its operations and given orders to the plaintiff is admissible to show his joint interest in the mine and his acquiescence in the contract of employment, even though he did not himself make it. *Berringer v. Cobb*, 557.
3. An employer has no arbitrary power to dismiss his employee for a disobedience to orders that involves no serious consequences and is not "willful" in the sense of being perverse, insubordinate or un-

reasonable; and its reasonableness is for the jury. Nor can disobedience be made a pretext for dismissal apart from the injury it causes. Whether even a menial or domestic servant can be dismissed for mere harmless disobedience—Q. *Shaver v. Ingham*, 640.

4. A railroad employee takes the ordinary risks of the work for which he hires; and if the company has used proper diligence in choosing competent servants it is not liable in damages for an injury to one of them caused by the carelessness of another. *Gardner v. M. C. R. R. Co.*, 585.

custom excusing employee from rent, 557 (6).
Materials—evidence of value, 413 (2).
Mental incompetency—averment of, in petition for guardian, 549 (1).
proceedings on appeal, 549 (2).
finding of, 549 (3).
Merits—not considered on motion to dismiss, 315 (5).
Mesne profits—suggestion of claim for, 637 (1, 2, 4).
Mills—injunction to restrain interference, 411 (1).
sale of, includes appurtenances, 412 (2).
Mines—custom excusing superintendent from paying rent, 557 (6).
Misnomer—of plaintiff in attachment, 377 (2).
Mistake—of attorney, appeal allowed, 571 (1).
discharge of mortgage by, 138 (1, 2).

MORTGAGE.

1. The character of a deed as security is not destroyed by the fact that no defeasance was given until after the delivery of the deed, provided the transactions were substantially contemporaneous and were manifestly meant to amount to a mortgage. *Jeffery v. Hursh*, 246.
2. The recital in a bond of defeasance that the obligor will reconvey such interest as he has *now* acquired, establishes the contemporaneous character of the deed and defeasance and cannot be contradicted by parol. *Id.*, 247.
3. A bond of defeasance, being under seal, is an instrument of as high order as the deed which it accompanies. *Id.*, 247.
4. A bond to reconvey is valid as a defeasance even though it covers lands belonging to a third person and included with the grantor's land by virtue of a power of attorney to him to sell them. It would be good at law as to the grantor's land, and in equity as to the third person's, the last not being mortgageable under a power of sale. *Id.*, 247.
5. A deed absolute taken in connection with a bond or separate defeasance or agreement, executed at the same time, to reconvey on payment of a stated sum, constitutes a mortgage if the instruments are of the same date or are executed and delivered at the same time and as one transaction. When this is the case it is a conclusion of law that they constitute a legal mortgage. *Id.*, 247.
6. Whether a chattel mortgage upon a quantity of lumber is not void for uncertainty if given before the mortgagers have received the lumber and acquired title to it, and before the portion designated in the mortgage has been set apart and identified by the selection, from the mass, of other lumber claimed by a creditor—Q. *Cass v. Gunnison*, 108.
7. The intention of the parties to a chattel mortgage may aid in ascertaining the exact description of the property it is to cover and in applying it thereto; but it cannot apply the mortgage to property not known to the parties when the mortgage was made. *Id.*
8. The question whether the parties to a chattel mortgage knew what it was to cover, is one for the jury. So, also, is the good faith of a purchaser of the goods. *Id.*
9. A bill to vacate the inadvertent discharge of a mortgage, and to fore-

close it, was dismissed on appeal, where it appeared that seven years after the mortgage was discharged the mortgager had sold the land to his son whose good faith as a purchaser was not to be impeached by any presumption that his relationship gave him opportunities of knowing his father's financial condition, or by any such inadequacy of price as a sum from three-fifths to three-quarters of the value. *Sheldon v. Holmes,* 138.

10. A party seeking to restore and foreclose a mortgage that has been discharged by mistake and without any fault of the mortgager, cannot have it re-instated to secure any extortionate sum made up by semi-annual computations of compound interest, even where the mortgage discharged was made up in that way and had been given to take up a previous mortgage. *Id.*
11. On dismissal of a foreclosure bill as against a subsequent bona fide purchaser who has not made full payment, he may still be held for such sums as remain due after he has been notified of complainant's equities. *Id.*
12. A wife's mortgage upon her own land is not invalidated by her husband's joining in it; nor is the sale thereunder made void by the fact that the notice of sale describes her as his wife. *Yale v. Stevenson,* 537.
13. A mortgage sale of several lots which were fenced and used as one parcel when the mortgage was given and had continued so, was not void under the statute in force in 1869. Comp. L. (1871) § 6918. *Id.*
14. A foreclosure decree fixes the amount due on the obligation and security, and is a final adjudication on that point; and no objections can be made to the issue of execution for a deficiency unless they arose after confirmation of the foreclosure sale and recognize the decree and go to its discharge. *Haldane v. Sweet,* 429.
15. One who takes a deed of mortgaged land will be personally liable on the foreclosure of the mortgage if his deed expressly binds him to pay it; but a covenant to do so cannot be implied by either deed or mortgage. *Gage v. Jenkinson,* 169.
16. The statutory jurisdiction to enforce the collateral obligations of third persons upon a mortgage foreclosure is permissive and not obligatory and will not be exercised to their prejudice unless they have made it necessary by their own agreements. *Id.*
17. Whether on mortgage foreclosure, a personal liability can be enforced against one who is not a party to the mortgage but has bought the land subject thereto and without making anything more than a parol agreement with the grantor to pay it—Q. *Id.*
18. A first mortgagee can waive his priority and let the second in upon the same footing with himself, so that in taking possession on default they become tenants-in-common of the securities and the goods therein specified. And they can jointly bring trespass for interference with the goods. *Densmore v. Mathews,* 616.
19. Creditors who levy subject to a mortgage are in position to require the mortgagee to pursue the methods prescribed in the mortgage as to the mode of sale and the disposition of the proceeds. *Id.,* 617.
20. In an action by mortgagees against a marshal for interference with their possession while disposing of the goods, it is proper to show that they were realizing the best prices that could be obtained and failed to get enough to pay the mortgages, and that the deficiency exceeded the value of the goods taken by the marshal. *Id.,* 617.

attachment not justified by sale under, 616 (3).
clearing title from "expenses and interest," 441.
consideration for abatement of debt, 177 (1).
damages to mortgage from wrongful levy, 617 (6).
ejectment for land sold under, 537 (3).

evidence as to manner of sale under, 378 (3).
evidence of, in replevin, 108 (1).
mortgagee protected against tax-sales, 49 (3, 4).
mortgagees as parties in condemnation proceedings, 642 (8).
notice lis pendens to mortgagee, 394 (2).
not supported by power of attorney to sell, 247 (5).
replevin by chattel mortgagee, 377 (1), 378 (3).
replevin by mortgagee of libeled vessel, 288 (1).
suit by administrator to set aside, 340.
Motion—to dismiss appeal, merits not considered, 315 (5).
to quash writ of replevin in cross-suit, 450.
to set aside void proceedings, 288 (7).
to strike from files, 242 (3).
to strike out, withdrawn to save error, 58 (5).
MUNICIPAL CORPORATIONS.
1. The fundamental and necessary characteristics of the various classes of municipal bodies which administer local government in Michigan, cannot be changed by legislation from what they were as fixed by usage and recognition when the Constitution was adopted. *Attorney General v. Detroit Common Council*, 213.
2. Detaching territory from a township does not affect its ownership of anything but the land, unless the law provides for the transfer of other rights; if it does not, debts and other incorporeal rights still belong to the township. *Springwells v. County Treasurer*, 240.
3. Municipal ordinances are general and impose duties which in particular cases may not be important; their purpose is public and their violation is to be redressed by legal penalties. *Cook v. Johnston*, 437.
4. A contract made by village trustees, as such, for the building of abutments to a public bridge does not bind the trustees personally for payment, but is apparently binding on the village. *Lyon v. Irish*, 518.
5. Courts cannot stand between the public and their regularly elected authorities unless the latter exceed their powers; so long as they do not, the people must bear the consequences of their folly or choose wiser representatives; the discretion necessarily vested in a public functionary cannot be reviewed. *Putnam v. Grand Rapids*, 416.
6. Equity cannot interfere with municipal contracts on the ground merely that they are impolitic or unwise, but it may if they violate the municipal charter. *Id.*
7. Charter provisions empowering the common council to regulate the lighting of public lamps and to employ a suitable person to superintend them do not confine the management of the lighting apparatus, or of any part of it, to the city government, nor exclude the use of gas or electricity controlled from a central point. Such provisions are neither exhaustive nor imperative. *Id.*
8. Charter provisions prohibiting the creation of municipal liabilities in any one year exceeding the amount to be raised by tax and providing that payments on a municipal contract shall be made from sums raised by tax for the year for which such contract is made, have the effect of forbidding the creation of future responsibility for annual current expenses. *Id.*
9. Towers for electric lights are not "local improvements" any more than lamp-posts are, so long, at least, as the system of lighting is not owned by the municipality. *Id.*, 417.
10. Municipal discretion as to how much of a street shall be set aside for the actual highway, and how much for the sidewalk, trees, gutters, etc., cannot be reviewed judicially or passed upon by a jury so long as no distinct legal duty has been violated. *McArthur v. Saginaw*, 357.

