MICHIGAN REPORTS

CASES DECIDED

IN THE

SUPREME COURT

OF

MICHIGAN

FROM

JUNE 13 TO OCTOBER 31 1883

HENRY A. CHANEY

STATE REPORTER

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1884

Mr. Justice SHERWOOD took no part in the decision of cases argued orally at the April term of 1883 after the 19th of April.

Rec. July 28, 1884

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SUPREME COURT OF MICHIGAN

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Baraga	12	Gratiot	21	Macomb	16	Otsego	26
Barry	5	Hillsdale	1	Manistee	19	Ottawa	20
Bay	18	Houghton	12	Manitou	11	Presque Ile	26
Benzie	19	Huron	24	Marquette	25	Roscommon	28
Berrien	2	Ile Royale	12	Mason	19	Saginaw	10
Branch	15	Ingham	4	Mecosta	27	Sanilac	24
Calhoun	5	Ionia	8	Menominee	25	Schoolcraft	11
Cass	2	Iosco	23	Midland	21	Shiawassee	7
Charlevoix	13	Isabella	21	Missaukee	28	St. Clair	16
Cheboygan	13	Jackson	4	Monroe	22	St. Joseph	15
Chippewa	11	Kalamazoo	9	Montcalm	8	Tuscola	24
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Clinton	8	Kent	17	Muskegon	14	Washtenaw	22
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SUPERIOR COURT OF GRAND RAPIDS,	ISAAC H. PARRISH.
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SUPREME COURT RULE 61.

At a session of the Supreme Court on January 31, 1884, it was *ordered* that the following stand as Supreme Court Rule 61:

RULE 61. The party bringing a case into this Court shall, in his brief, make a clear and concise statement of the case, and of the errors upon which he relies. Each party shall file with the clerk of the Court, for the use of the opposing counsel, or deliver to such counsel, a printed copy of his brief at least one full day before the case is placed upon the call for hearing, and in default thereof he will not be entitled to make an oral argument.

SUPREME COURT RULE 62.

At a session of the Supreme Court on April 17, 1884, it was *ordered* that the following stand as Supreme Court Rule 62:

RULE 62. No application for a rehearing will be considered by the Court unless the moving party, at as early a day as may be practicable, shall cause any papers upon which it is based, together with his reasons for the granting of the same, to be printed, and copies thereof to be left with the clerk of the Court for the several justices, nor unless a copy thereof shall be served upon the counsel for the opposite party. Proof of this service shall also be filed with the clerk, and the Court, after the expiration of not less than four days from such service, will examine the papers, and without further argument, unless specially ordered, will pass upon the application. The party opposing will be at liberty to file with the clerk his objections to the application, either printed or written, as he may prefer, at any time before the application is decided.

CIRCUIT COURT RULE 106.

At a session of the Supreme Court on April 30, 1884, it was *ordered* that the following stand as Circuit Court Rule 106:

RULE 106. When matter shall arise subsequent to the joining of issue in a suit at law, which the defendant shall desire to rely upon as a defense, he shall be at liberty to give notice thereof as a special defense under the plea of the general issue, and the filing of such a notice shall not be deemed a waiver of other defenses. The notice shall be served under the rules for the service of pleas, and no replication thereto shall be necessary. The notice shall be interposed under the practice heretofore regulating the filing of pleas *puis darrein continuance*, and if the filing is after the case is noticed for trial or during a term of court when the case is on the docket for trial the plaintiff shall not be compelled to proceed to trial at that term, and costs on continuance shall be in the discretion of the court.

[This rule is to take effect on July 1, 1884, but parties at their option may conform their action to it in the interval from this date.]

CHANCERY RULE 123.

At a session of the Supreme Court on March 6, 1884, it was *ordered* that the following stand as Chancery Rule 123:

RULE 123. In any case in equity where a defendant shall claim from the complainant any relief which, according to the established course and practice of courts of chancery, might be had by cross-bill, such defendant shall be at liberty by his answer to present the facts upon which his equity rests, and to claim by such answer the benefit of a cross-bill, and the court shall have power to give relief upon such answer to the same extent that it might have given it had a cross-bill been filed. But if the case be such that, if a cross-bill had been filed, the practice of the court would have required it to be sworn to, the answer claiming such relief shall be under oath, notwithstanding an oath thereto may be waived by the bill.

CHIEF JUSTICE GRAVES.

At the opening of Court on Tuesday, January 8th, 1884, being the first day of the January term,

The Honorable GEORGE V. N. LOTHROP addressed the Court as follows:

May it please your Honors: I am charged by my brethren of the Bar of Michigan with the performance, this morning, of a most agreeable duty.

At the end of the year just now closed, Mr. Chief Justice Graves retired from this bench. His judicial career had been long and most honorable. He had shown very high judicial qualities of mind and character. He had brought to his duties learning, patience of temper, habits of laborious investigation, a discriminating judgment and the most conscientious purpose. He had a profound reverence for the worth and dignity of his great place. To decide a cause was, with him, more than the disposition of the controversy of litigants. It was to do justice, and to maintain law, as the sovereign order of the State. This made his presence on the bench always instructive and impressive.

The Bar of Michigan justly thought that this retirement of Judge Graves should be marked by a distinct expression of their respect and esteem. Accordingly, on the evening of December 27th last, the Bar of Michigan gave Judge Graves a public reception at the Detroit Club House, which was honored not only by the profession, but by many eminent citizens at large. At the same time a brief address was prepared, elegantly engrossed on parchment, and, after being largely signed by lawyers, was presented to Judge Graves as a permanent memorial of the occasion.

While this was intended as a most sincere and individual tribute to Judge Graves, it had, I think, a still further meaning, of which I may properly here speak. I am justified in saying that it was felt not only as a tribute to Judge Graves, but also to the Supreme Court.

The Supreme Court of this State has always possessed the esteem and confidence of our entire people. It is not yet fifty years since our State was formed; but the government then organized was organized as a government of law; for it was felt that just laws, wisely administered and cheerfully obeyed, gave a security greater than could be given by arms. The men who founded this State were a handful in number and poor in wealth; but they were men of rare foresight. They looked forward to a commonwealth, not inferior to any other in institutions of learning, in social and religious culture, and in liberty protected by law. Their work was not in vain. All that is now about us testifies to this—the nearly two millions of people now gathered in our domain, the noble building where we now stand, the University of which we are so proud, our schools and churches, our prosperous towns and cities, and, more than all, the innumerable homes which shelter instructed, cultured, refined and happy men and women, the glory and perfection of any state.

Such fruits are possible only where there are upright judges and a pure administration of law. From beginning to end, the roll of the names that have adorned our Supreme Bench is without stain or reproach. To their great honor they have moulded a system of jurisprudence just, equal and liberal, practical in character, and of great simplicity, where the magistrate never ceases to be the citizen. At the same time their labors have been marked with distinguished learning and scholarship. Perhaps to-day we stand too near for perfect criticism. But I sincerely believe, what it gives me pleasure here to declare, that in our reports may be found judgments that would do honor to Westminster Hall or to the United States Supreme Court,

—judgments that in learning, in judicial sagacity and in comprehensive wisdom, are worthy to stand beside those of Mansfield, of Marshall and of Kent.

If I may add a word personal to myself, I wish to say that it has been my happiness to know personally every judge who has ever sat in the Supreme Court of Michigan. To the larger part of the living bar, the names of many of the earlier judges are only historical names. To me they are the names of personal friends. And, as I stand here, I recall with emotion that it is just forty years, at this term, since I first essayed to speak in the Supreme Court of Michigan, and that here a large part of the humble labor of my life has been done.

I have therefore felt it a personal privilege, in offering our tribute to Judge Graves, also to offer a tribute equally sincere to the high tribunal of which he was so long a distinguished member.

May it please the Court: In the name of the Bar of Michigan, I now bring to you a copy of their address to Chief Justice Graves, and, in their behalf, respectfully ask that it may be entered on the journal of this Court, and given an appropriate place in the Reports of Michigan.

The Address was as follows:

To the Honorable BENJAMIN F. GRAVES, Chief Justice of the Supreme Court:

The undersigned, members of the Bar of Michigan, deploring the loss which they, with all your fellow-citizens, sustain in your relinquishment of office, wish, in these few, imperfect words, to testify to you their sense of your merits and of their own appreciation. Upon the Circuit and Supreme Court bench you have given the long service of twenty-five years. Patient in hearing, careful in judgment, courteous to the bar, studious and learned without ostentation, wise without pretension, in private life pure and upright, without suspicion and above reproach, you have commanded the respect and won the love of all. Your high bearing and good example have kept before us, as ministers of the law, the dignity and responsibility of our profession, and worthily shown how men should serve in places of public trust. Nothing graces an honorable retirement like sincere respect and affection won by duty well done; and we follow you with the earnest prayer that your future may be as rich in peace as your past has been in good service.

We congratulate you that you still have good health, and we trust that your learned leisure, like a sound and healthy tree, may bear further fruit in the field of enlightened jurisprudence.

We shall not say farewell, for we hope that days and years may be graciously added, and that in your future life and new labors the ripest blessings of a kind Providence may be your happy lot.

GEO. V. N. LOTHROP
JOHN D. CONELY
WILLIAM P. WELLS
LEVI L. BARBOUR
DEWITT C. HOLBROOK
OSCAR M. SPRINGER
S. M. CUTCHEON
J. W. FINNEY
A. C. BLODGETT
HENRY M. DUFFIELD
F. H. CANFIELD
E. W. PENDLETON
HENRY M. CAMPBELL
L. N. KEATING
GEO. H. HOPKINS
J. PATCHIN
THEODORE ROMEYN
LEVI T. GRIFFIN
GEO. JEROME
GEO. GARTNER
THOMAS WEADOCK
JAMES A. RANDALL
T. J. O'BRIEN
DON M. DICKINSON
MARTIN V. MONTGOMERY
WILLIAM A. MOORE
CHARLES B. LOTHROP
EDWARD A. GOTT
A. H. WILKINSON
E. H. FLINN
JOHN ATKINSON
HENRY C. WISNER
OTTO KIRCHNER
HENRY D. BARNARD
GEO. H. LOTHROP
HENRY A. HAIGH
HENRY M. CHEEVER
ANDREW HOWELL
JAMES F. JOY
C. A. KENT
GEO. W. MOORE
JOHN H. BISSELL
HENRY H. HOLT
ALFRED LUCKING
J. H. CHANDLER
C. E. WARNER
JAS. W. ROMEYN
C. I. WALKER
HOYT POST
FRED A. BAKER
SAMUEL T. DOUGLAS
C. P. BLACK
GEORGE P. VOORHEIS
ISAAC MARSTON
HUGH MCCURDY
HENRY RUSSEL
CHARLES M. SWIFT
C. J. REILLY
WM. T. MITCHELL
T. CROCKER
J. W. CHAMPLIN.

The Honorable CHARLES UPSON then addressed the Court as follows:

May it please the Court: The sentiments of the members of the Bar on the occasion of the recent voluntary retirement of Chief Justice Graves from the bench of this Court, have been appropriately and feelingly expressed in the communication lately addressed by them to him, to which your attention has, in such felicitous language, just been called. The present has also been deemed by them a proper occasion for some further manifestation of their respect and esteem calculated in some degree to preserve and perpetuate his presence here after his retirement.

On behalf, therefore, of the members of the Bar of this State, I have now the honor and the pleasure of presenting to this Court a portrait of the Honorable Benjamin F.

Graves, late Chief Justice of this Court, accompanied with their respectful request that the same be assigned a permanent place in the Supreme Court Room.

The CHIEF JUSTICE said: It affords the members of the Court very great pleasure to receive and assign to a suitable place in the hall where he so recently presided the admirable likeness of their late associate. It also gives them the highest satisfaction to respond affirmatively to the request that they should place upon their records the very feeling and appropriate address which was presented to Judge Graves by the bar of the State. The address was a spontaneous tribute by the bar to official worth and official integrity, but no one could know so well as the members of the Court how truthful was all that was said and how well deserved. All of us have known him long and intimately; two of us have practiced before him when he has been sitting at the circuit in the trial of causes; two of us have sat with him upon the bench in the closest possible official relations for sixteen years. His kindness, his courtesy, his devotion to duty, his indefatigable industry are known of all men; but none could know so well as those who were officially associated with him how little he spared himself, how patiently he gave his time and attention to the study of records and to the examination of the printed arguments and the authorities, how anxious he was not only to do what justice seemed to him to demand, but also to put upon record the right reason for the right judgment. All these things were seen most clearly by those who were associated with him in the consultation room and in the disposition of causes. Passing by without remark all that has been said that is complimentary to the Court, it is a pleasure to say that nothing could be more truthful than what is said concerning Judge Graves himself, and nothing better deserved. And the Court are gratified with the reflection that while it is well on personal grounds that these things should be said, it is still more important for public reasons. It is always

conducive to public virtue, to good order in the State and to a proper and thorough administration of the law, when faithful and conscientious public services are cherished and so suitably commemorated.

The Clerk of the Court will be directed to enter the address at large upon the Journal of the Court, and the Reporter will give it appropriate place in his next volume.

DAVID DARWIN HUGHES.

At the opening of the afternoon session on Tuesday, January 8th, 1884,

Mr. MITCHELL J. SMILEY addressed the Court as follows:

May it please the Court: On the 12th day of July last, one who has often met with us here, and whose words have been listened to with deep interest in this Court, passed from this earth. His place at this bar has been occupied by him for the last time. He of whom I speak was David Darwin Hughes, a distinguished member of this bar and in many respects the most gifted lawyer of the State.

Soon after his death, his brothers of the bar met and passed resolutions suitable to the occasion, and appointed a committee to present them to the several courts. As I had been associated with him in the practice of the profession during the last eleven years of his life, and had known him for some years prior to that, during which time I had esteemed him a great friend, and learned to love him as an elder brother, it was thought proper that I should present the resolutions to this Court, and ask that they be spread upon the records.

With your Honors' leave I will read the resolutions:

At a general meeting of the Grand Rapids Bar, called to give suitable expression to their common sorrow at the sudden death of their brother, D. Darwin Hughes, and to render to his memory as a lawyer and a citizen their sincere tribute of respect, it was, on motion of Mr. J. W. Ransom, unanimously

RESOLVED, That his intellectual vigor and acumen, his thorough knowledge of the law, his fidelity to professional duty, his catholic views of men, his integrity and high sense of personal honor, his thorough appreciation of the true duty of the lawyer to the public, made him a successful leader at the bar and one whose opinion and advice were widely sought and thoroughly respected in the most important business affairs of our State;—that we remember him not alone as honor-

ing the profession he had chosen; he was a true man in all life's relations and duties, a good citizen, a warm friend and genial companion; that we tender to his bereaved family our respectful sympathy in their sad affliction; we too mourn an associate and brother; that we attend his funeral in a body; that a committee be appointed by the chairman and members thereof designated to present these resolutions to the Supreme Court and the courts of record of this city and move the appropriate action; that an engrossed copy be transmitted to the family of the deceased.

These resolutions, may it please your Honors, but mildly state the preëminent qualities of our departed brother. As a lawyer he stood not only in the front rank, but at the very head of the profession in his State. He was born at Camillus, New York, Feb. 1st, 1823, and came to this State in 1840; was admitted to the bar in Calhoun county in 1846, and commenced active practice at Marshall in 1850. From that time his reputation as a lawyer gradually extended until his entire time was devoted to the trial of leading cases. I remember first seeing him about the time of my admission to the bar in 1862. I made inquiry of brother lawyers at the time and learned that he had a fair and growing reputation. Soon afterward he defended in the case of *Stone v. Anderson*, tried at the Kalamazoo Circuit, and made what was considered a very able defense. This greatly increased his reputation and he began to be employed extensively in leading cases; and a few years later, was regarded by many as the strongest trial lawyer in the State. He was able in the management of causes—peculiarly ingenious in the arrangement and statement of the facts, and wonderfully strong in the argument of questions of law and fact as they arose during the progress of a case. His final arguments, although not what would be called eloquent, were logical, keen and interesting, and commanded from beginning to end the attention of those who heard them. He struggled hard to win before he reached the jury, but he never gave up the contest until the end, and one of his trials was a fair but determined struggle from first to last. He was honorable and courteous toward court and counsel, and especially toward junior counsel, but an adversary who had met him once generally understood,

when entering into a trial with him that there was labor and difficulty close at hand.