11. The liability of a city for an injury caused by the condition of a street is purely statutory, and the purpose of the statute is to limit the responsibility to reasonable care. *Id.*
12. The act "for the collection of damages sustained by reason of defective public highways, streets," etc., covers such defects only as are due to want of repair, and has nothing to do with the presence in the street of building material or other objects that do not affect its condition in that particular. *Id.*
13. The unauthorized or excessive use of a portion of the public highway by an abutting owner in putting lumber or material thereon is a matter that falls within the cognizance of the police power, and it has nothing to do with the duty to make or repair highways. *Id.*
14. A man was thrown out of his buggy and killed in consequence of striking a pile of lumber that projected over the street to the traveled part of the way but not over the latter. *Held,* that his administratrix could not recover against the municipality for his death as for an injury caused by failing to keep the street in repair and safe for travel. *Id.*
15. How. Stat. § 1443 gives a right of action against a municipality for any injury its neglect to keep its streets in repair may cause to horses traveling therein. A horse that was driven on a trot was permanently injured by stepping on a cobble-stone of which there were several scattered about the street, and there was evidence that they could be seen by the driver. An action against the city for the injury was taken from the jury. Upon review the Supreme Court was equally divided and the result was not disturbed. *McCool v. Grand Rapids,* 41.

control over working of streets, 444 (1, 3–5).
vicinage of jury limited to, 641 (3).
estoppel from opening street across track, 642 (12).
right to liquor tax not transferred by annexation, 240 (1).
right to local self-government, 213 (5).

Municipal courts—proceedings to administer assigned estates cannot be removed to, 311 (1).
purpose of, 312 (2).

Murder—and manslaughter, joinder of counts, 594 (1).

Name—amendment of proceedings, to change, 25.
Necessity—of street opening, 642 (5, 6).

NEGLIGENCE.

1. Putting ashes in a wooden barrel in violation of a municipal ordinance is not negligence per se; it is a question of fact whether it is negligent in a particular case. *Cook v. Johnston,* 437.
2. Negligence may sometimes be inferred from all the evidence taken together, even though the only direct evidence on the subject tends to negative it; and wherever the facts might support different inferences, it is a question for a jury. *Crosby v. D., G. H. & M. Ry.,* 458.
3. The illegal obstruction of a highway by a freight train standing across it is not the proximate cause of the injury which a driver, who is waiting to get across the track, may suffer from having his horses frightened by a passing train while he is detained there. *Selleck v. L. S. & M. S. Ry. Co.,* 195.
4. Any disposition of the snow cleared from a street railway track must be made with due regard to the rights of travel on the highway; and it cannot be charged as matter of law that the fact that the general level of the road was left above the level of the railway track would not make the disposition of the snow unlawful. *Wallace v. Detroit City Ry. Co.,* 231.
5. A declaration in an action against a street railway company for an

injury resulting from its neglect to properly clean the snow from its tracks, in consequence of which a horse harnessed to a double bob-sled was thrown down, described the ridges of snow as "along and very near to said street railway track, and between the double tracks thereof," and stated that as the sleigh struck the ridge between the tracks the horse stepped on the steep and slippery bank piled "along and near said" track. *Held*, that this distinguished between the two places; and as a like distinction was kept up in farther recitals, there was no variance arising out of the question whether it was one ridge or the other that caused the injury. *Id.*

6. A declaration for an injury caused by the insufficiency of a cattle-guard should state in what particulars it was insufficient; and if it does not do so it is demurrable *Smead v. L. S. & M. S. Ry. Co.*, 200.
7. Where in an action for negligent injury both sides have without objection introduced such testimony as fully explains all facts bearing on the manner and cause of the injury, an amendment of the declaration should be allowed as a matter of course, if objected to for variance, so long as it is plain that no one could have been surprised by the testimony. *Wallace v. Detroit City Ry.*, 231.
8. In an action for injury to a person crossing a defective bridge with a team it was error to charge that the fright of a team was no defense *unless the jury found it was caused by something else than the defect*, for that places the burden upon the defense of proving that it was something else; while in fact it was the plaintiff's duty to establish his own case and show the affirmative fact, if it existed, that the defect caused the fright. *Merkle v. Bennington*, 157.
9. An error in taking a case of railway injury from the jury upon a particular question, may be rendered nugatory by such evidence of contributory negligence as would render that course necessary. *Rhoades v. Chicago & Grand Trunk Ry. Co.*, 264.
10. A man walking along a country road upon a dark night stepped into a hole, for which he was, however, on the look-out. *Held*, that his knowledge of the defect did not necessarily establish his negligence, but was only a fact for the jury to consider in deciding whether he was negligent or not. *Lowell v. Watertown*, 568.
11. A man approached a railway crossing at an acute angle in a buggy drawn at an easy trot by a horse and a mule. A regular fast train, coming at the same time, and in full sight for a considerable distance if he had turned his head, whistled sharply close by the crossing and frightened his team so that it became unruly, and ran upon the track, and the man was killed. The man, who knew the neighborhood, was apparently ill, and drove absent-mindedly, without noticing the train until he was close to the crossing, though several witnesses saw the danger he was running into. *Held*, that he was guilty of contributory negligence, and that an action for his death could not be maintained against the railway company. *Rhoades v. Chicago & Grand Trunk Ry. Co.*, 264.
12. It is negligent to approach a railway crossing with a team so closely as to involve apparent danger, either of direct collision or of the team's being so frightened by the passage of the train as to become unmanageable and likely to get upon the track in spite of the attempt to check it. *Id.*
13. One who voluntarily exposes himself to evident risks caused by another's negligence cannot recover against the latter for bodily injuries resulting from such exposure even though the exposure was for the purpose of saving property or the life of an animal. *Cook v. Johnston*, 437.
14. A switchman who had been strictly cautioned against having anything to do with coupling cars tried to uncouple some while the train

was moving, and had his foot caught where the planking had been for some time slightly broken, though the defect had not been seen by him as yardman and the railroad company had no notice of it. *Held*, that he could not recover for the injury resulting to him. *Gardner v. M. C. R. R. Co.*, 584.

15. How. Stat. §§ 8313–14 giving a right of action for a fatal injury, though in derogation of the common law is a remedial statute and establishes a general rule which applies as well to townships as to other defendants, even though at the time of its adoption townships were not liable for such injuries but became so afterwards. *Merkle v. Bennington*, 156.

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NEW TRIAL.

New trial will not be ordered for an error which could not have prejudiced appellant. *Finan v. Babcock*, 301.
for improper testimony allowed to remain in case, 188 (10).
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to corporation, through agent, 386 (5).
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NOVATION.