In the later years of his practice he acted almost entirely as senior counsel and rarely conducted a case alone, but he was very quick in understanding the leading points of a case as they were presented by junior counsel, and he generally had considerable preparation of his own. He could prepare a case rapidly and well, and his briefs were generally thorough and able. He did not use or need many authorities. He was very effective with a single one, and he only needed *it* to show that his reasoning had been approved by legal authority; and he could aptly distinguish his case from the authorities cited against him. He was not uncommonly learned in cases and authorities, but he was well grounded in the general principles of the law, and could readily classify cases and refer to the leading maxims and principles governing them.

He exhibited perhaps his greatest strength in the argument of purely legal questions before the courts. His arguments were complete, graceful and strong. In this particular he had few equals. I have heard many of the most famous lawyers of the last twenty years, but never one whom I thought his superior in this respect. This gift was what he termed, in speaking of others who possessed it, "ability to lift a heavy weight."

Upon the whole he was fully entitled to rank, as he did, as one of the ablest lawyers of the Northwest.

But it was not as a lawyer alone that he was entitled to our respect and admiration. He was learned in other sciences. He was a worthy citizen, an upright and honorable man, a kindly neighbor, an amiable head of the family, a true and open-hearted friend, and a jovial and magnificent character. Always cheerful and looking upon the bright side, he had a strain of good nature, merriment and wit, which made him the centre and admiration of pleasant little gatherings of old and young people at his own house and in the houses of his friends. Although he had a par-

donable vanity and delight in having his greatness acknowledged, he had with it a happy faculty of making his humble associates and followers feel, while in his society, that they were nearly if not quite his equals.

I cannot at this time speak more in detail of his virtues and manly qualities, but they were many, and such as to command for him the admiration of his brother lawyers and fellow-men. With all his admirable qualities of head and heart he has departed from among us forever, but he leaves a bright example for the guidance of followers in the profession, and his memory will long be cherished and kept bright by those who knew him and enjoyed his acquaintance and friendship while he lived.

In presenting these resolutions and remarks, bearing my humble testimony to the character and personal qualities of our deceased brother, I feel that I should not fail to mention that towards those with whom he was associated in business he was uniformly kind, obliging and even partial.

In conclusion I ask, in behalf of the Bar, that the resolutions which I now present be entered among the records of the Court.

The CHIEF JUSTICE said: The Court has listened with great sensibility to the remarks just made concerning Mr. Hughes by his friend and former business associate, and they agree very cordially in the propriety of placing upon the journal the resolutions that have been submitted.

The judges of this Court have many times listened to arguments made by Mr. Hughes in important public cases, and they can truthfully say that he never brought a case to their attention in which he did not for the whole time which he occupied command their undivided attention. Neither, it may be added, did he ever present a case, when the members of the Court did not feel, from the very beginning of the argument to its conclusion, that they were being instructed. As a man, as a citizen, as a neighbor and a friend, his character has been admirably portrayed in what

has been said. Personally I knew him—not so intimately as many knew him—but well enough to know his great strength of mind, his great logical powers, his fullness of illustration, his kindness of heart, his generosity of character, his excellence in all the relations of life; and it was always a delight to be in his company when his leisure permitted him to give his time to his friends and to social enjoyments. And it may be affirmed with great confidence that every one who has occupied a seat on this bench during the period covered by his practice has counted it a pleasure to be among the number of his friends. Twice he was made a candidate for a seat on this bench; and while on each occasion nearly one half of all the electors of the State gave him their suffrages, it may be safely affirmed that of all the rest no one withheld his vote from any doubt concerning his fitness for such a position. The people of the State knew very well that were he selected for any of the high offices for which his eminent abilities and acquirements fitted him, there would be no question but that in the discharge of its duties he would do honor to himself and to the State.

Such a loss is a serious one to the whole commonwealth, but it is peculiarly appropriate that the profession, of which he was so distinguished an ornament, should honor his memory in the manner proposed.

The Clerk will therefore be directed to enter the resolutions at large upon the records of the Court.

Mr. Justice CAMPBELL said: I have but few words to add to what has been said by the Chief Justice, and I would not add even this except for the fact that my personal acquaintance with Mr. Hughes dates back further than that of my associates. I became intimately acquainted with him while I was in practice, before coming upon the bench, and it was my good fortune to be associated with him considerably in the management of legal controversies. He was all that he is represented to have been in the resolutions presented and in the remarks which have been made. He

was always a pleasant associate, doing his full share of the labor of a cause, and always willing to allow his colleagues their full share of the responsibilities and of the honors of the litigation. Mr. Smiley referred to his ability in the discussion of legal questions as his most prominent characteristic. This is a just estimate, but I think he would never have shown that ability unless he had possessed some other qualities of no less value. It was due largely to his strong common sense, and to his sagacity in observing and interpreting such facts and things as came within his range of observation. He noticed everything, and his knowledge of human nature enabled him to understand what he saw. He could read very correctly the expression of men's faces, as witnesses, jurors and business men, and his sagacity saved him from making too much of law points which were attenuated, or which it was not wise to dwell on under the circumstances. He escaped in this way some perils that lawyers sometimes fall into.

Our private relations were of the pleasantest character. He was of a genial and kindly nature, always desirous of making life pleasant to every one about him. He will be remembered with affection by all who knew him.

JUNE TERM 1883.*

GEORGE H. SELBY v. JOHN HURD ET AL.

Tender of performance in discharge of lien.

Tender of performance of an agreement will not operate to extinguish the lien by which the agreement is secured if it is not unequivocal and reasonably capable of being understood by the other party as a bona fide tender of the requisite thing, act or service; and the offer itself should be accompanied by circumstances fairly implying control of the necessary means, and possession of the necessary ability to fulfill it.

Error to Osceola. (Judkins, J.) April 26.—June 13.

TROVER. Defendants bring error. Reversed.

Morse, Wilson & Trowbridge for appellants.

M. Brown and *C. M. Beardsley* for appellee.

GRAVES, C. J. The plaintiff recovered damages in trover for a large quantity of lumbering appliances, and the defendants brought error.

August 20th, 1880, the plaintiff entered into a written contract with defendants to go upon certain of their lands and take off several million feet of saw logs and deliver them on skidways on the main line of the Evart & Osceola Railroad. He was to commence about the 23d of the same month and make delivery as fast as possible and fully complete the entire job on or before the first day of May, 1881. The contract contained the following special provision:

*Continued from Vol. 50.

"And it is also expressly agreed that in case said parties of the second part [the defendants] shall at any time become satisfied that the work on the contract is not progressing as rapidly as it should to be completed as agreed, said second parties are hereby authorized to take possession of said job and all teams, tools, sleighs, implements, roads, camp, etc., used by said first part in and about the prosecution of said job, and complete the putting in and delivery of said logs as agreed by said first party, at his expense and charge the same to said first party under this contract."

The plaintiff began work the latter part of August and proceeded with it until about the 5th of April. Only a few days remained in which to finish up the work in accordance with the contract, but the job was very much behind and it was quite impracticable for the plaintiff to complete it in the time left to him. He had just finished a similar job for one Eldred, and was much in need of money to pay off the men who had worked there for him. The defendants had advanced him a large sum on their contract and they were anxious to have the lumbering completed and the logs delivered with the least possible delay. At the same time he requested a further advance to enable him to pay off his men, and the defendants let him have $717. This money was advanced under an arrangement the nature of which is the subject of contention. The plaintiff executed on the back of the contract the following instrument:

"EVART, Michigan, April 5, 1881.

"For a good and valuable consideration to me in hand paid I hereby sell, assign, transfer and set over all my right, title and interest in and to the within contract, and all of the goods, chattels and camp utensils named within and used by me on within lumber job of every name and nature, to Hurd, McFarlane & Company of Evart, Michigan, intending by this indenture to convey to said Hurd, McFarlane & Company all of the horses, harnesses, oxen, yokes, chains, sleighs, trucks, cant-hooks, bed and bedding, cooking utensils of every name and nature, and all camp equipage of every name and nature used by me on within named lumber job, also the tram road and cars used on said road and on within named job."

On the execution of this writing the plaintiff turned over the property at once to the defendants, and they proceeded at considerable expense to finish up the job.

The plaintiff claims that in handing over the property he also delivered three teams from the Eldred job, but the defendants deny this and insist that all the teams which were given up were in use on their job and covered by the two contracts. The suit relates to the property so turned over to the defendants, and it is conceded that all of it, unless the three teams should form an exception, was the same property intended by the two contracts.

The chief subjects of controversy at the trial may be thus explained. The plaintiff claimed that this second writing, which was endorsed on the contract, was not absolute and final, as indicated by the terms, but was subject to an unwritten condition which converted it to a mortgage; that the purpose of the transaction was to secure the defendants for their advance; and that the understanding was that the plaintiff should still go on and conduct the work to completion, and in that way and through such means pay back the money advanced; that after the property was handed over to the defendants he offered to proceed and carry out the arrangement, but they refused to accept the tender, whereby the lien created by the assignment was effectually discharged.

The defendants denied that the assignment was subject to any condition. They claimed that it was an amicable expedient to carry out the special provision in the original contract and put them in possession of the property in order to effectuate the object of that provision which had become imperious in consequence of the plaintiff's laches. They further insisted that proof of prior and contemporaneous talk was not admissible to show that the assignment was conditional, and also that the plaintiff made no offer to perform sufficient to affect their right to the property.

In the view taken by the Court it is quite unnecessary to consider whether it was competent for the plaintiff to introduce the unwritten matter in order to engraft a condition

on the assignment and turn it into a mortgage. The case may be decided on the plaintiff's theory, and for this occasion it may be assumed that the transaction was in substance a mortgage as he claims. The vital question then is whether the trial judge was warranted in putting the case to the jury on the supposition of a state of facts tending to show that such an offer of performance was made by the plaintiff as would liberate the property from the alleged lien. The point is fairly raised by the charge and exception, and we think the direction, on this subject at least, was a plain mis carriage.

In order that an offer of performance should operate as performance itself, and extinguish a lien, it should be unequivocal and reasonably capable of being understood by the other party as a bona fide tender of the requisite thing, act or service; and the verbal element should be accompanied by circumstances fairly implying control of the necessary means and possession of the necessary ability. Independently of some loose talk touching the consummation of the job through the plaintiff's aid, and his chance to work enough out of it to repay the advance to him, there was nothing to support his theory of an offer of performance. He was evidently without means and he does not pretend to have met the defendants on the footing of one in actual readiness to perform the condition claimed, and as actually making the offer. It is needless to go further.

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

Cooley and Campbell, JJ. concurred.

51 5
76 171
51 5
93 128

EMERSON, TALCOTT & CO. v. THE MCCORMICK HARVESTING MACHINE CO.

Error—Dismissal of case—Suits within the State between foreign corporations—Notice.

Error lies upon an order finally dismissing a common law action of trover where the grounds of the motion to dismiss are made part of the record.

Foreign corporations may sue each other in Michigan if both are doing business within the State and the cause of action accrued there. Act 256 of 1881.

The requirement that notice must be sent to the home office of a foreign corporation against which suit is brought in Michigan is not jurisdictional, and in a proceeding in personam is extra-territorial, if not nugatory.

Where trover is brought against a foreign corporation and personal service of the writ is made upon the proper officer, the omission to notify the home office of the suit, as provided by law, is a mere irregularity and not a jurisdictional defect.

Error to Kalamazoo. April 27.—June 13.

TROVER. Plaintiff brings error. Reversed.

H. F. Severens for appellant.

Howard & Roos for appellee.

SHERWOOD, J. The parties to this suit are two corporations organized under the laws of the state of Illinois; and at the time of the commencement of this suit both were engaged in the business of introducing and vending agricultural implements in Kalamazoo in this State; each having a business office at that place and a depository of such implements. While the parties were thus engaged in business the facts and circumstances transpired out of which the alleged cause of action in the case arose, and all occurred in this State.

The action is trover for the conversion by defendant of

five hundred dollars worth of the plaintiff's property at Kalamazoo.

The writ was served personally on the secretary of the defendant company at Kalamazoo, and after the plaintiff had filed his declaration.

The defendant appeared specially and moved to dismiss the plaintiff's suit and quash the writ on these grounds: 1st. Because the court had no jurisdiction of the parties, both being foreign corporations. 2nd. Because there was no sufficient service of the process. 3rd. Because the plaintiff did not, within thirty days after the commencement of the suit, send notice of the suit by mail to the defendant at its home office.—The circuit judge sustained the motion, and gave judgment dismissing the suit, and for ten dollars costs against plaintiff, who now brings error.

Defendant's counsel insist error is not the proper remedy. This is a mistake. A final disposition was made of the plaintiff's case at the circuit in a suit according to the course of the common law. Graham's Prac. (2d ed.) 932, 933; *Jewell v. Lamoreaux* 30 Mich. 155; *Stall v. Diamond* 37 Mich. 429. The grounds of dismissal are a part of the record in this case, and must be read in connection with the order of the circuit court dismissing the case.

Our statutes expressly authorize domestic corporations to sue and be sued. 1 Comp. L. p. 1148, sec. 1. Foreign corporations may do business and bring suits in this State. 2 Comp. L. p. 1837, sec. 1. And since the statute of 1881, whatever may have been the situation before, suits may be brought against them. The statute of 1881 is as follows:

"suits may be commenced at law or in equity in the circuit court for any county of this State where the plaintiff resides, or service of process may be had, and in cases where the plaintiff is a non-resident, in any county of the State, against any corporation not organized under the laws of this State, in all cases where the cause of action accrues within the State of Michigan, by service of a summons, declaration or chancery subpoena within the State of Michigan, upon any officer or agent of the corporation, or upon the conductor of any railroad train, or upon the master of any

vessel belonging to and in the service of the corporation against which the cause of action has accrued: *Provided*, That in all such cases no judgment shall be rendered for sixty days after the commencement of suit, and the plaintiff shall, within thirty days after the commencement of suit send notice by mail to the corporation defendant at its home office." p. 348, sec. 1.

It is claimed by defendant's counsel that this statute does not apply to a foreign corporation defendant, when both parties are foreign corporations, but only when a natural person is plaintiff. Why this distinction is made is not obvious. A foreign corporation may bring suit where an individual, or domestic corporation can. 1 Comp. L. p. 1148 sec. 1; p. 1837 sec. 1. There is certainly nothing in reason why it should not be liable to a suit here for a violation of the rights of others committed in this State. A very large portion of the business of Michigan is now done and managed by foreign corporations, many of them having local or branch offices and places of business in our midst, conducted by one or more of their officers or agents, who in behalf of such corporations are constantly dealing with our people, and reaping the benefit of the thrift and enterprise of our citizens, and so long as the defendant acts de facto as a corporation in this State it should have no right to immunity not extended to an individual or to a corporation organized here. "To extend to the defendant the comity of permitting it to do business here, prosecuting its objects in our community for gain, sueing our citizens, and enjoying all the privileges and protection afforded by our laws and at the same time giving to it entire immunity from suit, is an intolerable abuse of courtesy, and contrary to the ordinary principles and reasons on which the doctrine of comity rests."

In this case the statute seems to have been complied with except that portion of the proviso which requires notice of suit to be sent by mail to the home office of the corporation defendant within thirty days after the commencement of suit. This requirement, if valid, is not jurisdictional.

It is extra-territorial, in a proceeding in personam, and which several authorities hold nugatory. *Pennoyer v. Neff* 95 U. S. 714; *Price v. Hickok* 39 Vt. 292; *Scott v. Noble* 72 Penn. St. 115; *Arnold v. Tourtellot* 13 Pick. 172. But if mailing the notice were necessary, the only object to be accomplished is information to the principal officers having control of the company's affairs, of the existence of the suit. This was fully accomplished when service was made upon the secretary whose principal business was at the home office, and who says in his affidavit, "had notice by mail been sent, he would have been the person at the home office to receive it." He had already been served with a certified copy of the writ. It is difficult to see what necessary or useful purpose would have been accomplished had the notice been mailed.

Under the circumstances of this case and as they appear upon this record we must hold the omission to send the notice to the home office an irregularity only, the general officers of the company having been fully apprised of the commencement of the suit, by a personal service of the process on one of their number in this State.

The judgment at the circuit must be reversed with costs, and the case permitted to go to trial.

The other Justices concurred.

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157	[2]187

JOHN BOATZ AND GEORGE R. FOWLER v. ANDREW BERG.

Certiorari — Assignments of Error — Bill of particulars — Continuance — Waiver of jury — Judgment against surety.

Where a justice's judgment in a case tried without a jury was reversed on *certiorari* and there were no findings of law, the only assignments of error that were considered were general, viz.: that the court had erred in sustaining the writ of *certiorari* and in giving judgment against the surety for costs.

It is an abuse of discretion for a justice, acting solely on his own motion,

to exclude a defendant's bill of particulars of his claim of set-off merely because it was not filed within the time allowed for that purpose after being demanded by plaintiff, if it was in fact filed before trial, and if there was nothing to show that its reception would prejudice plaintiff.

Defendant's refusal to submit to cross-examination upon his affidavit for continuance in justice's court is sufficient reason for denying the continuance.

Defendant's absence from further proceedings in justice's court after demanding a jury and paying the jury fee does not amount to a waiver of the jury, and the justice cannot proceed to try the case alone.

Errors assigned upon the proceedings in summoning and striking a jury in justice's court are immaterial if no jury was had on the trial.

A surety for costs in justice's court may be included in the judgment rendered on appeal against his principal. Comp. L. § 6133.

Error to Manistee. (Judkins, J.) April 27.—June 13.

ASSUMPSIT. Plaintiffs bring error. Affirmed.

S. W. Fowler for appellants.

A. J. Dovel for defendant. Adjournment of a cause in justice's court should be allowed where the affidavit therefor is sufficient: *Annin v. Chase* 13 Johns. 462; *Mercer v. Lowell Bank* 29 Mich. 248; it is error for a justice to try a case without a jury in defendants' absence and without his consent after a venire is issued: *Schring v. Wheedon* 8 Johns. 460; *McGraw v. Sturgeon* 29 Mich. 429.

SHERWOOD, J. In the record in this case there are shown no findings of law, and no findings by the circuit court outside of what the judgment itself, sustaining the certiorari, imparts. The general assignments of error that the court erred in sustaining the certiorari, and also in rendering judgment against George R. Fowler, the surety, are the only errors properly alleged, or that we can consider.

The return to the writ of certiorari shows that on the return day of the summons—the 19th day of February, 1881,—both parties appeared before the justice; that plaint-

iff declared verbally in assumpsit on the common counts; to which the defendant pleaded the general issue with notice of set-off. Security for costs was demanded by defendant and was ordered by the justice, and forthwith given by the plaintiff with George R. Fowler as surety. Both parties respectively demanded a bill of particulars of their respective demands which the justice ordered should be filed within six days, and the defendant then demanded a jury, and the cause was adjourned to the 18th day of March, 1881.

On the adjourned day the parties appeared and defendant paid into the court $6.00 as a jury fee and asked for the striking of a jury. There is no irregularity or error in the proceedings to this point to complain of.

The defendant not having filed his bill of particulars within the time ordered, now presented it and requested the justice to file it, which he refused to do. This refusal of the court, to receive and file defendant's bill of particulars, was not upon the objection of the plaintiff but at its own instance and for the alleged reason that the time had expired within which it had been ordered to be filed. It does not appear that the acceptance and filing of the bill of particulars at that time would have prejudiced the plaintiff; while, in fact, as plaintiff had demanded the bill and could, for the failure to file it, exclude all testimony relating thereto, it was to the defendant a denial of justice, and by the justice was an arbitrary abuse of discretion.

The application by the defendant at this time for an adjournment upon his affidavit filed, was properly refused, and for the sufficient reason of his refusal to submit to a cross-examination.*

*The return states upon this point, that

"The defendant then presented an affidavit taken then and made before me, in which he claimed that he was not prepared for trial because of the absence of a material witness and which affidavit he claimed to have filed when the plaintiff asked of the court to have the defendant examined in relation thereto, to which examination the defendant, through his counsel, refused to submit when the affidavit was filed, but not on a satisfactory showing, as appears by the endorsement thereon, as from

It is alleged in the affidavit for the writ of certiorari as error that the justice proceeded to try said cause without a jury, against defendant's objection and without his consent, and rendered judgment in the cause in favor of the plaintiff, and against the defendant; and the allegation is by the return to the writ shown to be true. This the justice had no authority to do. The defendant having demanded a jury was entitled to it, and though he left and absented himself from the court room and from further subsequent proceedings in the case, it was no waiver of the jury; and the error of the justice, in proceeding himself to try the case and in rendering judgment, is well assigned.

The errors assigned in regard to striking and summoning the jury are not to be considered; as there was no jury in the case, no harm has been done.

The judgment against the surety is authorized by our statute under the decision of this Court in the case of *McLean v. Isbell* 44 Mich. 129.

For the reasons herein given the judgment of the justice was erroneous, and that of the circuit court reversing it must be affirmed with costs.

The other Justices concurred.

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Hugh S. Peoples v. The Evening News Association.

Newspaper libel—Weight of evidence.

A libel suit was based on an article charging the plaintiff with arson to defraud insurers and with murder. *Held* proper to permit the defendant, in justifying, and as bearing upon the malice of the libel,

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the fact of the deponent's counsel refusing to allow the said deponent to be examined in relation to the matter set forth in the affidavit, as also from the fact of said deponent's counsel having, only a short time previous to his drafting the affidavit, declared himself ready for trial and demanded the striking of a jury. It was considered by the court as merely a get-up for the purpose of embarrassing the court, when it was ruled that a jury be struck forthwith."

to show that plaintiff's claim for insurance on the house that was burned was contested.

A newspaper article complained of as libelous did not name the plaintiff, but it was practically conceded that he was the person referred to. *Held* that the exclusion of a subsequent article naming him, when offered merely for the purpose of establishing identity and objected to as incompetent for that purpose, was not material error.

Proof beyond reasonable doubt can only be required in criminal cases; in all others, including those, even, that involve facts of a criminal nature, the question is one of preponderance.

The Supreme Court will not review the conclusions of a jury upon the weight of testimony, in a case at law, if there was any evidence to be submitted to the jury, even if it were only circumstantial.

Rehearing will not be granted on the mere ground that a change in the Court has taken place or is about to do so.

Error to the Superior Court of Detroit. (Chipman J.) April 27.—June 13.

CASE. Plaintiff brings error. Affirmed.

C. I. Walker for appellant. Where the justification of a libel is general, its truth must be proved in the sense charged in the declaration: Odger on Libel 169, 170; Townshend on Libel §§ 212, 215, 355, 361–9; *Whittemore v. Weiss* 33 Mich. 348; *Bailey v. Kal. Pub. Co.* 40 Mich. 255; *Atkinson v. Free Press* 46 Mich. 354; even if the libelous charge be made upon belief it is not a justification to prove that the defendant believed the story to be true, after careful investigation: *Wilson v. Fitch* 41 Cal. 379; *McLaughlin v. Cowley* 127 Mass. 320; whether there is evidence tending to prove each and every charge is a question of law for the court: *Poleman v. Johnson* 84 Ill. 269; if there is the case must go to the jury: *Smith v. Gillett* 50 Ill. 291; *Crowley v. Crowley* 80 Ill. 473; *Waller v. Carter* 8 Ill. App. 511; *Compton v. Blair* 27 Mich. 399; *Webber v. Donnelly* 33 Mich. 470; *Hayes v. Homer* 36 Mich. 376; but if the testimony does not fairly tend to prove each fact essential to a decision, there is nothing for the jury to pass upon, and if submitted to them, a new trial

will be granted: *Walrath v. Campbell* 28 Mich. 123; *Scripps v. Reilly* 38 Mich. 22; *Brown v. Congress & Baker St. Rw.* 49 Mich. 153; *Wood v. Barker* id. 295; it is not enough that there is a scintilla of evidence tending to prove the fact in controversy, to authorize a submission of the question to the jury: *Improvement Co. v. Munson* 14 Wall. 442; *Pleasants v. Fant* 22 Wall. 120; *Hyatt v. Johnston* 91 Penn. St. 196; where a distinct issue of crime is made in the pleadings, the party upon whom the burden of proof rests, must prove such crime beyond a reasonable doubt, as in a criminal case: *Wilmett v. Harmer*, 8 C. & P. 695; *Thurtell v. Beaumont* 1 Bing. 339; Folkard's Starkie on Slander § 693; Odger on Libel 548–9; 2 Greenl. Ev. § 426; Townshend on Libel § 404; *Woodbeck v. Keller* 6 Cow. 118; *Clark v. Dibble* 16 Wend. 601; *Pollock v. Pollock* 71 N. Y. 142; *Steinman v. Mc Williams* 6 Penn. St. 170; *Gorman v. Sutton* 32 Penn. St. 247; *Wonderly v. Nokes* 8 Blackf. 589; *Gants v. Vinard* 1. Ind 476; *Hutts v. Hutts* 62 Ind. 214; *McConnel v. Ins. Co.* 18 Ill. 233; *Crotty v. Morrissey* 40 Ill. 477; *Fountain v. West* 23 Ia. 10; *Mott v. Dawson* 46 Ia. 533; *Barton v. Thompson* 46 Ia. 30; *Merk v. Gelzhaeuser* 50 Cal. 631; *Kane v. Ins. Co.* 38 N. J. L. 441; *Lexington Ins. Co v. Paver* 16 Ohio 324; *Strader v. Mullane* 17 Ohio. St. 624; *Coulter v. Stuart* 2 Yerg. 225; *Thayer v. Boyle* 30 Me. 475; *Freeman v. Freeman* 31 Wis. 235; *Berckmans v. Berckmans* 17 N. J. Eq. 453; *Dillon v. Dillon* 3 Curt. Eccl. 47; but see *Blaeser v. Ins. Co.* 37 Wis. 37; *Munson v. Atwood* 30 Conn. 102; *Folsom v. Brawn* 25 N. H. 114; *Spruil v. Cooper* 16 Ala. 791; *Ellis v. Buzzell* 60 Me. 209; *Hoffman v. Ins. Co.* 1 La. Ann. 216; *Sloan v. Gilbert* 12 Bush 51; *Kidd v. Fleek* 47 Wis. 443; *Kincade v. Bradshaw* 3 Hawks 63; *Miller v. Balthassern* 78 Ill. 302; *Robinson v. Randall* 82 Ill. 521; in *Smit v. Ins. Co.* 1 Gray 534, it seems to be admitted that libel cases may be an exception to the general rule; where there is an opposing presumption, a mere preponderance of evidence is not sufficient: *Knowles v. Scribner* 57 Me. 497; 1 Greenl. Ev. §§ 34–5; *Ellis v. Buz-*

zell 60 Me. 214; *Jones v. Greaves* 26 O. St. 6; *Scott v. Home Ins. Co.* 1 Dill. 107; when circumstantial evidence is relied upon to prove a fact, the circumstances must be proved, and not themselves presumed: *Douglass v. Mitchell* 35 Penn. St. 440; *Manning v. Ins. Co.* 100 U. S. 697–8; each material circumstance must be clearly proved, and should be intimately connected with the main fact to be proved: Wills on Circum. Ev. 108 (136); Starkie on Evid. 754–6 (856–60); circumstances that merely excite suspicion do not form the basis of a verdict: Wills on Circum. Ev. 156, 207; *State v. Banks* 43 Ia. 595 *Watkins v. Wallace* 19 Mich. 77; the press has no greater right to utter libels than the private citizen: Odger on Libel 34; *Campbell v. Spottiswoode* 3 B. &. S. 781; *Sheckell v. Jackson* 10 Cush. 25; *Snyder v. Fulton* 34 Md. 128; *Barr v. Moae* 87 Penn. St. 385; *Detroit Daily Post Co. v. McArthur* 16 Mich. 452; though some matters of public interest may be discussed by the press and by individuals, whose comments and statements in relation to which are so far privileged that, though erroneous, they do not incur liability in the absence of malice or recklessness: Odger on Libel 35, 40, 41; 2 Addison on Torts 935, 940; thus, the public have an interest in the character of candidates for office, and in the conduct of public officers, and any fair comment thereon, even if not strictly true, may not be libelous; but even then there must be no imputation of corrupt and criminal conduct: *Parmiter v. Coupland* 6 M. & W. 105; *Hamilton v. Eno* 81 N. Y. 116, 126; *Rearick v. Wilcox* 81 Ill. 77; *Curtis v. Mussey* 6 Gray 261; but a sensational article, published without regard to the public interests and merely to obtain an advantage over rival papers is not protected: *Foster v. Scripps* 39 Mich. 380: 41 Mich. 742.

Henry W. Montrose, Atkinson & Atkinson and *Isaac Marston* for appellee.

Campbell, J. Plaintiff sued defendant for publishing a libel against him, the substantial charges being connected with the murder of one Martha Whitla, whose body was found

in Detroit river in the spring of 1879, and whose murder was alleged to have taken place January 11, 1879. The article, while it gave no name, pointed out a particular person easily identified with plaintiff, and in the course of it indicated illicit relations between him and the deceased, and also an act of arson committed some years before to defraud insurers.

Defendant pleaded the general issue, and appended a notice of special matters not now necessary to refer to. It also contained a notice of justification of the entire libel. The jury found for the defendant.

The substantial charges against plaintiff were three—the burning of his house,—criminal relations with Martha Whitla, the deceased,—and her murder.

The errors assigned include two on the admission and rejection of testimony, and three to the charge, which are substantially a failure to charge *first*, that defendant must, in order to justify, establish the truth of the entire article; *second*, that proof of a portion of the accusations less than all would not be a complete justification; and *third*, that there was not sufficient evidence of the truth of the charges to authorize a verdict for the defense.

The first allegation of error relates to the refusal of the court to rule out a question put to an insurance agent: "Will you state whether or not the insurance company contested the claim made by Mr. Peoples for indemnity under the policy of that company?"

The fact of such a contest was referred to in the libel, and we think it was admissible to show it. It was not claimed, and was not held, that such a contest had any tendency to prove the fact of arson. But it was a part of the narrative, bearing more or less against the plaintiff, and which might also have some bearing on the extent of malice in making the principal charge. It does not appear to have been regarded as a very serious point and was not much pressed on the argument.

The second allegation of error relates to the exclusion of an article published on the eve of the trial, referring to the

action, and also setting out a narrative of the facts connected with the search for the cause and instrumentalities of Martha Whitla's death. It named plaintiff as pointed out by circumstances suggested, and it is claimed by counsel practically acknowledged him to be the person aimed at in the article sued on, which gave no name.

The record shows this article to have been offered "for the purpose of showing the identity of the plaintiff." The defendant objected that it was "incompetent for that purpose," and it was ruled out. It was not offered for any other purpose, and no ruling was asked on the pertinency of it for any other purpose. The record shows that it was expressly conceded that the article sued on referred to plaintiff, and the whole record indicates that the trial proceeded on that understanding. There was therefore no damage caused by this ruling; and we need not examine whether or not the article went far enough to identify plaintiff as the alleged criminal referred to in the libel, or whether, if not confined by the offer to the single purpose of identification, there might have been other grounds on which it could have been let in.

We do not think the record supports the claim that the court refused to charge that nothing less than proof of all the libelous statements would amount to a justification. On the contrary the charge was emphatic and fully as direct and clear as the two instructions specifically asked on that subject. "The allegations must all be justified. If there are four charges, justifying three of them will not excuse the publication of the fourth. So that there must be a reasonable justification, a substantial justification, a substantial proof of the probability, of the preponderance, so to speak, of the testimony, which will establish them in their entirety."

Except as to the measure of preponderance of proof, instead of proof beyond a reasonable doubt, we can see nothing which could authorize the jury to find a verdict of justification on anything less than a complete justification. No exception was taken to the charge as actually given. But

on the measure of proof required, it is insisted the third assignment of error is well taken, and that the proof fell short of the legal standard.

Some authorities were cited to show that where proof of criminality becomes material to the issue in a civil case, and is directly involved in that issue, the rule is the same as in criminal trials, and that a preponderance of evidence is not enough to authorize the jury to find it.