A novation arises where A owes B, and B, C, and B pays C with an order charged to B on A's books and drawn by A's authorized agent; this shifts A's indebtedness from B to C. *Finan v. Babcock*, 301.
amendment to admit testimony of, 301 (5).

NUISANCE.

1. A bill in equity will lie against complainant's neighbor for building and maintaining a cornice that projects over complainant's boundary line to the permanent injury and depreciation of his property. And this is so, though a remedy be given by statute (How. Stat. ch. 273) for the abatement of a private nuisance where the party complaining thereof has recovered therefor in an action on the case. *Wilmarth v. Woodcock*, 482.

2. Whether, in a chancery bill to abate a private nuisance, it is necessary to allege that the injury it does exceeds $100; and whether the suit must fail, if it falls below that—Q. But a bill alleging that the injury amounts to $500 is not bad for setting up a standard of damages that might be recovered at law. *Id.*

3. The allegation in a bill to abate the private nuisance of an encroachment on complainant's premises, that defendant has claimed ownership of a strip thereof, is not such a statement of a dispute about a boundary as would deprive the court of jurisdiction, if the bill states with certainty the actual boundary and complainant's ownership on one side. *Id.*, 483.

Objections—to affidavit for capias, waiver of, 187 (1).
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OFFICE AND OFFICER.
1. The phrase "office or public trust" in the constitutional prohibition against tests includes every important function of government, and covers boards of registration commissioners. And the term "test" does not apply to those special qualifications that are required for particular offices. *Attorney General v. Detroit Common Council*, 213.
2. All officers and functionaries exercising powers of government and control over political action must derive their powers and office either from the people directly or from the agents or representatives of the people. *Id.*
3. One who is shown to be entitled to the office of supervisor can compel his predecessor to deliver to him the books and papers pertaining to the office. How. Stat. § 8539. *Schneider v. McIvor*, 511.
4. The statutory proceeding for compelling a public officer to surrender the books and papers of his office to his successor (How. Stat. ch. 295) is summary and does not apply for determining the latter's right to the office, but only for ascertaining whether he has been declared by the proper authority to have been elected or appointed. *Curran v. Norris*, 512.
5. Public proclamation by the inspectors of election, after canvassing the votes, that a specified person has been elected is sufficient prima facie evidence of his right to the books and papers of the office to warrant an order to the former incumbent to show cause why he should not surrender them to his successor. *Id.*
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political, not a condition to holding office, 213 (5).
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to condemnation proceedings, 642 (8).
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PARTNERSHIP.

1. The existence of a partnership, as between the parties, is a question of fact for a jury. And it is negatived by a verdict permitting recovery if there could be no recovery otherwise. *Densmore v. Mathews*, 616.
2. Whatever one partner does in the collection of a firm debt is presumptively done with the other's consent. *Rolfe v. Dudley*, 208.
3. A partner after drawing cheques upon the funds of the firm for his personal use, and charging them against himself, was succeeded by another partner, and sold out his interest to the new firm. *Held*, that the new firm could not sue him at law for the amount of the cheques, nor use them as offset against an action brought by him against the firm; the mutual liabilities of the old firm should be settled by an accounting. *Gardiner v. Fargo*, 72.
4. A partner's sale of his interest in the assets of the firm does not, it seems, assign his personal indebtedness thereto unless the instrument of transfer expressly includes it. *Id.*
5. One partner paid firm debts from his private funds at the other's request on the latter's promise to repay half the amount, with interest. *Held*, that after the dissolution of the firm he could offset so much against an independent claim for which his former partner sued him at law; and he could do this though a suit in chancery was pending for a partnership accounting. *Cilley v. Van Patten*, 404.
6. A bill for relief against an heir holding in trust a partnership interest in lands should show the partnership character of the interest. *Jenness v. Smith*, 281.
7. On a bill for an accounting involving the interests of a deceased partner the latter must be represented in court. *Id.*
8. Whether, where the duration of a partnership is not fixed by the agreement therefor, either partner cannot dissolve it at pleasure—Q. Whether any condition or limitation as to its duration can be ingrafted on the partnership contract as an implication from its nature—Q. *Walker v. Whipple*, 476.

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lands of, notice from possession, 394 (6).
lien upon property, 297 (2).
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PARTY WALLS.

A, having put up a brick building, sold to the adjoining owner, B, a half interest in a side wall to be used as a party wall in a building which B was putting up. C was also building next beyond B, and the new buildings went up together as one. Their foundation was laid before the sale of the wall was made. After the new buildings were finished, A sued C for injuries resulting to A's building from alleged defects in the construction of C's The trial judge charged that there could be no recovery if the defect was in this general foundation, nor unless it was in the foundation of a vault that was in

C's building. The defense claimed that A's building was in the same condition before C's was erected as afterward. Verdict was for defendant. *Held* (1) that the instruction was too broad, as A and C had no contract relations which would preclude A from suing; and (2) that as there was some evidence, though slight, that the injury was in part due to a defect in the foundation proper of C's building, the instruction could not be said to be harmless, on the ground that the verdict covered all defects. *Feige v. First Nat. Bank of East Saginaw*, 164.

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PLEADING.

1. Pleading a special count in assumpsit does not estop the plaintiff from recovering under the common counts, if he abandons the special count at the outset and all his evidence is consistent with the common counts. *Berringer v. Cobb*, 557.
2. Joinder of repugnant counts in the same declaration does not preclude recovery on one of them; they do not nullify each other. *Id.*
3. Omission to file a bill of particulars is unimportant if defendant, by demanding one, could preclude any surprise, and if plaintiff's case proceeded throughout upon the theory on which he recovered. *Id.*
4. A declaration in an action for the amount of an order may be amended in the discretion of the trial court so as to admit testimony that the person giving the order acted as agent, and that it amounted to a novation of the indebtedness. *Finan v. Babcock*, 301.
5. Striking out the name of a co-plaintiff is within the Statute of Amendments (How. Stat. § 7636), if it appears to be improperly in the declaration. *Hudson v. Feige*, 148.
6. A declaration in assumpsit can be amended on appeal from a justice to show that plaintiff claims as assignee. *Donovan v. Hulsey Fire Engine Co.*, 38.
7. Under the Statute of Amendments a notice of defense can be so amended as to make the pleadings conform to the referee's finding in the case; and such an amendment can bring in an item which the referee has disallowed and which would have been wiped out if there had been notice of recoupment. *Mason v Peter*, 554.
8. A plea puis darrein continuance is either in abatement or in bar; and when such a plea interposes the special defense that defendant has been garnished as plaintiff's debtor since the beginning of suit, it is a plea in abatement. *Grosslight v. Crisup*, 531.

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of settlement of accounts by giving note, 465 (4).
that purchaser of lumber becomes tenant, 521 (2).
that verdict is warranted by the evidence, 208 (1).

PRINCIPAL AND AGENT.

1. An agent's right to defend his principal's possession of premises is not affected by what he has said in the latter's absence about the latter's title, so long as he did not speak as agent, and has given no license to occupy the premises. *Taylor v. Adams*, 187.

2. Where the traveling salesman of a corporation has power to make a contract in its name, take payments thereon, receive a bond for its fulfillment and settle with the other party to the contract, his agency is sufficiently established to charge the corporation with notice of what was said and done in respect to liability on the bond at the time of the settlement. *Columbus Sewer Pipe Co. v. Ganser*, 386.

3. A power of attorney to sell will not support a mortgage; and if the deed is really intended as security they are conveyed without authority and the grantee cannot maintain ejectment for them. *Jeffery v. Hursh*, 247.

4. A woman doing business, with her husband as agent, authorized him to sell certain notes belonging to her in order to raise money to use in the business. He indorsed the notes as agent, and then sold them to a customer to whom he was individually indebted, and without his wife's permission he allowed the purchaser to apply part of the purchase price upon his debt. *Held* (1) that the indorsement was notice enough to put the purchaser on inquiry as to his authority to make such application; (2) that in an action by the wife against the purchaser to recover back the money so applied, a contract between the husband and the purchaser, with which the wife was not shown to be connected and which provided for the payment of the husband's debt by allowances in transactions with him in the course of the wife's business, was wholly irrelevant to the issue. The agent could not charge his wife's business with this debt without showing her assent to this arrangement, and if he could, this application of money was not an allowance within the terms of the contract.

The ownership of the notes discounted and the nature and extent of the agent's authority in discounting it were questions for the jury. *McBain v. Seligman*, 294.

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who can file the bill, 281 (6).
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QUO WARRANTO.
1. The right to a public office is to be settled by a proceeding in the nature of quo warranto. *Curran v. Norris*, 512.
2. A plea to the information in a quo warranto proceeding need not be verified; and if it shows that respondent has been declared elected it need not aver his citizenship or other qualifications for office. And if it states the number of votes cast at the election it need not explicitly negative the casting of a greater number. *Attorney General v. McIvor*, 516.

RAILROAD COMPANIES.
1. Positive testimony as to the giving of stationary railway signals near a highway crossing cannot, as matter of law, control negative testimony on the same subject. If such proofs conflict their weight is for the jury. *Rhoades v. Chicago & Grand Trunk Ry.*, 263.

2. A railroad company must be as watchful to keep its fences in repair as any prudent person would be in maintaining fences to protect his own property. *Crosby v. D., G. H. & M. Ry.*, 458.
3. Track repairers found at the close of the day that several rods of railway fencing, enclosing pasture land, had been burned, but they put off mending it till morning. Meanwhile a horse got upon the track during the night and was killed by a passing train. *Held*, that in an action against the company for the injury it was for the jury to say, in view of all the circumstances, whether defendant was negligent. *Id.*
4. In an action for the loss of a colt killed upon a railway track in consequence of the insufficiency of the cattle-guards it was improper to ask the plaintiff and his witnesses whether, in their opinion, the cattle-guard was sufficient to prevent animals from getting on the right of way under circumstances ordinarily arising at those places. *Smead v. L. S. & M. S. Ry. Co.*, 200.
5. Cattle-guards are sufficient if they are in good repair and of a pattern that has been found by experience effective in keeping from the track such animals as they are generally designed to restrain. *Id.*

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RECEIVER.

1. A receiver of an estate assigned for the benefit of creditors is a trustee, and subject to the general duties requiring impartiality; he cannot collude with any one, or prefer one set of interests to another. And the power to appoint him is subject not only to all rights paramount to the assignment, but to legal conditions. *First Nat. Bk. &c. v. Barnum Wire Wks*, 315.
2. Redress against the receiver of an assigned estate for injury to private rights therein must be had by petition in the court appointing him, and not by original bill. But the form of the remedy does not destroy its substance, and the action of the court thereon is reviewable on appeal if the fund in which the complaining party claims an interest is alleged to be liable to such danger as to be within the risks against which the law gives protection. *Id*
3. Mandamus will not lie, whether an appeal does or not, to review an order for the appointment of a receiver for an assigned estate. *Scott v. Wayne Circuit Judge*, 312.

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Recognizance—of special bail, who may take, 242 (2).
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RELEASE AND DISCHARGE.
A release by the party defrauded by a forgery, of rights set up under a forged deed by subsequent purchasers, may be effectual and valid. *Crawford v. Hoeft*, 2.
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REPLEVIN.
1. Demand before bringing replevin is unnecessary where defendant has deliberately obtained the goods by a fraudulent promise to pay for them which he did not mean to perform. *Carl v. McGonigal*, 567.
2. A motion to quash the writ of replevin in a cross-suit is not the proper procedure for getting rid of the cross-action. The second proceeding may be shown in bar of the first, or the defendant in the cross-writ can plead in abatement if he wishes to raise the question at the outset. *Fisher v. Marquette Circuit Judge*, 450.
3. Where replevin against a sheriff holding under attachments is brought by one who claims by virtue of chattel mortgages and sales thereunder, it is a full defense to show that plaintiff acquired his rights with knowledge of the antecedent rights of the attaching creditors. *Barmon v. Clippert*, 377
4. In replevin against an officer levying an attachment, the proceedings in the attachment suit are admissible even though one of the plaintiffs was misnamed therein and in the judgment, if it is also shown that an amendment to correct this error has been allowed. *Id.*
5. The manner of making sale under a chattel mortgage and the statements of the mortgager with reference to paying his debts when called on before the sale to pay a claim, may be shown in defense to an action of replevin brought by a claimant under the mortgage, if they tend to show collusion and fraud between such claimant and the mortgager. *Id.*, 378.
6. The notes given upon a purchase of goods and the chattel mortgage on such goods to secure the notes are properly put in evidence in an action of replevin brought by the vendor for the property. *Cass v. Gunnison*, 108.
7. In replevin for goods bought by some of the defendants from plaintiff to satisfy the purchasers' debt to another defendant with whom they had gone into partnership, the dealings of the firm in regard to partnership matters, after the goods were replevied, were immaterial in the absence of any charge of fraud. *Id.*
8. The issue in replevin is to be determined by the jury upon the facts as they were at the beginning of the suit. *Id.*

9. Where defendant in replevin has waived return he is entitled to a verdict for the value of such property in his possession as is claimed by the declaration but as to the ownership of which there is no evidence. *White v. White*, 546.
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SALE.

1. The "reasonable time" during which a purchaser of lumber is entitled to leave it where it is piled, before removing it, is for the jury to determine, in view of the circumstances, where suit is brought for the use of the space occupied. *Ducey Lumber Co. v. Lane*, 520.
2. A contract for the sale of lumber provided that a balance of payment was to be adjusted, "on basis of eight per cent. interest, *after thirty days from date*, on amount due either party hereto, *when lumber is tallied or inspected*. Said tally or inspection is to be made within thirty days from date by tallyman or inspector agreeable to both parties hereto, and each party standing one-half of the expense thereof; *all other expenses* from and after this date to be paid by the" purchaser. *Held*, that title passed by this memorandum of agreement; but whether it did or not, the expense of storage until the lumber should be removed fell upon the purchaser. *Id.*, 521.
3. If one who ships poorer goods than are ordered does not notify his customer of their inferiority he must stand the reasonable and necessary expense of testing them and then of storing them to await the vendor's orders; and these expenses may properly include insurance, freight and cartage. *Whiting Co. v. White Lead Works*, 30.
4. Where goods shipped by a vendor are of such a character that they must be used to ascertain their quality, and it turns out to be so inferior to that bargained for that the purchaser is justified in refusing to accept the goods, he cannot be charged for the quantity necessarily used in ascertaining the quality if he promptly rejects the rest on finding it out. *Id.*
by receiver, when order final, 315 (6).
evidence as to purchaser's good faith, 424 (1).
contract of, by correspondence, 29 (1), 30 (4).
evidence in replevin by vendor, 108 (1, 2).
expense of testing and storing goods, 30 (3).
for taxes, estoppel to bid at, 49 (3).
for taxes, invalid decree, 318.
for taxes, under act of 1881, 64 (1).
for taxes, when enjoined, 345 (1, 2).