That question is not an open one in this State. There are but two classes of cases recognized as requiring different rules of proof; *first*, criminal cases, and *second*, civil cases, or, to speak more accurately, cases not criminal. In all cases criminal the jury must be satisfied of guilt not merely by a preponderance of proof but beyond a reasonable doubt. In cases not criminal they may be satisfied by a preponderance of proof. And where only a preponderance will suffice, if it satisfies the jury, courts have no means of further discrimination, and the law does not require it. Courts, where they pass upon facts, and jurors also in their findings, will usually scrutinize testimony more closely when it is conflicting, or when it stands against common presumptions. We are not so easily satisfied in some cases as in others. But the discussion of these probabilities belongs to the domain of fact and not of law, and the tribunal passing on facts must judge of their weight in each case. The rule of the criminal law rests upon its own peculiar reasons, and has become settled. But in cases not criminal, and involving no criminal judgment and punishment, the court cannot require the jury to disregard any preponderance of evidence which convinces them. *Watkins v. Wallace* 19 Mich. 57; *Elliott v. Van Buren* 33 Mich. 49; *Semon v. People* 42 Mich. 141.

It is insisted, however, that the testimony does not even tend to prove the various wrongs charged against plaintiff, and that for this reason the court should have charged the jury that there was not sufficient evidence of justification to act upon.

Upon the charge of arson we think there was pertinent testimony bearing upon the plaintiff as the person who

burned the house in question. It was shown that the house was burned while unoccupied, and that he had gone into it but a few hours before the fire with some sort of a package or bundle which he did not bring out, and which on inquiry from a neighbor he said he intended to leave in the house. That he placed blinds or curtains that afternoon in the room where the fire broke out, and that the fire was not seen outside for some time. That although he professed to be in a hurry in going towards the railroad, because he was going into the country, yet he went back again, and again went into the house, and that no one else was seen there. It was also testified that the fire was aggravated and spread by throwing water on it. Enough appeared to indicate that the fire was not accidental, that no one else was shown to have been in a position to set it, and that he was twice in the building, and did what would tend to hide the light from observation. Without referring to the rest of his conduct on that day and when he returned two days thereafter from the country, there was certainly testimony which the jury had a right to consider on his responsibility for the fire, and there was no explanation or contradiction of defendant's witnesses, and no testimony in rebuttal whatever. Plaintiff had an undoubted right to urge upon the jury the weakness of the proofs, but this, it must be presumed, he failed to convince them of.

There was also testimony which had a distinct tendency to indicate illicit relations between plaintiff and Martha Whitla, and to indicate further that if such relations existed they were extended over a considerable period of time. It is not for this Court to say that the jury should have taken a more favorable view of it than they did. There was evidence showing that if there was any vicious inclination there was opportunity to carry it out. There were letters making appointments which were designed to be clandestine. There was evidence from which it could, not unfairly, be inferred that there was mutual attachment. There was evidence tending to show that she advised with him in regard to medical aid to get rid of some difficulty of a private

nature, and that she had been unchaste with some one. In view of the correspondence written by plaintiff, and not explained by the production of her letters or in any other way, and in view of the peculiar domestic intimacy in the same household of which he was the head, and she for a time in charge, and more or less circumstances bearing on their mutual feelings and relations, we have no authority to say that the verdict is such as the jury had no right to render. If so, we have no occasion to form or express opinions of our own on the facts.

A similar remark will apply to the finding as to murder. The corpus delicti was proved by very direct testimony. There is plain reason to believe that Martha Whitla came to her death by unlawful means, and that she was murdered by some one. In such cases proof of the murderer's identity and of the cause of death may even in criminal cases be shown by circumstantial evidence. In the present case there was testimony indicating that she was seen in Detroit by several persons on the 11th day of January, 1879, and was never seen afterwards. There was testimony that she stated on that day, in explaining where she was going, that she was going to see plaintiff to obtain money. There was testimony, which, whether weak or not, was admissible, that she was seen with him towards evening on the street, and that in the same evening a witness called at the house of a Mrs. Schneider in the immediate neighborhood and while there saw plaintiff and another man in a room down stairs, and heard a remark from some one, (she thinks Mrs. Schneider) that Martha was very sick. She also saw a person supposed to be a physician who was described, and whose name was given, but who is not otherwise made prominent in so much of the testimony as is in the record. There was testimony indicating some jealousy on the part of plaintiff's wife, and also of annoyance to plaintiff from applications for money on a note given by plaintiff to Martha Whitla at the time of his marriage. Plaintiff was also shown to have been active in promoting the prosecution of other parties for the murder. The history of their private

relations could not be kept out of view in considering the probabilities of his guilt.

Where murder is committed, as this, if it was murder, was committed, there can never be any probability that the facts will be known to any but guilty participants in the homicide. It cannot be expected that they will furnish means of knowledge, or that they will fail to conceal or create difficulties in arriving at the facts. Circumstantial evidence is in such cases the only resort, and of course it is usually open to the danger of erroneous inferences, and may do injustice. But if it has any legitimate tendency, if believed, to lead any honest mind to a conclusion of guilt, there is no way in which a court in a civil case can shut out such an inference. It is impossible to pick out leading facts and separate them from the multitude of smaller ones which accompany them, and which give them color. To require direct evidence would be, in many cases, to secure its destruction. In looking over this record we cannot avoid seeing that there are many things which, if the witnesses tell the truth, furnish grounds on which an inference of plaintiff's guilt may lawfully be founded. There are some on which the omission to explain them might have a damaging effect. It is easy to see that different persons might have different views concerning the truth or force of what appears in the testimony. But all of these considerations were to be addressed to the jurors who saw the witnesses and heard the testimony. It is not our function either to approve or disapprove their conclusions.

The judgment must be affirmed with costs.

GRAVES, C. J. concurred.

COOLEY, J. I agree in the principles laid down by Mr. Justice Campbell, and disagree only as to there being any evidence tending to connect Peoples with the murder of Martha Whitla.

Afterwards, at the October term of 1883, appellants

moved for a rehearing. The motion was submitted October 2, and denied October 3.

Walker for the motion.

Marston against.

PER CURIAM. This case having been heard and decided when three judges only were sitting, and a change in the Court having taken place and a further change being to occur on the first of January, a motion is now made for a rehearing at the next January term before the full Court as it will then be constituted.

Held, unanimously, that a rehearing will not be ordered on the ground merely that a change of members of the bench has either taken place or is about to occur.

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WILLIAM F. BELL AND JOHN W. SCHERMERHORN v. ALBERT M. TODD.

Misjoinder—Closing platted streets—Estoppel.

Objections for misjoinder of complainants are not entitled to favor in the appellate court if not called to the attention of the court below until the case was brought to hearing on the proofs.

The rule that those who purchase by reference to a plat are entitled to the use of the streets on which the purchased premises appear to abut, and of all connecting streets, was *held* not to apply in a case where the plat was never acknowledged, nor the dedication thereby accepted, nor the streets laid out on it used, or capable of use; and where the streets were neither ways of necessity nor of convenience, and no equities were shown against closing them for the benefit of individual interests.

Estoppels arise upon equities and are enforced for their protection.

One who has purchased according to a plat and has, so far as his own premises are concerned, closed up a street which is represented on the plat as passing through them, cannot be heard to complain that a subsequent purchaser of neighboring land has closed the same street where it crosses such land.

Appeal from St. Joseph. (Pealer, J.) June 5.—June 13.

INJUNCTION against obstructing streets. Complainants' appeal. Dismissal of bill affirmed.

O. J. Fast and *John B. Shipman* for complainants. Selling a lot as bounded on a street estops the grantor, and those claiming under him, from shutting it up so as to prevent the grantee's use of it, whether it be a public street or not; the grantee has a right to make use of it "for his own accommodation;" there is no question of necessity about it: *Smith v. Lock* 18 Mich. 56; *White v. Smith* 37 Mich. 291; *Karrer v. Berry* 44 Mich. 391; *Child v. Chappell* 9 N. Y. 246; *Wiggins v. McCleary* 49 N. Y. 346; the grantee's right is not limited to the boundaries of his own lot, but he has a right to have the way kept open to its connections with all public highways as exhibited on the plat according to which be buys, whether it be a public or a private plat: *Oswald v. Grenet* 22 Tex. 94, 100; *Lamar v. Clements* 49 Tex. 347; *Thomas v. Poole* 7 Gray 83; *Rodgers v. Parker* 9 Gray 445; *Stetson v. Dow* 16 Gray 372; *Tobey v. Taunton* 119 Mass. 410; *Fox v. Union Sugar Refinery* 109 Mass. 292; *Farnsworth v. Taylor* 9 Gray 167; *Wyman v. Mayor* 11 Wend. 487; *Pratt v. Lewis* 39 Mich. 11; *McConnell v. Rathbun* 46 Mich. 303; *Bartlett v. Bangor* 67 Me. 466.

D. E. Thomas, Chas. Upson and *H. H. Riley* for defendant. Platting lands into blocks and streets is but an offer to dedicate the lands indicated as streets, and where the public authorities do not within a reasonable time accept such offer to dedicate, the party owning the property may again take possession and revoke his offer: *Field v. Manchester* 32 Mich. 279; *Cass Co. Supervisors v. Banks* 44 Mich. 467; *Detroit v. D. & M. R. R. Co.* 23 Mich. 173; *Buskirk v. Strickland* 47 Mich. 389; *White v. Smith* 37 Mich. 291; but sales of lots bounded on streets surrounding a public square, so marked on the plat, do not tend to prove an acceptance by the public of the square as devoted

to public uses, or an estoppel in favor of the public, nor would purchasers of these lots have any individual right of entry upon or occupancy of such spaces: *Baker v. Johnston* 21 Mich. 348; and when the public has refused to accept the dedication of lands platted as for public purposes, the purchasers of lots on the plat have no right to insist that they shall be kept open as public grounds: *Sinclair v. Comstock* Har. Ch. 404; the rule is that when one sells a village lot which is described in the deed as bounded on a certain street, the purchaser is entitled as against the seller to have such street kept open, where it abuts his lot, for his accommodation in the enjoyment of his purchase: *Graham v. Poor* 50 Mich. 153; *Tapert v. Det. G. H. & M. Ry. Co.* id. 267; its purpose is that the purchaser shall have a reasonable and convenient way to a public highway, as well as the benefit of light and air: *Livingston v. Mayor* 22 Am. Dec. 622; *Underwood v. Stuyvesant* 10 Am. Dec. 215.

Cooley, J. The purpose of the bill in this case is to enjoin the defendant from enclosing and occupying with buildings and for his private business certain parcels of land which complainants claim have been made public streets by dedication, or, if not public streets, their private ways for the enjoyment and use of complainants in connection with certain lots owned by them and which abut on one of the supposed streets or ways. The facts appear to be that one Reed, in the year 1872, being the owner of certain lands in the township of Nottowa, St. Joseph county, platted a village thereon which he named Nottowa, and caused his plat to be recorded, but without the statutory execution and acknowledgment. The Grand Rapids & Indiana Railroad ran across the land platted, and the company had a station house and side track there. West of the land of this company a street was marked on the plat which was named Railroad street. Complainant Schermerhorn bought five of the platted lots near the railroad station, all lying together, and three of them appearing to abut on Railroad street. Upon two of these lots he built a store, which a

tenant now occupies. Sturgis street crosses Railroad street at this point, and is a public highway much used. South of Sturgis street other streets were laid down on the plat crossing Railroad street in the following order: Graham street, Wallace street, William street and South street. South of the last named street were block 23 on the west and 22 on the east side of Railroad street, and these were purchased by complainant Bell. The deeds to Schermerhorn and Bell referred to the plat as a part of the description. Bell occupied his blocks for agricultural purposes. The main highway north and south is Nottowa street running parallel to Railroad street and having East street between them.

The proposed village never acquired much population and was never incorporated. Lying adjoining it and coming nearly up to Railroad street on the west is a little lake, and it seems to have occurred to defendant to build ice houses upon this lake and make a business of shipping ice by the railroad. He therefore purchased the four blocks bounded by Wallace street, East street, South street and the lake, and commenced the erection of ice houses upon them. Up to this time Railroad street had never been opened or used as a public highway, and in its natural condition through the land of defendant it was incapable of such use because of low and marshy ground. Neither had William street across the land of defendant ever been improved or used as a highway, and defendant in his preparation for improvements ignored the existence of any public highways across his lands, and proposed to build regardless of street lines. When this was perceived, complainant Schermerhorn endeavored to induce the highway authorities of the township to take possession and improve Railroad street as a public highway, but they refused, and there is no claim that any offer of a dedication made by the platting which Reed put on record was ever accepted. When the highway authorities refused to interfere the complainants filed this bill.

The bill sets out the platting of the village of Nottowa

as a statutory platting, and alleges that Railroad street and the other streets named became public highways. It further sets out the purchase made by complainant Bell with reference to the plat, and avers that Railroad street furnishes a direct and safe way from his lands to the railroad station, post office, &c., and connects at Sturgis street with the principal highway in that part of the country, and also by way of William and Wallace streets provides a way to desirable and convenient points on the lake for boating, fishing, and in season, ice. It also describes the purchase by complainant Schermerhorn of the lots mentioned, and avers the importance of Railroad, William, Wallace and East streets to the use of the lots as business property. It also alleges that the streets are important as public highways, and prays that defendant be enjoined from obstructing or interfering with their enjoyment.

The defendant answered, and the case was heard on pleadings and proofs, and the bill dismissed. In the decree entered by him the circuit judge recites that "it was found by the court that the public authorities have asserted no rights in or to the streets in question in this case, and have declined to do so when requested, and have neglected and refused to improve Railroad street so as to make it fit for travel;" and that the "whole village of Nottowa is but little more than a common. And it was further found that heretofore the complainants have not used either of the alleged streets or parts of streets so far as they are obstructed, or required them for use, and neither have persons heretofore passing to or from complainant Schermerhorn's store or property traveled over the said parts of streets, but they have chosen other routes still open to them; and there is nothing to show that the patrons of the store of said complainant now use or desire, or ever will desire to use the streets obstructed in any way to benefit complainant, or that complainant will ever be likely to need them for any purpose. The complainant Schermerhorn has not ever found it desirable to have an entrance to his store on Railroad street, and no damage or prejudice has yet resulted or is likely to result

to him in consequence of the acts of defendant; and the streets were closed and large expenditures made before the bill in this cause was filed. And the court further found that as to said complainant Bell, he has waived his right to be heard, and received a consideration which he still retains for so doing, and although the alleged grievance is in one sense of the same nature to both, it does not as alleged affect both these complainants in the same way, and may affect one and not the other."

All the facts here recited we find established by the evidence. The consideration mentioned as received by Bell was a small sum paid him by defendant for his consent to the exclusive occupation defendant contemplated, and which Bell, though subsequently claiming he did not fully understand the matter, has always retained. The question, then, is whether in the light of these facts complainants have any equities.

The question of misjoinder which is made by the defense we pass without decision. It was not called to the attention of the court below until the case was brought to a hearing on the proofs, and was then entitled to no favor.

No attempt was made on the argument to sustain the claim of the bill that Railroad street had become a highway by dedication; but complainants insisted that by purchasing lots by reference to the plat, which the plat showed to abut on a street, they acquired the right to the use of the street and of all connecting streets for the enjoyment of their purchases, and that their grantor was estopped by his conveyances from disputing the right. The principle is supposed to be well settled, and many cases are relied upon to show its application to the facts of this case.

In *Smith v. Lock* 18 Mich. 56, it was decided that by granting a lot described in the conveyance as bounded on a street the grantor is estopped from shutting it up so as to prevent the grantee from making use of it for his own accommodation in the enjoyment of his purchase. The principle was again declared in *White v. Smith* 37 Mich. 291, and was recognized and applied in *Karrer v. Berry* 44 Mich.

391 and *McConnell v. Rathbun* 46 Mich. 303. In none of these cases did it become necessary to decide whether the right of the grantee went beyond the particular street or way upon which his lot abutted, nor did the relief which was granted in any case go farther than was necessary to give the party convenient access to his lot and a passage way from it by the road or street to which his conveyance referred. Numerous cases in other states recognize the same principle; and in New York and Massachusetts in particular the occasions for applying it have been frequent. *Livingston v. New York* 8 Wend. 98; *Underwood v. Stuyvesant* 19 Johns. 180; *Wyman v. New York* 11 Wend. 487; *Trustees &c. v. Cowen* 4 Paige 510; *Child v. Chappell* 9 N. Y. 246; *Bissell v. New York &c. R. R. Co.* 23 N. Y. 61; *Wiggins v. McCleary* 49 N. Y. 346; *Tufts v. Charlestown* 2 Gray 271; *Thomas v. Poole* 7 Gray 83; *Loring v. Otis* 7 Gray 563; *Farnsworth v. Taylor* 9 Gray 162; *Rodgers v. Parker* 9 Gray 445; *Stetson v. Dow* 16 Gray 372; *Fox v. Union Sugar Refinery* 109 Mass. 292; *Tobey v. Taunton* 119 Mass. 404. To the same effect are cases in other states: *Sutherland v. Jackson* 32 Me. 80; *Stetson v. Bangor* 60 Me. 313; *Bartlett v. Bangor* 67 Me. 460; *Hawley v. Baltimore* 33 Md. 270; *Zearing v. Raber* 74 Ill. 409; *Rowan v. Portland* 8 B. Mon. 232; *Carter v. Portland* 4 Oreg. 339; *Oswald v. Grenet* 22 Tex. 94; *Lamar County v. Clements* 49 Tex. 347; *Price v. Plainfield* 40 N. J. L. 608.

No support for the broad claim that is made on behalf of these complainants can be derived from these cases, nor, in our opinion, from any one of them. *Fox v. Union Sugar Refinery* 109 Mass. 292, seems to be very much relied upon. It was decided in that case that where land was conveyed by a description which bounded it on a private way not defined in the deed but shown upon a plan referred to therein, the deed operated as an estoppel upon the grantor, and precluded his denying the existence not only of the abutting way, but of any of the connecting ways represented on the plan, which would enable the grantee to

reach public roads in any direction so far as the grantor's title extended. The way which was in question in that case had been open and in use for more than twenty years, and its convenience in connection with the use of the land conveyed was plain and important. In some other cases it is held that the purchaser of a lot described as bounded on a street or way is entitled to have it kept open for the whole distance shown by the plat or description; but the decision in every case has been based upon substantial equities. It could not have been otherwise; for estoppels arise upon equities and are enforced for their protection. *Powell v. Conant* 33 Mich. 396; *Maxwell v. Bay City Bridge Co.* 41 Mich. 453; *Ferguson v. Millikin* 42 Mich. 441; *Alpena Lumber Co. v. Fletcher* 48 Mich. 555; *DeMill v. Moffat* 49 Mich. 125; *Barnard v. German American Seminary* 49 Mich. 444.

That complainant Bell has no equity to be protected is shown by his having assented for a consideration to what defendant has done. But it also appears that Railroad street south of South street is enclosed and occupied by Bell himself, so that he is doing in his own individual interest in respect to this very street precisely what he seeks to enjoin defendant from doing. It would be preposterous to grant the relief prayed for on his application under such circumstances. Schermerhorn's case is not thus embarrassed by action on his part inconsistent with his prayer, and if he has shown that it is necessary or important to the enjoyment of the lots he owns that Railroad street or William street as platted should be kept open through the lands of defendant, he has thereby made out a prima facie equity. But he has made no such showing. Defendant has closed up no passage way that was ever open to him along either of these proposed streets, for neither of them in its natural condition was susceptible of use as a street, and neither of them was ever put in condition for that use. If opened and improved they would be to Schermerhorn of no value. They would give to him no new connection with the roads of the country around him, and they would shorten no con-

nection he now has. And no person is living or has a business house or establishment on either of the proposed streets, who will be less accessible from Schermerhorn's lots by existing ways than by these streets if open. To force the streets open under such circumstances would be to inflict serious injury upon defendant and prevent his making valuable use of his premises, with no corresponding advantage to any one.

The circuit court was right in dismissing the bill, and the decree must be affirmed with costs.

The other Justices concurred.

THOMAS BREEN v. SAMUEL H. PANGBORN.

Administration of personal estate of married woman dying intestate.

Under the Statute of Distributions the husband of a woman who dies intestate is entitled to one-third of her personalty, or to one-half if she leave but one child or a father, mother, brothers, sisters or their issue. No individual, under any circumstances, takes any larger interest than the husband. Comp. L., § 4377, subd. 7.

A husband has a right to be heard in regard to the appointment of an administrator for his wife's estate if she leaves any personalty, as he has an interest in the property.

Persons interested in the property left by an intestate can always raise the objection of any want of jurisdiction in the court which issues letters of administration; but no one can be allowed to intervene in the affairs of an estate unless he is authorized by law to do so, or is personally interested.

Administration, when letters are issued on petition to the court, can only be granted to, or on application by, one or more of the persons specified in Comp. L., § 4379, viz., creditors and distributees; and as between these, only in this order, and under the contingency specified, of their being competent or willing to take the trust.

A woman died intestate leaving a husband and four minor children. The husband was a creditor to her estate, and applied for letters of administration, but the probate court issued them to a person who was neither a creditor nor a distributee, and did so on a petition

filed by the intestate's brother and setting forth on its face that there were lawful distributees residing in the county and that the petitioner was not interested. *Held* that the petition negatived the jurisdiction, and that in the absence of reasons for disregarding the petition of the husband, the appointment was void as against him.

Case made after judgment from Alpena. (Emerick, J.) June 6.—June 13.

REPLEVIN. Plaintiff had judgment below. **Reversed.**

J. D. Turnbull for plaintiff.

J. B. Clayberg for defendant.

CAMPBELL, J. Defendant, claiming to be administrator of the deceased wife of plaintiff, Mrs. Mary Ellen Breen, took from plaintiff a considerable amount of personal property, which plaintiff thereupon replevied, but in the court below judgment of return was given for defendant, and plaintiff brings error. The only question is whether defendant showed a superior right of possession.

The case finds that Mrs. Breen was formerly the widow and sole executrix and legatee of James Moran, who died in January, 1879. That his estate is not yet closed up, and that when defendant intermeddled with the property, there was no administrator de bonis non, and that an appointment made since this controversy arose is appealed from and undetermined. Mrs. Breen left four minor children—three by her first husband and one by plaintiff—and she died intestate April 1, 1881. Defendant was nominated to the probate court of Alpena county on the petition of one Robert Black, filed May 31, 1881. No written order was entered appointing him until May, 1882, after the trial of the suit below had begun, but letters were issued June 27, 1881. Plaintiff had made an earlier application than Black, in which he claimed to be creditor of his wife, but the probate court seems to have paid no attention to it. Black sets up his interest in the estate of Mrs. Breen as that of a brother merely, and his petition shows the existence of

the husband and four children, all residing in the county, of a father and mother of Mrs. Breen, and of two of her sisters. No personal notice was given to any one, and the action in the probate court seems to have been based upon some claim of publication, although the record does not show any order or proof of publication of any order.

Under our statute of distributions the husband of a deceased married woman is now entitled, if she dies intestate, to one-third of her personalty at all events, and to one-half if she leaves but one child or if she leaves no children but has a father, mother, brothers, sisters or their issue. If no such blood relatives, he takes the whole estate. There is no individual who takes under any circumstances a larger interest than the husband. In the present case, there being four children, he and his own child together took one-half of the property. Comp. L., § 4377, subd. 7.

The interests of Moran's estate, whatever they may have been, were not in the hands of any successor to Mrs. Breen, and therefore were not of any importance in determining this controversy. Here the question is between an alleged administrator of Mrs. Breen's estate, and her husband, who was personally entitled to a share of it, and was lawfully possessed of it at the time of the appointment.

Since the passage of the statute creating this right in him there can be no possible doubt of his right to be heard on the question of administration. It directly concerned him who should manage the estate in which he and his child were so largely interested. Whether he has, since the change in the law, any exclusive preference in claiming the appointment or not, this is not a record on which that question arises. But that he has a right to be heard in any controversy concerning his own property is manifest.

It was held in *Gillett v. Needham* 37 Mich. 143 that whatever may be the immunity of letters of administration against attacks from strangers, parties interested may always object to the want of jurisdiction in the court which issued them. And it is also clear that no one has any right to intervene, and no court can allow any one to intervene in

the affairs of an estate, unless he is either personally interested, or else authorized to do so by law. *Dickinson's Appeal* 2 Mich. 337; *Taff v. Hosmer* 14 Mich. 249; *Besancon v. Brownson* 39 Mich. 388. These cases are all in point on the present issue. As suggested in those cases, a stranger, if allowed to set proceedings in motion, obtains in most cases a power of exercising some control over them, besides involving parties in expense and litigation who may not desire it, or who may not be in a condition to look after their own interests. This case illustrates the danger as well as any. No personal notice to plaintiff is claimed to have been given, and so far as he is concerned the whole proceedings were practically ex parte. No guardian ad litem was appointed of the infants in his custody, and there was no one to represent any of them. Assuming, what there is neither evidence nor finding tending to show, that there was some, or that there was an entirely valid notice published, that would not necessarily, and it might not even probably, come to his notice. If, as is further claimed, the issue of letters is valid without any order in writing made by the court, there could have been nothing learned, even by perusing the records, which would enable a party to know that an appeal was desirable or possible.

Without passing upon any of these questions of procedure, which could only become important by the application of some authorized person for the granting of letters, it is sufficient to say that under our statutes administration can only be granted to or on application of one or more of the persons specified in the statute itself, and as among them can only be granted in the order and under the contingency specified. The only persons having a right to letters are the persons interested as creditors and distributees, and in all cases the grant must be made to some of those persons or their nominees, if competent or willing to take the trust. Comp. L. § 4379.

In this case it appeared expressly, on the face of the petition, not only that there were lawful distributees residing in the county, but that the petitioner was not even re-

motely interested in either capacity. The jurisdiction is completely negatived by the petition itself. It also appeared that the plaintiff had applied for letters under circumstances which made it obligatory on the probate court to appoint him administrator (or some other creditor equally well entitled), unless incompetent to take upon him the administration. § 4379 subd. 3. What right the judge of probate had to disregard this application does not appear. But it does appear that Black's application was unlawful—and defendant's appointment was void as against plaintiff.

The judgment must be reversed and judgment rendered for plaintiff on the finding, with nominal damages, and with costs of both courts.

GRAVES, C. J. and COOLEY, J. concurred.

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STEPHEN BALDWIN v. MARTIN CULLEN.

Ejectment for mortgaged premises—Presumption of payment from lapse of time—Time of filing claim for improvements.

The statute forbidding ejectment to be brought for mortgaged premises before foreclosure does not apply to mortgages given before its enactment, and under which the purchase made at the foreclosure sale passed the title to the purchaser, even though the foreclosure were ineffectual.

A mortgage is not necessarily presumed paid, from lapse of time, if the mortgagee asserted his right to foreclose in due season, and there does not appear to be any adverse holding, under the mortgager; the purchaser must be understood as claiming under the sale ever since it was made.

Defendant in ejectment filed a claim for improvements at the proper time but it was informal and insufficient. Two years after the suit was put at issue, but three years before it was brought to trial, he filed a claim that was in due form, and no motion was made to strike it from the files nor did plaintiff object that it was not served on him or brought to his notice. *Held* that as a motion to amend the first claim should have been allowed, if made, the second claim

should have been treated as an amendment and evidence should have been received under it. *Van Den Brooks v. Correon* 48 Mich. 285 distinguished.

Error to Wayne. (Speed, J.) June 7. — June 13.

EJECTMENT. Defendant brings error. Reversed.

C. I. Walker for appellant.

H. C. Wisner for appellee.

COOLEY, J. Ejectment for two certain parcels of land. The plaintiff recovered, and defendant brings error relying upon certain supposed defects in the plaintiff's title to each parcel, and also upon the refusal of the court to permit the defendant to show the value of betterments made by him upon the premises while holding them under color of title, and to recover the amount.

As regards one parcel of the land, no defects are pointed out which we think have plausibility. As to the other it appears that the plaintiff's title is deduced through the foreclosure by advertisement of a mortgage. The mortgage bore date July 29, 1841, and covered distinct and unconnected parcels of land. It was foreclosed in 1854, and all the parcels sold and struck off for one gross sum. It was decided in *Lee v. Mason* 10 Mich. 403, that such a sale was invalid, as against the mortgagor, who was entitled to have the parcels sold separately, and no more sold than should prove necessary to satisfy the mortgage. This defendant, however, is not the mortgagor, nor is he in privity with the mortgagor. He is a stranger to that title, and the plaintiff insists that he is not at liberty to raise this question. The point is not material in this case; for the mortgage was given at a time when ejectment might be maintained upon it; and the subsequent statute which forbade ejectment before foreclosure had no application to such mortgages. *Mundy v. Monroe* 1 Mich. 68; *Blackwood v. Van Vleet* 11 Mich. 261. The purchase at the foreclosure sale

passed the mortgage title to the purchaser. *Gilbert v. Cooley* Wal. Ch. 494. So that the suit is well brought even if the foreclosure was ineffectual. It is suggested that the mortgage, from the great lapse of time, must be presumed paid; but we think not. The mortgagee asserted his right to foreclose in due season, and the purchaser must be understood as claiming under the sale ever since it was made. And as no adverse holding under the mortgagor appears, the lapse of time raises no presumption against the mortgage title.

The facts respecting the claim for improvements appear to be these: Defendant when the suit was instituted had for some time been in possession of the land under a purchase for delinquent taxes, and claims to have made valuable improvements. When the suit was begun he pleaded to the merits, and also filed a claim to have his improvements estimated that he might recover their value. It is conceded that this claim was wholly insufficient under the statute. Discovering the insufficiency the defendant, two years after the suit was put at issue, but three years before it was actually brought to trial, put on file another claim for compensation for improvements, which appears to be in due form. But when on the trial he offered to give evidence upon this claim, it was rejected because no sufficient claim was filed ten days before the first term of court at which the case might have been tried.

The ruling is understood to have been made in reliance upon *Van Den Brooks v. Correon* 48 Mich. 285. In that case the claim for compensation for improvements was not made until after one trial had been had; and we held that defendant was too late in making it. There is a dictum in the case which goes further than the decision, and the correctness of which may be considered hereafter should occasion arise for it. No such occasion appears in this case. The first claim filed by the defendant was in due season whether the one construction of the statute or the other is adopted. If it was insufficient, the defendant should have been permitted to amend it; and it would have been an

abuse of discretion to cut the defendant off from substantial equities by refusing to permit an amendment. The claim afterwards filed in due form was an amendment made without an order of court, but no motion was made to strike it from the files, and it is not shown by the record that plaintiff made any claim that it was not served upon him or brought to his notice. Under the circumstances, as we must suppose the motion for leave to amend would have been a mere formality, and would have been granted without hesitation, we think the paper on file and confessedly in due form should have been suffered to stand as an amendment of the defective paper filed in due season, and that the evidence should have been received under it.

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

The other Justices concurred.

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PHILETUS P. BIRCH v. MAXWELL M. FISHER AND DAVID G. PRESTON.

Certificate of deposit—Good faith.

Certificates of deposit are negotiable instruments; and where the owner of such a certificate has indorsed it, and, through his want of ordinary business caution, it has passed beyond his control, *it seems* that one who within a reasonable time purchases it in good faith and for value is entitled to protection. But the question of good faith is for the jury, if there is any evidence to impeach it.

It seems that the lapse of thirty-one days from the date of a certificate of deposit is not enough to raise the presumption that it is dishonored paper, even though such paper be due at its date.

Error to Wayne. (Speed, J.) April 19.—June 20.

TROVER. Plaintiff brings error. Reversed.

Geo. H. Prentis and *Alfred Russell* for appellant.

A certificate of deposit is a promissory note, payable on demand: *Cate v. Patterson* 25 Mich, 191; and is due and payable at once and without any demand: *Palmer v. Palmer* 36 Mich. 491; and if past due a purchaser acquires no better title to it than the seller had, and if it was stolen, he obtains no title, even if he purchased in good faith: *Church v. Clapp* 47 Mich. 257; or if the owner lost his possession of it without carelessness: *Cline v. Guthrie* 42 Ind. 227; *Chipman v. Tucker* 38 Wis. 43; even in the case of a negotiable promissory note transferred before maturity, if there is doubt or suspicion thrown on the transaction by the manner of transferring, the purchaser would not be a *bona fide* holder: *Aniba v. Yeomans* 39 Mich. 171.