goods used to ascertain quality, 30 (5).
guarantee implied from correspondence, 30 (4).
in gross, of mortgaged lots, 537 (2).
mode of, under mortgage, rights of creditors, 617 (4).
notice of, under married woman's mortgage, 537 (1).
of libeled vessel, without jurisdiction, 288 (1, 2, 4, 5).
of mill, includes appurtenance, 412 (2).
of tax certificate, consideration, 542 (2, 3).
private, of mortgaged stock, 616 (3).
to defraud creditors, intent of purchaser, 424 (3).
Saloons—approval of saloon-keeper's bond, 212.
meaning of term "closed," 328.
Security—for injunction bill, 281 (7).
SEDUCTION.
In an action for the seduction of an adopted daughter, evidence of kissing and similar familiarities between the parties is admissible to aid the jury in understanding their whole family relations. *Watson v. Watson*, 507.
Sentence—delay in pronouncing, 372 (2), 373 (3-5).
remission of unlawful excess, 327 (1).
Service—substituted service of attachment, 208 (2).
Services—assumpsit for extra services, 226.
accepted, assumpsit implied, 38 (3), 39 (4).
SET-OFF.
1. The statutory right of offset is meant to save the expense of litigation by cross actions; it does not exist where defendant could not sue at law for the demand he seeks to set off, and it cannot therefore extend to the settlement of accounts between partners. *Gardiner v. Fargo*, 72.
2. A set-off may be allowed in equity in the same cases in which it is allowed at law. *First Nat. Bank &c. v. Barnum Wire Works*, 124.
3. A debt accruing to a person in his individual capacity cannot be set off against a debt due from him as trustee. *Id.*
4. A bill to compel the offset of judgments was dismissed, where one was a joint and the other a sole judgment, and that recovered by defendant had been lawfully assigned to a third person for a valuable consideration before there was any final judgment against which it could be set off. *Ledyard v. Phillips*, 204.
5. Where notice of set-off was withdrawn it was not error to exclude the testimony it would have covered. *Donovan v. Halsey Fire Engine Co.*, 38.
against partner of old firm, 72 (2).
by trustee of corporation against individual claim, 124 (1).
in action between partners, 404 (2).
of rent of house occupied by employee, 557 (6).
SETTLEMENT.
1. A settlement of previous accounts is not to be conclusively presumed from the giving of a note by one party to the other. Whether it furnishes a prima facie presumption or is only a question for the jury—Q. *Cotherman v. Cotherman*, 465.
2. The disallowance of an item of account by a referee was proper where the parties had had a settlement, which from its nature presumably covered, though it did not specifically mention it. *Mason v. Peter*, 554.
3. A corporation gave sundry notes to a firm, both supposing that the corporation was indebted to the firm. The firm indorsed the notes, and negotiated them to strangers. The corporation made an assignment, and as it failed to pay the notes at maturity, the firm took them up. *Held*, that in an adjustment of accounts between the firm

and corporation these notes should have been credited to the firm, leaving the accounts standing as if the notes had not been made. They were not proper charges against the firm until paid by the corporation. *Blackmar v. Cornwell*, 400.

4. A son obtained apparent control of his mother's property by means of a forged deed, but she prevailed on him to convey it back to her, which he did under certain conditions by deed in escrow; but at the same time, without her knowledge, he conveyed away and mortgaged portions of the property. *Held*, that she was justified in repudiating the settlement, not only because of the fraud upon her, but because the settlement gave her nothing of value. *Crawford v. Hoeft*, 1.

as to amount due on mortgage, 177 (1).
of accounts between partners, no set-off, 72 (1).
of disputed boundaries, jurisdiction, 347 (1), 348 (2).
Sheriff—fees for subpœnaing witness, how taxed, 248 (14).
levying attachment, evidence in replevin against, 377 (1, 2).
SHIPS AND SHIPPING.

1. The mortgagee of a vessel that is afterward libeled for supplies furnished in a home port and is sold by the Admiralty Court without obtaining jurisdiction, can bring replevin for it against the purchaser. *Gould v. Jacobson*, 288.
2. How. Stat. § 8236 provides that watercraft of above five tons burthen shall be subject to a lien for certain specified demands. *Held*, that a showing that a boat was of five tons burthen was jurisdictional in a proceeding to establish such lien. *Id.*

enforcement of lien for supplies, 288 (4, 5).
proper party to suit on policy, 132.
who can testify as to methods of passenger travel, 182 (2).
following officers' directions in embarking, 182 (3).
Sidewalk—discretion as to use of street for, 357 (1).
Snow—cleaning snow from railway track, 231 (2, 3).
Solicitor's fee—of complainant in divorce, 273.
Special—bail, time to file, etc., 243 (1, 2, 4).
count, abandonment of, 557 (2).
districts, in street opening, 642 (6).
Statements—irresponsive, in answer to question, 649 (2).
of agent, about principal's title, 187 (3).
of person injured, as *res gestæ*, 156 (2).
previous to contract, vitiating it, 557 (5).
STATUTES.

A statute cannot be modified or superseded by one of earlier date, or perhaps by one of the same date which precedes it in the authorized publication of the laws. *Thomas v. Collins*, 64.

confined to purview of their titles, 237 (2).
of fraud, contract from year to year, 503 (1).
relating to oleomargarine, invalid, 381 (1).
title of, legislature cannot extend scope, 381 (2).
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Stockholders—estopped from denying liability, 351 (3).
making them parties to bill, 351 (5, 6).
decree against a part only, 351 (7).
Striking from files—proper practice to get rid of void document, 242 (3).
Striking out—answer not stricken out for ambiguity, 157 (5).
name of co-plaintiff, from declaration, 148 (4).
immaterial evidence, 188 (7).
irresponsive testimony, 649 (3).
motion withdrawn to save error, 58 (5).
Street railways—neglect to clean snow from track, 231 (2, 3).

Streets—charter provisions for lighting, 416 (5), 417 (7).
injury to horse from defects in, 41.
municipal control over opening and closing, 444 (1–5).
municipal discretion as to purposes of, 357 (1).
municipal liability for injury, 357 (2–5).
Substituted service—of writ of attachment, 208 (2).
Substitution—of attorneys, 454 (1).
Suggestion—of claim for mesne profits, 637 (1, 2, 4).
Summons—successive writs of, statute of limitations, 67.
SUNDAY.
A lease, though dated on Sunday, will be considered to have been delivered and taken effect at the date of the acknowledgment of its execution. *Hoard v. Stone*, 578.
judicial notice of date, 578 (2).
time to file special bail expiring on, effect, 242 (1).
Superintendent—mining, custom as to rent, 557 (6).
Superior Court of Detroit—proceedings to wind up assigned estate cannot be removed to, 311 (1).
Supervisor—official papers of, delivery to successor, 511.
Supervisors—board of, must pass health accounts, 452.
Supplies—statutory lien on vessel for, 288 (1, 2, 4, 5).
Support—contract for, specific performance, 563 (2–4).
Supreme Court—power to issue writs, 2 (9).
Surety—proof that signer of note is, 343 (2).
release of, by extension, 343 (1).
release of, by suspension of sentence, 373 (4).
Surrender—of official papers to successor, 511, 512 (1, 3, 5).
Survival—of action, 563 (6).
Suspension—of sentence for crime, 373 (3–5).

Taxation of costs: see COSTS.
TAXES.
1. Where a lumber company had its principal office in a metropolitan city, but had no yard, and paid no taxes there, it was proper to tax its lumber in the remote township where, by contract with a company that had its mill and storage room there, it was manufactured and piled on the latter's docks, from which, after remaining until it was seasoned, it was taken by purchasers. Act 9 of 1882, sec. 10. *Manistique Lumbering Co. v. Witter*, 625.
2. The tax-law of 1885 (Act. 153 sec. 107) in forbidding the injunction of assessment proceedings thereunder does not apply to proceedings for the sale of lands for taxes assessed and levied before the enactment of that law. *Auditor General v. Iosco Circuit Judge*, 345.
3. Injunction lies to restrain the sale for taxes of lands illegally assessed; as where the lands belonged to a non-resident and were assessed at three times their value and disproportionately with the lands of residents. *Id.*
4. A sale under section 70 of the General Tax Law (1 How. Stat., p. 1285) for taxes which accrued before the passage of such law, is invalid, because (1) the title of the Act—"to provide for the assessment of property and levy and collection of taxes thereon"—relates to future proceedings only; and (2) the subsequent Act (No. 11 of 1882) which repeals former laws relating to taxation, leaves them in force for the sale of lands for taxes already levied. *Thomas v. Collins*, 64.
5. An invalid decree of sale for taxes should be annulled by reversal instead of being permitted to stand as a null decree. And both parties should be placed in the condition in which they would have been if no proceedings in court had been taken. *State v. Eddy*, 318.

6. A certificate of tax-purchase will cloud title if the deed to be issued thereon would establish presumptive title adversely. And as the fact that the certificates attached to the assessment rolls were not filled out or attached by the proper officer, or that part of the tax had been illegally assessed, could not appear on the face of the deed, evidence of such facts would be inadmissible in defense to an action for the consideration agreed upon for the assignment of such certificate. *Stoddard v. Prescott*, 542.
7. The assignment of a certificate of tax-purchase that is regular on its face, is a valuable consideration where the certificate is sufficient to cloud the assignee's title. *Id.*
8. A State tax-deed may be executed and acknowledged by the Deputy Auditor General; and its validity does not depend on its being recorded if no question of priority is made. *Fells v. Barbour*, 49.
9. Assessment rolls with the certificate of the assessor or board of review attached are admissible in proof of the regularity of tax-deeds, where the tax or collection roll fails to show that such certificates were made; and it is discretionary with the trial judge to admit such evidence out of its order. *Id.*
10. One whose title is obtained from an execution purchaser is in such privity with the defendant in the execution that if the latter has mortgaged the land he cannot let it be sold for taxes and bid it in so as to cut off the mortgagee's rights; nor can he cut it off by taking tax leases. *Id.*
11. The purchase of bids at a tax-sale operates as a payment of the taxes so far as a previous mortgagee of the land, or his assignee, is concerned. *Id.*

enforcement of void drain taxes, 364 (1).
injunction by tax-payers to restrain enforcement of municipal contract, 416 (1).
limitation of, in charter, prohibits time contracts, 416 (6)
liquor tax not transferred by annexation, 240 (1).
provisions for special districts, street opening, 642 (6).
recording tax-deed, ejectment lies, 432 (2).
tax-titles as consideration for abating mortgage debt, 177 (1).
Tenants-in-common—mortgagees as, 616 (1).
possession by, as notice to purchasers, 394 (6).
trespass for removing timber, 435.
Tests—for offices, prohibition defined, 213 (6).
Timber—license by minor to remove, 435.
Time—duration of partnership, 476.
extension as releasing surety, 343 (1).
lapse of, excluding statements as res gestæ, 156 (2).
reasonable, to remove timber sold, 520 (1).
within which to file special bail, 242 (1).
Title—bill to quiet, 281 (5, 6).
cloud upon, cannot exist by owner's grant, 348 (2).
cloud on, what creates, 542 (1, 2).
effect of agent's statements about, 187 (3).
not given by unaccepted consignment, 233.
of statutes, 64 (3), 237 (2), 381 (2).
passed by contract for sale of lumber, 521 (3).
taken by wife, husband's acquiescence, 612.
what titles to be joined in bill, 280 (1).
Townships—detaching territory from, effect, 240 (1, 2).
liable for fatal injuries from defective bridges, 156 (1).
Trade orders—action on, 301 (2, 4, 5).
TRESPASS.
1. The clandestine entry of a claimant upon premises of which another

has been given possession by legal process, make one a tortious intruder whom the lawful possessor may expel by force, if need be. And if the intruder is accidentally injured in the process of expulsion, his own contributory negligence should be considered in fixing responsibility therefor. *Taylor v. Adams*, 188.

2. In trespass for the seizure of stock in trade plaintiff can recover for the use of his store for the time he was excluded from it by the officers levying on the goods, and he can therefore show what such use was worth as an item of damages. *Hough v. Dickinson*, 89.

evidence in action by mortgagee against officer, 617 (5).
exemplary damages, trespass by animals, 310.
joint action by mortgagees, 616 (1).

TRIAL.

1. A declaration in case contained two counts, one of which alleged the wrongful expulsion of plaintiff from premises occupied, and the other an assault and battery. *Held*, that as no inconsistency between these points was pointed out, there was no error in refusing to require an election between them. *Taylor v. Adams*, 187.
2. A model may properly be exhibited to the jury in a case involving questions of construction, if there is testimony that it correctly represents distances and dimensions; its correctness, if disputed, is a question for the jury. *Richmond v. Atkinson*, 413.
3. It is within a court's discretion to refuse to allow a jury to visit the premises where a job of building was done, the value of which is contested. *Id.*
4. The omission to strike out irresponsive testimony to which no objection is made and on which no exception is based is not ground for reversal, especially if the court has already refused to receive such testimony. *Shaver v. Ingham*, 649.
5. Where a motion to strike out testimony, on being consented to by the other side, is withdrawn in order to save a ground of error, the appellate court will not feel bound to consider the objection made to it. *Brown v. Bell*, 58.
6. It is error to instruct the jury as to what the evidence of a witness amounts to; it is their business to determine its effect. *Baird v. Randall*, 175.
7. A judge's favorable comments upon the character of witnesses, though scarcely proper, are not clearly erroneous if borne out by undisputed evidence. *People v. Gibson*, 368.
8. Facts adverse to plaintiff and not denied by him while on the witness-stand cannot be treated as in controversy. *Stevens v. Oaks*, 343.
9. When the testimony of experts, based on subsequent examination or proofs, is met by positive testimony of facts, the jury must determine what the facts are, and cannot be required to give such testimony as is theoretical in its deductions any weight they think it does not deserve. *Watson v. Watson*, 508.
10. In a conflict between scientific and other testimony, the judge cannot decide for the jury that one witness is more to be regarded than another. *Id.*
11. A request to charge which begins with a recital of facts as undisputed and closes with several propositions which the court is expected to charge "upon these undisputed facts" must be considered a single request; and if any part of the statement of facts is incorrect the whole request must fail and the judge is right in refusing to give it. Nor can he declare a given state of facts as to which there is any contest without usurping the province of the jury. *Bedford v. Penny*, 424.
12. An instruction to the jury to disregard mischievous and improper testimony will hardly cure the error of allowing it to remain in the

case until the close of the trial; and if so allowed the trial judge should remedy the injustice on motion for new trial. *Taylor v. Adams*, 188.

13. A charge to a jury must, on review, be considered as an entirety; the trial judge cannot be expected in giving it to reiterate every qualification and condition with every clause. *Watson v. Watson*, 507.
14. Irregularities in receiving a verdict were not considered on review where the case had to go back for a new trial anyway, and it was unlikely that the same questions would again arise. *Petrie v. Lane*, 528.
15. Counsel must not state in the jury's presence what took place or what rulings were made on a former trial. *Bulen v. Granger*, 274.
16. Where counsel, in summing up, appeal to a jury's prejudice against non-residents and make injurious remarks not justified by evidence, and exception is taken to this conduct, it is error if the trial judge omits to stop it and counteract its effect. So *held* where counsel said that attaching creditors adversely interested were hogs and wanted to gobble up all the property. *Bedford v. Penny*, 424.
17. Where the circuit judge who signs a bill of exceptions certifies that it contains the substance of all the evidence, the verdict will be presumed to be warranted by the evidence if it stated that any was introduced tending to prove the material issues. *Rolfe v. Dudley*, 208.

conclusiveness of judge's finding, 637 (1).
taking case from jury, error nugatory, 264 (2).
weight of conflicting proofs is for jury, 263 (1).

TROVER.

1. Trover will lie for property taken under a void judgment, not only against the constable who seized it, but against the judgment creditors if they took part in the proceedings after judgment. So *held*, where the creditors were the members of a firm, and one of them received the property, and refused to give it up, while the other declined to do anything about it, but referred the owner to his partner. *Rolfe v. Dudley*, 208.
2. Creditors to whom goods have been consigned in payment, but who have neither asked for nor accepted such consignment, have no title to such goods and cannot maintain trover against a third person for their conversion. *Gibbons v. Farwell*, 233.

TRUSTS.