Geo. H. Penniman and *Samuel T. Douglas* for appellees. Paper payable on demand is regarded as over-due and dishonored "when so much time has elapsed that the law considers that it ought to have been paid, and that every one is bound to suppose that the paper must have been demanded and refused somewhere within that time:" 1 Pars. N. & B. 262; in *Tripp v. Curtenius* 36 Mich. 496 this Court held, that a certificate of deposit was in effect a promissory note, payable on demand, and due when issued, and that a person who took it nearly three years after it bore date did not acquire the rights of a *bona fide* holder as against the banker who issued it; this decision as to when a certificate becomes due has been a surprise and embarrassment to the commercial community, and is undoubtedly contrary to the prevailing doctrine elsewhere: 2 Dan. Neg. Inst. (2d ed.) 641; *Howell v. Adams* 68 N.Y. 314, 320; *Bellows Falls Bk. v. Rutland Bk.* 40 Vt. 377; but this case hardly calls for a reconsideration of the matter then decided, for in view of the purposes of this kind of paper and the commercial usages in respect to it, the lapse of thirty-one days, or even of six months, raises no presumption whatever that it has been dishonored: *Chartered Mercantile Bank of India v. Dickson* L. R. 3 P. C. 574; *Nutting v. Burked* 48 Mich. 241; Morse on Banks 52, (2d ed.) 63; a loss, as between two innocent parties,

ought to fall upon the one who is most in fault: *Chapman v. Rose* 56 N. Y. 137; *Abbott v. Rose* 62 Me. 194; distinguishing *Gibbs v. Linabury* 22 Mich. 479; *Burson v. Huntington* 21 Mich. 415; *Kinyon v. Wohlford* 17 Minn. 239; 1 Dan. Neg. Inst. 689, 692.

SHERWOOD, J. On the 29th day of January, 1881, the plaintiff made a deposit in the First National bank of Detroit and took the following certificate therefor:

"FIRST NATIONAL BANK. $2500.

DETROIT, Jan'y 29th, 1881.

P. P. Birch has deposited in this bank twenty-five hundred dollars, payable to the order of himself, in current funds, on the return of this certificate properly endorsed.

EMORY WENDELL, Cashier.

H. W. JESSOP, Teller."

On the 2nd day of March following, being thirty-one days after the certificate was issued and delivered to the plaintiff, he endorsed it in blank and left it with one Sanford in a private room in the office of an attorney in Detroit as a pledge that the plaintiff and one Judson, who had been intrusted by said Sanford for a short time with a deed of some patent right for the purpose of examination at the Russell House, would return the same.

Sanford, while thus left in the room with said endorsed certificate, took the same, without the knowledge or consent of plaintiff, to the banking office of the defendants, who, without any knowledge of the manner in which he came into possession thereof, purchased the certificate and paid therefor its face value, less two dollars and fifty cents claimed to be their usual charges for making the purchase. On the next day the plaintiff demanded the certificate of defendants, which demand was refused and the plaintiff brought trover.

On the trial the plaintiff's counsel asked the court to charge the jury:

"*First.* If the jury believe, after Birch had put his name on the certificate of deposit, he placed it on the lounge, and that Sanford took it from the lounge without the knowledge or consent of Birch, then the jury is instructed that they must find for the plaintiff.

Second. It appearing from the testimony of Preston that the certificate of deposit in this case was purchased the first of last March, and more than a month after it was issued, the jury is instructed that if they believe that Birch never intended to transfer the ownership of the certificate to Sanford, the plaintiff must recover."

These requests were refused and plaintiff excepted. The court then directed a verdict for the defendants. The plaintiff again excepted and now brings error.

The plaintiff claims, 1st, that the endorsed contract was never delivered so that the endorsement took effect as a contract; and 2nd, that the paper got into the hands of Sanford without any fault or carelessness on his part, and so seeks to bring himself within the case of *Burson v. Huntington* 21 Mich. 415.

We think neither of these propositions is maintained. In Burson's case the note was never completed or delivered, and was void, and it was held that the endorsement could not give it validity. In this case the validity of the certificate is not questioned. If the defendants were innocent bona fide purchasers for value they should be protected, because Sanford could have, in such case, negotiated this paper to the defendants freed from the equities between him and Birch, the real owner. He had been intrusted with it as a pledge by the owner, and so held it at the time he sold it to the defendants. It was negotiable paper. The owner had placed it in such a situation that it might be taken and disposed of by Sanford to an innocent party, and, as we think the record shows, without observing the ordinary caution of business men; and if he has been defrauded by Sanford he cannot be heard to complain, unless it shall be found that the defendants' purchase was not in good faith.

Plaintiff's counsel claim that the certificate was due when issued, and that so long a time had elapsed since its issue that when Fisher & Preston acquired it, it was presumably dishonored paper, and they did not acquire the right of bona fide holders. *Tripp v. Curtenius* 36 Mich. 496, sustains the first of these propositions. If, however, the ques-

tion were an open one, we should be inclined to think that such a certificate does not become due until payment is demanded, as held in *Bellows Falls Bank v. Rutland Bank* 40 Vt. 377, and *Howell v. Adams* 68 N. Y. 314; but whether this be so or not, it is unnecessary to determine in this case; however, all the authorities agree that such paper is properly payable only upon return and presentation of the certificate, and an innocent purchaser for value and without notice of equities, within a reasonably short time, is entitled to the rights of a bona fide holder.

In view of the purposes of this kind of paper and the commercial usages in respect to it, the situation of the parties, and the facts appearing upon the record, we do not think the lapse of thirty-one days sufficient to raise the presumption that the paper had been dishonored; and, had the testimony left the case here, we should not feel disposed to disturb the judgment at the circuit.

Counsel for plaintiff, however, insist that the testimony in this case raised the question of good faith on the part of the defendants in making their purchase of the certificate, and it should have been submitted to the jury.

In considering this point it must be remembered the case is not one of equities asserted in favor of the maker of negotiable paper, but whether Birch lost title to his certificate. That he never parted with the title is certain, if his own evidence is to be believed. The defendants get it, if at all, because he, by his carelessness, has put another in possession of his endorsement, with legal power to dispose of the paper, and the defendants may have title if they took the paper in good faith, in reliance upon the endorsement and without negligence. Have they done so? Does Preston's evidence show it? On the contrary, does it not appear affirmatively from his evidence that plaintiff's endorsement was not verified to him, and he did not take in reliance upon it? Apparently he knew nothing of plaintiff, and he made no inquiry concerning him. A stranger presented him the certificate, with the plaintiff's name upon it; and instead of having the signature verified, and taking the

paper in reliance upon it, he requested the stranger to give him an endorser he knew, and then bought it, in reliance, evidently, upon that endorsement. Prima facie, at least, that was the case. This, in connection with some other testimony appearing in the record, which it is unnecessary herein to state, made it quite proper to submit the case to the jury.

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

GRAVES, C. J. and CAMPBELL, J. concurred.

COOLEY, J. I concur in the result.

51	41
67	494
51	41
77	602
51	41
105	449
51	41
139	[3]217
51	41
f150	[1]244
51	41
145	[2]202

GEORGE C. BUSH v. THOMAS S. SPRAGUE, HENRY S. SPRAGUE, EDWARD P. SPRAGUE, CHARLES J. HUNT AND THEODORE S. DAY.

Statute of frauds—Representations as to business credit.

The refusal of a motion to strike out testimony of oral representations as to the credit of a third person, and of a request to charge that no recovery can be had on such representations, is sufficient to raise the question, on error, whether, under the Statute of Frauds, such representations will sustain a recovery.

The Statute of Frauds in forbidding any action to be based on unwritten assertions of the business credit of a third person (Comp. L. § 4701) does not apply to a case in which defendants are charged with conspiring to form a corporation for the purpose of defrauding plaintiff and with carrying out their fraudulent purposes by a course of dealing tending to make him believe the alleged corporation to be of good credit.

Representations concerning the credit of a corporation are within the statute of frauds. Comp. L. § 4701.

Testimony that supports any valid count of a declaration cannot be ruled out on a mere objection to its general materiality; and in the absence of any other objection to such testimony than that it will

not support the action at all, a general verdict based on it will be good if there is any count to which the testimony applies, and if no request was made to limit its application to the proper count.

Error to the Superior Court of Detroit. (Chipman, J.) April 24.—June 20.

CASE. Defendants bring error. Affirmed.

Atkinson & Atkinson, Conely, Maybury & Lucking and *John Atkinson* for appellants. A promise by a stockholder to pay a corporation debt is in every sense a promise to pay the debt of another; the corporation is in law a different person from any of its members: *Hanson v. Donkersley* 37 Mich. 186; *Rust v. Bennett* 39 Mich. 521; where one partner makes false statements concerning the credit of his own firm, he is not liable unless the statements are in writing signed by him: *De Vaux v. Steinkeller* 6 Bing. N. C. 84; Benj. Sales 355; false representations by an agent of an insurance corporation concerning its ability and solvency, are within the statute, and must be in writing, even though it is alleged that his object was to secure his own commissions as agent: *Wells v. Prince* 15 Gray 562; the motive of defendant is immaterial: *Kimball v. Comstock* 14 Gray 510; *Mann v. Blanchard* 2 Allen 386; Browne on Frauds § 184; no action can be maintained against the treasurer of a corporation for false oral statements as to the credit and ability of the corporation, though made in order to induce the plaintiff to receive a note signed by the defendant as such treasurer: *McKinney v. Whiting* 8 Allen 207.

Chas. M. Swift and *Otto Kirchner* for appellee. The original English statute forbidding actions upon representations of credit, unless in writing, limited its application to such representations as were made for the purpose of obtaining credit, and the construction in Massachusetts of the statute from which the Michigan enactment is copied is the same: *Norton v. Huxley* 13 Gray 285; *Medbury v. Watson* 6 Met. 246; *Wells v. Prince* 15 Gray 562; and

see *Hunter v. Randall* 62 Me. 423; *Stiles v. White* 11 Met. 356; *Haslock v. Fergusson* 7 Ad. & El. 94; directors and others causing or permitting false statements of fact to be published in prospectuses of their corporations are liable to all persons deceived thereby: *Morgan v. Skiddy* 62 N. Y. 319; *Clarke v. Dickson* 6 C. B. (N. S.) 453; *Cross v. Sackett* 6 Abb. Pr. 247; *Fenn v. Curtis* 23 Hun 384; *Vreeland v. N. J. Stone Co.* 29 N. J. Eq. 188; *Lincoln v. Claflin* 7 Wal. 132; *Morse v. Swits* 19 How. Pr. 276; *Cazeaux v. Mali* 25 Barb. 578; *Shotwell v. Mali* 38 Barb. 445; *Bedford v. Bagshaw* 4 H. & N. 538; *Paddock v. Fletcher* 42 Vt. 389; *Teague v. Irwin* 127 Mass. 217.

[MINORITY OPINION, STATING THE CASE.]

GRAVES, C. J. The plaintiff instituted this action to recover $2000, which, as he alleged, had been obtained from him by the fraud of the defendants. As he proceeded on two grounds he employed two counts, and in order to see how these grounds differ in matter of substance, it is needful to recur as briefly as may be to the essential ingredients of these counts. They are very long, and evince much scientific elaboration.

The first count begins by averring that on the 1st of April, 1879, the defendants, devising, contriving and wickedly combining to deceive the plaintiff and to obtain from him $2000 in money, and to cheat and defraud him of the same, did fraudulently enter into a conspiracy to the end aforesaid, and thereupon and in furtherance of such conspiracy said Thomas S. Sprague, Edward P. Sprague, Charles J. Hunt and Theodore S. Day did organize a certain corporation, called "The Condensed Oil Manufacturing Company," and made said defendant Thomas S. Sprague, president, said defendant Charles J. Hunt, vice-president, said defendant Edward P. Sprague, superintendent, and said defendant Theodore S. Day, manager, and caused articles of association of said corporation to be filed in the office of the county clerk for the county of Wayne, and in said articles did falsely, fraudulently and knowingly

cause to be set forth that the capital stock was $50,000, of which $15,000 was actually paid in; when, in fact, as defendants well knew, the corporation had no capital stock, and no amount had been actually paid in.

This first and introductory averment is followed by a number of distinct charges of fraud alleged to have been committed in pursuance and in furtherance of the said conspiracy, and they are in substance as follows: (2) That the defendants fraudulently caused to be published in the city directory that the corporation had a capital of $50,000, when it had none, and its debts exceeded its assets; (3) that defendants procured the defendant Isaac N. to fraudulently represent to the plaintiff, which he did, that the business of the corporation was very lucrative and yielding large dividends; that he, said Isaac N., owned fifty-six shares, and had invested $1400 in capital stock; that the corporation was solvent and doing a paying business; (4) that defendants procured defendant Edward P. to represent to the plaintiff and to the plaintiff's son, with intent that it should be repeated by the son to the plaintiff, that the corporation was doing a large and lucrative business, and was solvent, and earning large profits and more than two hundred per cent. on sales, and that since the organization the sales in the state of New York had exceeded $10,000; that the corporation had a secret process for the manufacture of leather dressing, invented by said defendant Edward P., which was worth $10,000, and that it would be for plaintiff's profit to invest his money in the corporation stock, and that the shares were worth $25 each; (5) that defendants procured defendant Day to represent to the plaintiff that a written statement produced was copied from the corporation books, and showed the true financial condition of the corporation, and that such statement made it appear that defendant Thomas had invested in the corporation $2900, the defendant Isaac N. $1400, the defendant Day $1000, one Elizabeth H. Day $2449.39; that bills receivable and accounts due amounted to $14,377.44; that the stock and fixtures were worth $2500; that bills payable and debts

owed did not exceed $4698; that since the organization the corporation had made a profit of $4054.24, and that the shares were worth $25 each, and said Day guaranteed that they would pay a dividend of at least ten per cent. a year; (6) that the defendants, by word of mouth, signs, and tokens, by statements in writing, and by other means, represented to the plaintiff that the corporation was solvent and doing a profitable business, and that its shares were worth $25 each; (7) that defendants concealed from the plaintiff and suppressed the true condition of the corporation, and that in this and in all the other fraudulent practices it was the defendant's object to cheat the plaintiff out of said $2000, and induce him to invest it in the capital stock of the corporation; that he relied on said representations and appearances, and paid to said Day, as the manager of said corporation, the sum of $2000, as "the nominal par value of shares of stock of said corporation, which said sum was received and kept by the defendants;" (8) that, in order to prevent the plaintiff from inquiring and finding out what was the truth and from getting back his money, the defendants procured the defendant Edward P., in January, 1880, to represent to the plaintiff and to his son, with intent that said son should repeat it to the plaintiff, that the corporation had declared a dividend of thirty per cent., which had been carried to the surplus account; that the corporation was then making large gains and profits, and doing a lucrative business; (9) that on the 23d of November, 1881, the defendants Hunt, T. S. Sprague, and Edward P. Sprague being directors, ordered the giving of a chattel mortgage on all the assets to the defendant Henry S., in trust for the defendants Thomas S. and Charles J. Hunt, to secure certain pretended indebtedness from the corporation to them, when in fact there was no such indebtedness.

The second count avers: *first*, that the corporation was constituted on the 1st day of April, 1879, by certain of the defendants, and that the defendant Thomas was made president, the defendant Hunt vice-president, the defendant

Edward P. superintendent, the defendant Day, manager, and the defendant Henry S. Sprague secretary, and that on September 1st, 1879, and January 1st, 1880, and at various other dates and times between said dates, the defendants, devising, contriving and wickedly combining to deceive the plaintiff and obtain from him $2000, and to cheat and defraud him of the same, and with a common design to that end, did falsely, fraudulently, and knowingly represent to the plaintiff that the corporation was solvent and had a capital stock of $50,000, of which $15,000 had been actually paid in; that it was doing a lucrative business and paying large dividends.