1. Any language in a will which indicates that the devisee is to hold the devise, in whole or in part, for the benefit of others, is sufficient to create a trust; and the property is in his hands as a trust fund if the will imposes a duty upon him in respect to it by the performance of which others are to be benefited. *Cummings v. Corey*, 494.
2. The executor of a will may be at once trustee and beneficiary under it. *Id.*
3. A wife who had a separate estate when she was married, made her husband, who was an insolvent debtor, the executor of her will, in which she provided, after making other bequests, that he should have the *use* of the remainder during his lifetime, and that on his death it was to be divided as directed. It was to be kept invested and no enroachment was to be made upon the principal, except in emergencies. *Held*, that this will created a trust for the husband's benefit, and that he was charged as executor with its execution. And the fund is beyond the reach of a creditor's bill against the husband, as the trust was not created by the defendant. How. Stat. § 6614. *Id.*
4. Where money was placed by a corporation in the hands of its general manager, as trustee, for safe-keeping, and to be paid out in the ordinary course of its business, such trustee cannot offset a debt due to him by the corporation against the moneys in his hands, after a

voluntary assignment by the corporation for the benefit of its creditors. *First Nat. Bk. v. Barnum Wire Wks.*, 124.
no set-off by trustee against individual claim, 124 (3).
partnership interest held in trust by heir, 281 (3).
village trustees not personally liable, 518.

Undue influence—upon testator, 58 (6), 96 (2, 3), 97 (4).
Usage—as bearing on methods of river travel, 182 (2).

Value—allegation of, in warrant for larceny, 325 (1–3).
appraisal as evidence of, 617 (6).
evidence of, of labor and materials, 413 (2).
of use and occupation, rent bears on, 637 (3).
verdict for, to defendant in replevin, 546 (2).
Variance—amendment of declaration for, 231 (1).
declaration held to be free from, 231 (2).
VENDOR AND PURCHASER.
1. The sale of a mill and of the power therefor presumably includes the actual appurtenances as between the parties, if not as to strangers. *Curtis v. Norton*, 412.
2. The owner of a mortgaged farm traded it for another, the purchaser assuming the mortgage. It was understood, however, that if the amount due upon it should vary either way from $3300 the difference should be paid by one party to the other. The vendor advanced fifty dollars to cover a possible excess which the purchaser might have to pay. The parties had a meeting with the mortgagee's agent and the amount due was roughly estimated at $3302.42. The agent afterwards found that this reckoning was wrong and that the amount should have been $3357.38. The difference, if any, between the excess and the fifty dollars was to be returned to the vendor, and he sued the purchaser for all but $2.42 on the ground that the estimate fixed the excess to be paid. *Held*, that in the absence of any showing by plaintiff that the difference between the two sums had been remitted by the mortgagee, or that her agent had authority to remit it, or that there was any consideration for so doing, the action would not lie.

   And the fact that plaintiff had bought in outstanding tax-titles which had inured to the mortgagee's benefit would not be a sufficient consideration to support an obligation on the mortgagee's part to make such an abatement. *Baird v. Randall*, 175.
3. The possession and use of land by a firm is not notice to purchasers that the land is partnership assets where the record title shows that the partners are tenants-in-common owning undivided half interests therein. It is consistent with individual ownership as tenants-in-common, and will not even put purchasers upon inquiry. *Hammond v. Paxton*, 394.
4. Innocent purchasers under a forged deed are in no better position as to title than if they had purchased with notice. *Crawford v. Hoeft*, 1.
5. Land exchanged in consideration of the conveyance of other land by a forged deed may be recovered back, even from subsequent purchasers. *Id.*
6. A person in possession under a forged deed can claim no rights; and even if he has made improvements, ejectment need not be resorted to for the purpose of recovering possession from him after a decree requiring him to give it up; a writ of restitution is enough. *Id.*, 2.
effect of notice lis pendens, 393 (1), 394 (2–5).
effect of notice of builder's lien, 634.
good faith of purchase by son, 138 (1).
good faith of purchaser of goods, 424 (1, 3).

purchaser held for sums due after notice, 138 (3).
purchaser liable for expense of storage, 521 (3).
reasonable time to remove lumber sold, 520 (1).
release of rights set up under forged deed, 2 (8).
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affirming probate order of appointment, 549 (4).
for value, to defendant in replevin, 546 (2).
irregularities in receiving, 528 (5).
negativing existence of partnership, 616 (2).
when presumed warranted by the evidence, 208 (1).
Verification—of plea in quo warranto, 516.
Vicinage—of jury in street opening case, 641 (3).
Villages—contract by trustees for bridge building, 518.
approval of liquor bonds, 212.
Visitation—by jury, discretion to allow, 413 (5).
Voluntary payment—not recoverable, 77 (2).
VOTERS AND ELECTION.
1. The elective franchise is substantially the same in all parts of the State and cannot be essentially changed in any locality by legislation to regulate the mode of exercising it. *Attorney General v. Detroit Common Council*, 213.
2. The ballot is a constitutional method of voting and cannot be changed; and its perpetuation is meant to secure the right to vote without having the voters' opinion of men or measures inquired into. *Id.*
3. Act 320 of 1885 in providing for the appointment of election inspectors in Detroit by a board appointed by the mayor and council, and consisting of two persons from each of the two leading political parties, is unconstitutional: (1) as making particular political opinions a condition to holding office; (2) for sub-delegating the popular power of choosing officers; (3) for interfering with the municipal right to local self-government. *Id.*

Wages—action by mining superintendent for, 557 (1, 6).
Waiver—by pleading, of objections to affidavit for writ, 187 (1).
client may waive errors, etc., 454 (2).
of improper process, by appearance, 512 (4).
of priority, by first mortgagee, 616 (1).
of objection to affidavit for capias, 187 (1).
of right to object to deposition, effect, 386 (3).
Warrant—justice's, for arrest for larceny, 325 (1–3).
must statute value, amendment, 325 (1).
Warranty deed—long form criticized, 1 (4).
Watercraft—lien on, for supplies, 288 (1, 2, 4, 5).
replevin by mortgagee, 288 (1).
Waters and watercourses—injunction against interference with mill-power, 411 (1).
WAYS.
1. Courts cannot interfere with municipal control over the question as to what streets shall be opened and worked, and how and when. Nor has a court of equity the means or process for executing the decision of such questions. *Baumun v. Detroit*, 444.
2. Private citizens cannot dictate through the courts the line of public duty. *Id.*
3. A street opening law is not made unconstitutional by the omission to provide that before proceedings can be taken thereunder, there must be some attempt to get the permission of the owners of property to be affected. *Grand Rapids v. G. R. & I. R. R. Co.*, 641.
4. The objection that before proceedings to open a street were taken no

attempt was made to obtain the consent of property owners cannot be raised on review in the Supreme Court if not made at an earlier stage. *Id.*

5. The "vicinage" from which a jury of freeholders in a street opening case must be drawn (Const., Art. xviii, sec. 2) may be limited by statute to the municipality instead of including the county at large; but in such case the whole municipality will be within it. *Id.*
6. The presumption is against the existence of any such bias on the part of a street opening jury as will make its verdict unfair. *Id.*
7. The essential duty of a jury in a street opening proceeding is to pass on the necessity for the work, and not merely the necessity of taking the land for it. *Id.*
8. Act 124 of 1883 for taking land for streets (1 How. Stat. pp. 1295–1300) is not clearly open to the objection that it does not require the necessity of the improvement to be determined by a jury. And if the provisions for special taxation districts are invalid, they do not invalidate the entire act since a general tax is also contemplated. *Id.* 642.
9. The mortgagees of the franchises and easements of a railway company need not be made parties to a proceeding to condemn a right of way across its track for a street, if the track is not disturbed and the company is left in control of the road. *Id.*
10. How far a city is estopped from opening a street across a railway track by its previous course in inducing the railway company to lay its track on the faith that the street would not be opened;—and how such estoppel, if any, is to be pleaded—Q. *Id.*
11. A small portion of a street that had been opened under an invalid statute was afterward discontinued so that travel was deflected from a straight line at its outlet, but the distance to be traveled was not substantially increased. The discontinued part had never been completed as a street, and was taken for business purposes and fenced in. Before this a curb had been run across it where its original outlet had been. *Held*, that private citizens could not maintain a bill to compel the re opening of the street, especially if they raised no objection until several years after these changes were made, and showed no grievance more substantial than a mere side-tracking of the street without other inconvenience. *Bauman v. Detroit*, 444.
12. The proper municipal authorities can discontinue a portion of a street, if they could do so otherwise, in consideration of the opening of another street and outlet by a private citizen whose interests are affected in both cases. *Id.*
13. The fact that a street is made less conspicuous by discontinuing a portion of it, is too shadowy a grievance, if depreciation in the value of property thereon is not shown, to sustain a bill in equity to require it to be opened again. *Id.*
14. Highway commissioners have no authority to contract with persons who have not themselves bid for work that under the statutes can only be let on sealed proposals. *Beard v. Burdell Township Clerk*, 245.

damage to railroad from street opening, 642 (11).
knowledge of defect in, negligence, 568.
municipal liability for condition of, 357 (2–5).
neglect to clean snow from track, 231 (2).
disposition of snow cleared from track, 231 (3).

Weight—of expert or scientific testimony, 508 (4, 5).
of testimony, is for jury, 263 (1).

WILL.

1. The effect of a will cannot be altered by any unattested writing. *McClintock's Appeal*, 152.
2. Wills are to be so construed as to carry out the evident intentions

of the testators so long as they are lawful. *Cummings v. Corey*, 494.
3. A testator's disposition of his property has no bearing upon a contest of his will except as it tends to show whether or not he was sound of mind. *Brown v. Bell*, 58.
4. Where the probate of a will is contested upon the ground of undue influence exercised over the mind of the testatrix by her pastor and his wife, in whose family she was a boarder, and where the trial judge correctly and fully instructed the jury upon the subject of undue influence, it was not error to refuse the following instruction: "If you find that a confidential relation existed between the parties, as the contestant claims, and that Mrs. Disbrow reposed her confidence in Mr. and Mrs. Schofield, and that they had such influence over her as is claimed, that influence must be kept free from selfish interest and cunning and overreaching bargains, and in their dealings with her no selfish advantage must have been taken of this influence. Such influence must be exercised in good faith, and not abused. It must be directed with reference to Mrs Disbrow's best interest, and not to further their own selfish interests at her expense." The language was inapplicable to the case before the court. *Schofield v. Walker*, 96.
5. Neither was it error, in view of the charge as given, for the court to refuse to give the following instruction: "If you find this confidential relation in fact existed, and the Schofields possessed the influence over Mrs. Disbrow as it is claimed they did, and that she reposed her trust and confidence in them as claimed, the situation would impose a solemn obligation upon the Schofields to abstain scrupulously from attempting to derive any pecuniary benefit to themselves which selfish motives might suggest at the sacrifice of those interests which they were bound to protect; for if confidence is reposed in that matter it creates a high and sacred trust, and an obligation and duty which must be observed. If confidence is reposed, it must be faithfully acted upon and preserved from any intermixture of imposition. If the means of personal control are given, they must always be restrained to purposes of good faith" The language is obscure when applied to the facts of the case. The rule of technical morality does not require that a person occupying confidential relations to a testator must do or say nothing to influence the action of the testator in his favor. If the influence exerted is not what in law is termed "undue influence," technical morality is not violated by its use. *Id.*
6. Influence obtained by modest persuasion and arguments addressed to the understanding, or by mere appeal to the affections, cannot properly be termed undue influence in a legal sense; but influence obtained by flattery, importunity, superiority of will, mind, or character, or by what art soever that human thought, ingenuity or cunning may employ, which would give dominion over the will of the testator to such an extent as to destroy free agency, or constrain him to do, against his will, what he is unable to refuse, is such an influence as the law condemns as undue when exercised by any one immediately over the testamentary act, whether by direction or indirection, or obtained at any one time or another. *Id.*, 97.
7. Where the contestant of a will does not allege undue influence in his pleadings, and submits his case upon the theories of mental incompetency, and the defective execution of the will, there is no error in refusing requests to charge that suggest for the first time the theory of undue influence. *Brown v. Bell*, 58.

costs to obtain construction of, 533 (2).
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WITNESS.

1. How. Stat. § 7545 provides that in suits to which the heir, personal representative, etc., of a decedent is a party, the party adversely interested cannot testify as to matters known only to himself and the deceased. *Held*, that this only applies when the estate is in some sense one party and the heir, representative, etc., is the other; and that it will not exclude such testimony from the proponent of a will claiming under it, where the contestant is not within the terms of the statute as an heir, devisee or representative of the estate. *Brown v. Bell*, 58.
2. The statutory rule excluding the testimony of a party where the facts were known only to himself and to one who, if living, would be the adverse party, does not prevent the wife of a claimant against an estate from testifying as to her husband's claim. *Cotherman v. Cotherman*, 465.
3. A claimant against an estate is a competent witness as to matters not shown to be known only to deceased himself. And *it seems* that if the adverse party consents he can testify as to matters known to them alone. *Id.*
4. In a proceeding to probate a will, a legatee is not disqualified from testifying to matters which, if true, must have been equally within the knowledge of the testator. Section 7545 has no application to such a case. *Schofield v. Walker*, 96.
5. Heirs can testify as to advancements in a proceeding to determine their rights as distributees under a will, and are not excluded as adversely interested to the representative of the testator's estate. *McClintock's Appeal*, 152.
6. A witness whose deposition has been admitted without objection may nevertheless be examined if present; waiver of the right to object to the deposition will not exclude his testimony. *Columbus Sewer Pipe Co. v. Ganser*, 386.
7. It is not responsive to a question asking for a conversation held at a specified date, to add statements made by one of the participants to the other at a subsequent date. *Shaver v. Ingham*, 649
8. The objection that an answer is not responsive is for the party who asks the question to make; he can accept it if he chooses. *Merkle v. Bennington*, 157.
9. In an action against a township for an injury caused by a warped plank in a bridge a witness who testified that he had crossed the bridge a month before the accident was asked, "Did you notice the planking?" and answered, "When I went across it was all right." *Held*, that the answer was not fairly open to the objection that it was irresponsive, or an expression of opinion. *Id.*
10. An answer is not necessarily to be stricken out for uncertainty or ambiguity, but its meaning should be reached by further inquiry. *Id.*
11. In an action upon an obligation given by a man to his divorced wife, the consideration for which was that she should pay certain debts of his, it is proper for him to show in defense that she had paid them, if at all, with the surplus moneys furnished her by him for domestic expenses. And after she had testified that she paid them with money obtained from an insurance company, it was proper to cross-examine her as to whether she did not borrow such money on property given her by her husband, the purpose being to show that the money was not borrowed, but was taken out of her husband's store. *Bulen v. Granger*, 274.
12. The right of cross-examination, within reasonable bounds, secures to litigants the best means of ascertaining the reasonableness and truth-

fulness of the direct testimony; and it is error to deprive counsel of the opportunity to cross-examine before the witness is discharged from the stand on the close of the direct examination. *Petrie v. Lane*, 527.
13. Where defendant in an action for breach of contract does not admit the contract and plaintiff testifies to it, defendant may put in by cross-examination anything that would tend to show that it was unreasonable or could not have been carried out by either party. *Id.*, 528.
14. In an action for non-performance of contract defendant should be allowed to show by cross-examination of the plaintiff that the latter after the contract was made, had left it discretionary with defendant to rescind. *Id.*, 528.
15. Repetitions of questions in different language are properly excluded on cross-examination after full answers have been given. *Simon v. Home Insurance Co.*, 278.
16. Defendant should be allowed to cross-examine plaintiff's witness where by so doing he can obtain testimony which he would otherwise be obliged to make the witness his own to obtain. *Bulen v. Granger*, 274.
17. The jury must determine for themselves as to the credibility of a witness, and make up their minds, from a view of all the circumstances even, where there are apparent discrepancies in the testimony of the same witness. *Watson v. Watson*, 507.
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WRIT AND PROCESS.
1. The Supreme Court has power to issue any writ necessary to the enforcement of its decrees; but it may also leave it to the court below to issue such writ, where the lower court has power to do so, if the record has been remanded to that court. *Crawford v. Hoeft*, 2.
2. After pleading and going to trial in an action begun by capias, defendant cannot insist on objections to the insufficieny of the affidavit for the writ. *Taylor v. Adams*, 187.
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