Following this first averment several distinct acts of fraud are charged as having been committed in furtherance of the common design, and they may be summarized as follows: 2d. That defendant Isaac N., with the connivance of the others, falsely, fraudulently and knowingly represented to the plaintiff that the business of the corporation was lucrative; that large dividends were being paid; that he, Isaac N., owned fifty-six shares, and had invested $1400 in the capital stock; that the corporation was solvent and doing a paying business. 3d. That the defendant Edward P., with the connivance of the others, and in furtherance of the common design, did falsely, fraudulently, and knowingly represent to the plaintiff's son, with intent that he should repeat it to the plaintiff, and also represented directly to the plaintiff, that the corporation was doing a large and lucrative business, was solvent, and earning more than two hundred per cent. on sales, and that sales in the state of New York since the organization had exceeded $10,000; that the corporation was possessed of a secret process for the manufacture of leather dressing, invented by said Edward P., which was worth more than $10,000, and that it would be very profitable for the plaintiff to invest his money in the capital stock, and that the shares were worth $25 each. 4th. That the defendant Day, with the connivance of the others, etc., did represent to the plaintiff that a certain written statement produced to the

plaintiff was copied from the corporation books, and showed the true financial condition of the corporation, and that such statement made it appear, etc. (as set forth in the first count); and the plaintiff, relying upon all of said representations, was induced thereby to purchase of said corporation eighty shares of the capital stock, and was thereby induced to pay, and did pay, for said shares of stock to the said corporation and to defendants the sum of $2000.

Isaac N. Sprague was acquitted, but the jury found against the others generally, and on the whole record. The recovery was not confined to either count. The defendants allege error.

Whatever evidence there was of representations claimed to be false and fraudulent was either oral or not signed, if in writing. This was admitted at the trial, and has not been questioned at the bar. The consideration of importance is whether this recovery, based on such representations,—on representations not written and signed,—can be supported. That the question is fairly raised, is conceded on the part of the plaintiff. A motion to strike out the testimony and a request to charge on the subject were respectively refused. The question depends on a provision of the statute of frauds, which reads as follows:

"No action shall be brought to charge any person, upon or by reason of any favorable representation or assurance made concerning the character, conduct, credit, ability, trade, or dealings of any other person, unless such representation or assurance be made in writing, and signed by the party to be charged thereby, or by some person thereunto by him lawfully authorized." Comp. L. § 4701.

The parties are at issue respecting the application of this provision, the defendants alleging that it applies, and the plaintiff insisting to the contrary. The occasion of this statute, in connection with the decision of the King's Bench in 1789, in the case of *Pasley v. Freeman*, is familiar to the bar, and no observations on the subject are called for. The regulation rests on the same high ground of policy as that which requires a signed writing as evidence of a guar-

anty. And as in that case, so in this, the construction and application ought to be favorable, and in furtherance of the object, and not restrictive or unfriendly. It is not necessary that the "other person" spoken of should be a natural person. An artificial person is equally within the meaning of the statute. Comp. L. § 2, subd. 12; *Devaux v. Steinkeller* 6 Bing. N. C. 84; *Boyd v. Croydon Ry. Co.* 4 Bing. N. C. 669; *McKinney v. Whiting* 8 Allen 207; *Rust v. Bennett* 39 Mich. 521; *Pharmaceutical Soc. etc. v. London etc. Ass'n* 4 Q. B. Div. 313; *People v. May* 27 Barb. 238; *British etc. Ins. Co. v. Com'rs of Taxes* 31 N. Y. 32; *People v. Utica Ins. Co.* 15 Johns. 381; *People v. Rector* 22 N. Y. 44; 2 Add. on Torts § 1179. Hence, if the representations are in such relation to the "Condensed Oil Manufacturing Company" that the case would be governed by the statute if the company were a natural person, the fact of its being an artificial one will make no difference.

The diversity in substance between the two counts demands notice.

The first alleges that the defendants entered into a conspiracy to perpetrate the fraud, and then sets forth the acts and things which were employed to advance and execute the conspiracy.

The second count alleges merely that the defendants united in committing the fraud, and not that they previously conspired together to effect it.

While this distinction is not devoid of consequence, it does not affect the present question. Conspiracy is not the ground of these actions on the case. The cause of action does not result from the conspiracy, but from the thing done and the damage flowing from it. Here, it is the fraud and damage. Conspiracy, by reason of the connection it involves among the conspirators, may cause individuals to be responsible, who, but for the conspiracy, would not be responsible at all. But unless something is actually done by one or more of the conspirators pursuant to the scheme and in furtherance of the object, and which causes damage, no civil action on the case will lie against any one. *Savile v.*

Roberts 1 Ld. Raym. 374; *Tappan v. Powers* 2 Hall 277; *Hutchins v. Hutchins* 7 Hill 104; *Parker v. Huntington* 2 Gray 124; *Bowen v. Matheson* 14 Allen 499; *Kimball v. Harman* 34 Md. 407; *Hauser v. Tate* 85 N. C. 81. It is therefore obvious that a charge of conspiracy to defraud by false representations will not disappoint the statute. The necessity for signed writings is just the same where conspiracy is set up as where it is not. Neither the reason nor the language of the provision will exclude a case on account of the number of wrong-doers, or in consequence of their having acted on a previously concerted plan. As a guard against misconception, it is proper to observe here that there is no intention to say that the second count alleges no conspiracy at all. It may be that the terms amount to a limited charge of that kind.

But, in view of the question which is being considered, there is a much more important distinction between the two counts. The aspect given to the wrong by the first count is that the defendants were exclusively intent on benefiting themselves; that their purpose was to obtain the plaintiff's money for their own use; and that as means to that end they concocted the figure and appearance of a corporation, which was a mere sham, and used it as intended, not only as a lure and decoy, but also as an instrument and agency to transfer the plaintiff's money, through deceptive forms and on a fictitious consideration, to their own exclusive use and advantage. Here the representations are not supposed to have availed anything to the corporation, or to have been so intended. On the contrary, they are deemed to have benefited the defendants and to have been made with that view, and the corporation is treated as having been in itself a false representation, gotten up and used by the defendants as a trick and a fraud. Now it may be conceded that the statute does not apply to such a case, because the corporation, which is the only one to be an "other person," cannot, on this state of facts, be regarded in that way within the meaning of the provision. I am, therefore, inclined to think that if the recovery had been confined to the first

count there would have been no foothold for the present objection. *Hauser v. Tate*, supra, and other cases.

But the second count is framed on a different principle. It contemplates the corporation as a lawful entity, and not as a false and fraudulent device gotten up for the very purpose of effecting a cheat, and it regards the representations as aimed to fraudulently exalt the credit and ability of this entity, with intent that the plaintiff should trust it and trust in it, and change his property in point of form from cash to so many shares of its stock. The language, in some instances, is not quite as certain as it might have been, but I cannot regard the sense as doubtful. There is no averment that it was the defendants' intent to secure the money to themselves, and the phraseology of the count will not bear that construction. Had it been the purpose to charge such a scheme as that, the pleader would have set forth the way by which the intent was to be carried out. But nothing of the kind appears. Where the defendants are charged with fraudulent conduct to deceive the plaintiff and "obtain" his money, the meaning is that they were to "obtain" it, not for themselves, but for the corporation. It was to become corporate funds; accordingly, no attempt is made to allege an intent or plan by the defendants to get the money from the corporation to themselves. The pleading leaves it in corporate hands. The passage where it is said the plaintiff paid the $2000 to the corporation and to the defendants for eighty shares of the capital stock is subject to the same view. In each case a strictly corporate act is contemplated, and not a separate and individual act of the defendants. An opposite construction would reduce the pleading to absurdity. Such, it appears to me, is the case presented by this second count, and I cannot avoid the conclusion that it is a case to which the statute is applicable. As I view it, it seeks to charge the defendants upon or by reason of favorable representations or assurances made concerning the credit, ability or dealings of the "Condensed Oil Manufacturing Company," and which representations or assurances were neither signed by any of the defendants nor by

any one else. See 2 Addison on Torts, § 1179; *Wells v. Prince* 15 Gray 562. And if it be found that it was a part of the purpose, or in substance the whole purpose, of defendants that the credit to be given to the corporation should inure to their immediate or eventual advantage, the effect here must be the same.

The case, under the view thus taken of it, is ruled by *Osburn v. Lovell* 36 Mich. 246.

The jury have returned a general verdict on the representations for the plaintiff, and the court has entered judgment on it. Admitting that the first count might sustain a verdict on the strength of representations not written and signed, still it is wholly impossible to apply the finding to the first count any more than to the second. It cannot legally be known, as observed in that case, that the jury would have agreed on the first count; and it is quite consistent with what appears that some of the panel may have based their conclusion on one count, and some on the other, and that there was no actual agreement on either. If it be said that the case laid in the second count actually includes matter which the statute does not rule, as well as some that it does, the consequence must still be the same. There is no legal ground for saying that the jury relied on one set of facts, and did not rely on another. It is a reasonable intendment, on the contrary, that they acted on all the facts before them, and no inference is justly admissible that they would have found as they did here if any of the matters had been absent which the court allowed them to consider.

It occurs to add this further observation before concluding. Suppose it were claimed for the plaintiff, although it has not been, that the articles of association should be deemed as signed within the sense of the statute in question, the position, if true, would not help the plaintiff here. The whole testimony as to this point, including the articles, was abandoned to a promiscuous application, and was left to be considered under the second count no less than under the first. But the articles were not prop-

erly examinable at all as evidence of false representations under the second count, because, as already said, the corporation is there presented, not as being itself a fraud and a false representation, but as a body instituted lawfully, and to which the defendants sought to give a fictitious ability and credit. Entertaining the opinion that the Court is bound to view the question discussed as certainly involved, I cannot perceive how the case set forth in the second count can be saved from the ban of the statute without introducing niceties and distinctions never dreamed of by the Legislature, and which will be likely to embarrass, if not impair, the provision in its policy, object and efficacy.

I am not satisfied that there is any other objection in the case of sufficient force to impeach the judgment; but, on account of the point in question, I am compelled to think there should be a new trial.

CAMPBELL, J. While I agree with the Chief Justice in all the matters in his opinion sustaining the judgment, I do not think that, under the exceptions taken and errors assigned, there is any reason for a new trial. If there was any ground of recovery on either count, the court presented the matter very fairly to the jury, and we are not concerned with the facts.

It cannot be well argued, or at least the argument is not tenable, that the count which set up the purpose of the fraud to put money into defendants' hands is within the statute requiring representations to be in writing. There was evidence going to prove such a purpose, and enough for the jury to act upon. Assuming—which, however, I do not assent to—that in such a case as this the other count could only be made out by written proofs, I do not think that question raised by the record. All the objections, and all the assignments of error, rest upon the theory that both counts stand or fall together. The court was not asked to discriminate between them, and the plaintiff's counsel were not asked to define under which count they offered proofs. When testimony is objected to, not as improper under a

particular count, but as improper generally, it cannot be ruled out if available for any purpose. And when the attention of the trial court is not asked to determine the absence or insufficiency of testimony to support a particular count, and it is claimed generally that the testimony introduced will not support the action at all, the verdict is good if there is any count to which it can be applied. Had the objection been made to the second count alone, the verdict could have been confined to the first by a proper charge; and under such circumstances it was held in the celebrated case of *Richardson v. Mellish* 3 Bing. 334, 346, that where no attention was called on the trial to a difference between counts, the verdict might be applied to the proper count even after error brought. Our practice does not allow an inferior court to interfere after the removal of the record, but amendments may be permitted by this Court to be made below. And in *Keeler v. Robertson* 27 Mich. 116, we recognized the propriety of conforming the verdict to the judge's notes, where other difficulties did not stand in the way.

In my opinion the question whether a recovery could be had under the second count is not properly raised.

But I do not think the objections taken are well founded on the merits. The statute supposed to be in the way of a recovery is section 4701 of the Compiled Laws, which declares that "no action shall be brought to charge any person, upon or by reason of any favorable representation or assurance made concerning the character, conduct, credit, ability, trade, or dealings of any other person, unless such representation or assurance be made in writing, and signed by the party to be charged thereby, or by some person thereunto by him lawfully authorized."

This statute, which was originally passed in England for the main purpose of preventing the recovery on verbal representations in evasion of the Statute of Frauds then applying to verbal promises to pay the debt of another, and to put promises and representations on a similar footing, has not been as fully settled in its meaning as it might be desir-

able to have it. But it does not seem to me to have been carried so far as defendants now seek to carry it. There have been several cases denying its application to particular facts, and confining it to the specific matters of "character, conduct, credit, ability, trade, or dealings" directly and not by remote inference. In *Lyde v. Barnard* T. & Gr. 250, Alderson and Parke, barons, were decidedly of opinion that particular facts were not covered, while Abinger and Gurney thought differently. In *Swann v. Phillips* 8 Ad. & El. 457, it was held that a particular fact stated not only as a reason, but asserted as a single and sufficient reason, why credit might safely be given, was within the statute, because coupled directly with a recommendation, so that if made in writing no further words would make it more complete. This case appears to harmonize some of the conflicting decisions.

But while the statute should be given all reasonable effect, it ought to be confined to such cases as fall fairly within it. It could not have been designed to furnish convenient covers for fraudulent conspiracies not manifestly within its terms.

In the first place, so far as we have found cases on the subject, it has not been extended to any case where there were not such representations made as were capable of being reduced to writing. And such acted fraud and by-play as produce false impressions more by action than by words, cannot be covered by the statute.

In the next place, no case has been discovered where the representation made by a single person is not so complete as, unaided by other persons' acts or representations, to be fraudulent in the direction of raising false credit. It is easy to see that different persons might each make single representations in writing over their signatures, which combined would work the grossest frauds, but which as separate papers would be harmless, so that no action could lie upon them at all.

It is further apparent in the same connection that the very fact that several persons of apparent respectability act

as associates, and make similar representations which differ enough to make them not legally identical, is a very powerful auxiliary to any fraud they see fit to adopt. Conspiracy is in itself an efficient means of carrying out any wrong design, and in my opinion it does not require written articles to make it actionable, if damage is done by it.

In the case before us the conspiracy of several persons, not expected to join in the separate representations complained of, is the real grievance indicated by the record. As already suggested, we have nothing to do with the inferences reached by the jury, and we must accept them as binding us. Here, then, is a case where the fraud was claimed to have been begun by the signing and filing of false assertions in the articles of association,—which, it may be remarked, would, thus far at least, bring the case within the terms of the statute, and justify the court in refusing, as it did refuse, to charge that there was no evidence of false representations written and signed. Following this were a series of transactions, partly in writing and partly in parol, which, if wrongly intended, were swindling performances, designed to create false appearances, but not easily convertible into words. Then came detached interviews by different persons, and conversations, which, if fraudulently meant, were not meant to be in such a shape as to be reducible to exact words, and could only be substantially remembered. The defendants, if implicated, as the jury found they were, in these transactions, must have been so because engaged in the same general purpose, and not because they ever authorized the precise words to be spoken, and the precise things to be done throughout, which are now relied on.

If we hold the statute applicable so strictly as is claimed here, and hold that all unwritten representations must be disregarded, it needs very little reflection to see that the statute would operate as a most convenient cover for fraud, and could seldom fail to further it. And I am not prepared to hold that it reaches the multifarious contrivances of conspirators, or any cases where the fraud is not con-

fined, at least substantially, to tangible verbal misrepresentations in which the defendants unite. Wherever any substantial gain accrues to the wrong-doers by the machinery of conspiracy, it cannot be said that the parties sued are charged upon mere representations or assurances. Neither can this be said where they have acted in concert, but by each one's choice of means, verbal or acted, to reach damaging results to the party defrauded. If mere words are sued upon, the words may come within the statute. But if they are but a part of the evil machinery I cannot think the statute meant that they should lend cover to the fraud.

I think the judgment should be affirmed with costs.

COOLEY, J. I agree with the Chief Justice in the view he takes of the application of the Statute of Frauds to this case. We all agree, I think, that the first count in the declaration sets out a case not within the statute. It may, therefore, be supported by evidence of acts and representations not evidenced by writing.

I am not satisfied that any evidence was given on behalf of the plaintiff which was not admissible under the first count. There was, therefore, no error in receiving it; and the error which is to reverse the judgment must be found, if anywhere, in the instructions to the jury, or in refusing to give instructions.

Error is not assigned on instructions actually given, but complaint is made that the trial judge refused nine several requests for instructions. One of these asked instruction for acquittal of three of the defendants; seven of them related to the evidence, and so far as they were correct seem to me to be covered by the charge which was given. The other is as follows: "Inasmuch as none of the alleged representations were in writing and signed by any of the defendants, the plaintiff cannot recover." This request, it is evident, could not have been given without error if one count of the declaration is good and is supported by the representations proved.

The trial judge no doubt ought to have restricted the

recovery to one count of the declaration, but no request to that effect was made and no error is assigned on the failure to do so. If, therefore, it was erroneous to receive verdict and enter judgment on both counts when the evidence supported one only, we have no concern with it, for we review only the actual rulings of the trial judge to which exception was taken, or on which error is expressly assigned. We have no general jurisdiction to correct all the faults we may think we discover in the record.

It is to be observed that this is not a case of a verdict on two counts, one of which is bad; for both counts are sufficient on their face, and the defect is one of proof only. If the result is a hardship to the defendants, it is to be regretted; but it is not likely that if the defense considered the plaintiff's case weaker on the first count than on the two together, they would have failed to ask instructions distinguishing between the two. Probably the differences in the two counts had no influence on the deliberations or verdict of the jury, and would have had none if they had been instructed that the evidence must be applied to the first count exclusively.

I think the judgment should be affirmed.

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GEORGE W. FAIRFIELD AND JOSEPHINE FAIRFIELD v. THERON W. BARBOUR AND JULIA A. BARBOUR.

Specific performance.—Character of possession.

A man and his wife filed a bill against the wife's father for the specific performance of an alleged oral agreement by him to convey them the premises on which they lived when the dwelling house thereon should be ready for occupancy. The father claimed that complainants held as tenants merely. *Held* that the fact that taxes were assessed against the father was not conclusive evidence against complainants, and that the payment of such taxes by the son-in-law was a significant fact in their favor.

Appeal from Mecosta. (Judkins, J.) April 25.—June 20.

SPECIFIC PERFORMANCE. Defendant appeals. Affirmed.

M. Brown for complainants.

Frank Dumon for defendants.

SHERWOOD, J. The bill in this case is filed to compel a conveyance by defendants to the complainant, Josephine Fairfield, of lots Nos. two (2) and three (3) in block No. twenty-three (23) in Warren & Bronson's third subdivision to the city of Big Rapids, in specific performance of an alleged parol agreement.

The agreement, as stated in the bill on which complainants ask relief, was made in the fore part of the month of September, 1876. The complainant, Josephine Fairfield, is the wife of George W. Fairfield, her co-complainant, and daughter of Theron W. Barbour, one of the defendants. The parties all lived in the city of Big Rapids, where they still reside.

The bill states that on the first day of September, 1876, the defendant, Theron W. Barbour, owned in fee-simple the lots in question; and that, between the first and twenty-third days of said month, it was verbally agreed between the complainant, George W. Fairfield, and defendant, Theron W. Barbour, that said Barbour would assist said Fairfield to build a dwelling-house upon the said premises of said Barbour, above described, for a home for complainants and their family; and that said Fairfield should manage so that the building of said dwelling-house should cost said Barbour as little money as possible; and that, when said dwelling-house should be ready to be occupied, the said Barbour would convey, in fee simple, said premises to said Josephine Fairfield,—his daughter, and wife of said George,—for a home for complainants and their family.

There is no dispute between the parties that a parol agreement for the building of a house on the lots in question, to be occupied by complainants was made at the time,

as stated; but defendants deny that it was agreed that said Barbour would convey said house and lots to said Josephine Fairfield, when it should be ready for occupancy, or at any other time, and aver that the agreement alleged by the complainants was without consideration to support it. The defendants aver that the agreement was a family arrangement entered into by said Theron W. Barbour, whereby his daughter Josephine might have a home, so long as complainants should live in said house, without rent, except as the labor of her husband, George W. Fairfield, upon said premises should be considered rent.

The bill avers that Theron W. Barbour, the defendant, pursuant to said agreement, did assist complainant, in accordance with the terms thereof, to build said dwelling-house upon said premises; that said complainant, relying upon the performance of said agreement by said defendant pursuant to the terms thereof, built said dwelling-house upon said premises, superintended the entire building thereof, and did a large portion of the work himself; that he cleared the ground from rubbish, logs and stumps which incumbered it,—graded its uneven surface,—set out shade and ornamental trees, fruit-trees, grape-vines, and built fences and a stone walk in front of the premises; that late in the fall of 1876 complainants moved into the dwelling-house, then in an unfinished condition, and finished and have occupied the same up to the present time.

The proofs in the case were taken in open court, and they substantially support all these averments. The only material controversy between the parties is whether complainants did the work upon the dwelling-house, made the improvements upon the lots, and hold possession of the premises under an agreement to occupy as owners or as tenants.

The contract, as stated by the complainants, is in terms sufficiently clear and specific to leave no doubt respecting the intention of the parties. The testimony of complainants and of their witnesses harmonizes with the contract as claimed,—that it was an agreement to convey the title to

Josephine Fairfield as a home. Whether this construction shall prevail against the defendants' denial, is a question of preponderance of proof.

On the 28th day of May, 1881, the defendant Theron W. Barbour conveyed the premises in question to his daughter Julia A. Barbour, co-defendant in this suit.

Upon a careful examination of the proofs in the case we are forced to the conclusion that, as testified by the complainants, the contract between the parties was, as alleged in the bill of complaint, a contract to convey a title. Several witnesses corroborate the complainants in their version of the contract. T. D. Stimpson testifies to a conversation with Theron W. Barbour, in front of Barbour's house, while this house was being built in 1876. Witness was building a house for his son, and Barbour remarked that he thought witness was building a pretty good house. Then pointing across the road to where complainant was at work, as witness thinks, about a fence or about the front yard of his house, he said: "'I told George that if he would go on and do the work I would furnish the material and give the lot, and let him have that house, and let him have that place over there.' Don't remember whether he was going to give it to Mrs. Fairfield or to Mr. Fairfield." Levi J. Osborn testifies to selling defendant Barbour some fruit trees, and to his wanting witness to go over to George's (complainant's) to see how many trees they ought to have on this lot. Said he had given his daughter this lot; that it cost him over $600; besides, had given her this property, and he thought that was doing pretty well, etc. To Theodore Kimball, Stephen W. Bronson, E. S. Rodman, B. F. Brazee, S. B. Bestor, George W. Crawford, and H. F. Burch, respectively, he said, in substance, that the house which he was helping to build and lot were to be his daughter's, Josephine Fairfield's, when the house was completed.

As against the effect of this testimony, as corroborative of the claim and showing of complainants, the defendants urge that it does not support such a contract as complainants set out in their bill of complaint. We think otherwise. There

is no force in this objection. The testimony shows the purpose of defendant Barbour with reference to the identical house and lot in question, and to the carrying out of a previous understanding with George W. Fairfield to convey the same for a home for his daughter Josephine. True, the defendants both deny that the agreement concerning the premises was that Josephine Fairfield should own them, and have a deed of conveyance from the defendant, her father; but as this defendant, his attention being directed to these, his alleged admissions, does not deny that to every one of the witnesses, nine of them, he made the statement imputed to him, his denial does not impress us with much force.

Nor is the testimony of several of defendants' witnesses relative to statements made at different times by complainants, respecting the tenure of their occupancy, necessarily to be construed as an admission against themselves that they were not in possession under a contract to convey. Statements like many of those attributed to complainants would not necessarily be inconsistent with an equitable right on their part to a specific performance; but, hopeless of defendant voluntarily performing his contract, and considering whether other methods,—even a compromise by purchase on the terms suggested, as a means of saving something, rather than lose all,—would not be preferable to litigation with defendant, considerations like these might well have influenced complainants to such expressions as imputed in the testimony referred to, while not implying an admission against the claim of equitable ownership.

It is not to count against complainants that the premises were assessed during these years to defendant, Theron W. Barbour, he holding the legal title, and a resident living near the premises; while the payment of the taxes by George W. Fairfield for these years, if he did pay them, as we think he did, is a fact of much significance bearing upon the character of his possession. The inference to be drawn from the fact is a strong one that all parties understood that

the owners of the land should pay the taxes and bear the burdens charged upon it.

There is no question in the case that the consideration for the conveyance, as alleged in the agreement stated in the bill of complaint, has been fully performed by George W. Fairfield, and that he has, since entering into possession, made further permanent improvements of value thereon. That he paid the consideration and made these improvements in reliance upon it as payment upon and improvement of his wife's property, is also unquestioned. Moreover, complainants' possession and their making these improvements were known to the defendant, Julia A. Barbour, when her father conveyed to her these premises, and she was present at the making of the agreement. She is, therefore, chargeable with notice of the nature of complainants' possession and claim.

The decree of the circuit court is affirmed with costs.

The other Justices concurred.

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94	353
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114	36

GARRY GOODRICH v. BELA HUBBARD AND JOHN E. KING.

Exceptions to confirmation of referee's report—Contract inter alios—Construction of logging contract— Prevention of performance —Measure of damages.

Where exceptions are taken to a referee's report and are overruled and error is assigned on the confirmation of his finding of law, the only questions raised are upon the exceptions to his conclusions of law.

Where one of the parties to a contract sues the other for preventing its performance, a prior contract, made by the defendant with a third person, can have no bearing unless it appears from the contract in suit that it was made with reference to the prior contract.

A contract should be construed in the light of what it expresses in terms, and what is necessarily implied therefrom.

A logging contract after providing that the logger should "have and deliver all of said logs this winter next ensuing, if weather will

permit" stipulated that "If weather unfavorable, and all the logs cannot be hauled the first winter, this contract shall be continued to another winter, on same terms and conditions." *Held*, where such preparations had been made as would be proper for an average winter, and the logger had made all reasonable efforts to do the hauling but there was so little snow and frost that it could not be done on sleds, in the usual way, that the logger was entitled to postpone what remained undone to the next winter, and the other party to the contract had no right to terminate the contract by taking possession of the logs and removing them.

The measure of damages for preventing the performance of a labor contract may include the loss of profits if there is no uncertainty as to what they would have been; and if plaintiff does not elect to consider the contract broken before the time for full performance has expired, and the cost of doing the work has meanwhile fallen, he is entitled to recover what difference there is to his advantage.

Error to Lapeer. (Stevens, J.) April 27.—June 20.

ASSUMPSIT. Defendants bring error. Affirmed.

John Atkinson and *Isaac Marston* for appellants. In giving damages for loss of profits caused by the prevention of the performance of a contract the profits must be ascertained as of the day of the breach of contract by the party so preventing its performance: *Masterton v. Mayor* 7 Hill 61; *Rittenhouse v. Mayor* 25 Md. 336; *Vischer v. Railroad Co.* 34 Ga. 536; unless the prevention is by the wrongful act of the defendant: *Burrell v. N. Y. & Sag. Salt Co.* 14 Mich. 37; and if the profits cannot be computed with certainty, prospective profits cannot be included in the award made: *McKinnon v. McEwan* 48 Mich. 108; *Allis v. McLean* id. 432.

Geer & Williams for appellee. A referee's findings of fact are conclusive where they have been confirmed and judgment rendered on them, and the case is taken up only on exceptions to the report: *Bevier v. Wright* 30 Mich. 484; *St. Denis v. Saunders* 36 Mich. 369; evidence embodied in the report is not part of it and will not be considered for the purpose of determining whether the findings should

have been different: *Peabody v. McAvoy* 23 Mich. 526; all reasonable intendments will be made to support the finding: *Nieb v. Hinderer* 42 Mich. 451; in an action for damages for preventing the performance of a contract, there may be a recovery of such profits as plaintiff might have made if he had been allowed to perform it, and in estimating damages the character of the season may be considered in its relation to the opportunities it affords for its fulfilment: *Royalton v. R. & W. Turnpike Co.* 14 Vt. 311; *Salvo v. Duncan* 49 Wis. 151; *Loud v. Campbell* 26 Mich. 239.

SHERWOOD, J. This is an action of assumpsit to recover damages of defendant for an alleged breach of contract, in preventing plaintiffs from hauling and delivering a quantity of pine saw-logs. The contract is as follows:

"This contract, made this 25th day of October, A. D. 1879, between Garry Goodrich, of Arcadia, Lapeer county, Michigan, of the first part, and Bela Hubbard and John E. King, of Detroit, Michigan, of the second part, witnesseth: That the party of the first part agrees to haul all the pine saw-logs that party of the second part may own on section twenty-one (21) in said town of Arcadia, to Long lake, in said section eighteen (18) and nineteen (19) in said town, and deliver them in the south boom of Henry Stephens, and to do it in such manner as will be satisfactory to said Henry Stephens, for the sum of one dollar per one thousand feet, and to put on good and sufficient force of men and teams to haul and deliver all of said logs this winter next ensuing, if weather will permit. And the said party of the second part agrees to skid said logs in a workmanlike manner, and to make the roads to the same, and to skid said logs as well as said Stephens skids his logs, on section twenty (20) and to make the roads as good as the lumber roads of said Stephens, in section twenty (20) and to furnish the logs as fast as first party can haul them, and to pay the party of the first part one dollar per thousand feet for the logs delivered on Long lake, as above specified. Payments shall be made as fast as 500,000 feet are so delivered, and according to the scale bill of said logs as sold by parties of second part to said Henry Stephens. The place and facility for delivering said logs on Long lake to be furnished by parties

of second part shall be as good as for delivering the logs of said Henry Stephens from section twenty (20) all logs hauled to be paid for in the spring. If weather unfavorable, and all the logs cannot be hauled the first winter, this contract shall be continued to another winter, on same terms and conditions. No logs to be hauled over twenty-four feet long.

[Signed] GARRY GOODRICH.
HUBBARD & KING.

By G. W. MCELHENNEY."

The declaration states a prior contract concerning the cutting, hauling and delivering by plaintiff of other logs, as in force between the parties at the date of the above-recited contract, which was canceled by the parties, as appears, at or about the time of entering into the above contract, and there is no claim of damages on account of it, and it needs no further consideration.

The case, upon stipulation of the parties, was ordered referred to James McNamara, as referee, and his report was confirmed, and judgment rendered for plaintiff. The case is here upon errors assigned, on the confirmation by the circuit court of the referee's finding of law. No exceptions were taken to rulings on the trial before the referee, but exceptions were filed in the court below to the referee's report, which were overruled by the court; and accepting his findings of fact as conclusive, we can only consider the question upon the exceptions to his conclusions of law, and the decision of the circuit court upon the exceptions.

The fact of the making of the contract which is the subject of this suit, is not questioned; and the question in issue upon the pleadings and the defendant's notice under his plea of the general issue, is whether the defendants are liable in damages for a breach of it. The referee's findings of fact which are material, are, substantially stated, as follows:

The winter of 1879 and 1880 was, for the purpose of hauling logs on snow and ice, most unfavorable. The first fall of snow, sufficient for any logs to be moved upon, occurred about Christmas or a little before, and only then

continued a few days,—about eight days,—and the frost was of very little account. Another little flurry of snow occurred in February of that winter, when, it was in evidence, some lumbermen put in five days, or rather nights, at that time, in hauling. The rest of the winter there was neither frost nor snow.

The quantity of logs to be hauled by the plaintiff was 3,618,000 feet, to move which to Long lake, calculating upon an ordinary season, which would be about six weeks of frost and snow, required him to provide a force of about 30 teams and take advantage of the first sufficient fall of snow, which this winter occurred, as stated, about Christmas time. Plaintiff had equipments for 30 teams; had arranged for 30 teams including his own, to haul logs, to come as soon as the roads were in condition to haul logs upon the snow. The plaintiff came on to do the hauling two or three days after this first snow had fallen, in the latter part of December, with six teams, and hauled with these six teams as long as it was practicable to haul with sleighs. The road was built by defendants over a line selected by plaintiff, and for about 70 rods of the distance ran through a swamp. The balance of the way, a mile and a quarter and upwards, was over hard land, and it connected with the lumber road of Henry Stephens running thence to Long lake; and this road was not graded by defendants until after the first fall of snow, or about the time plaintiff came on to do the hauling.

The work of the plaintiff was in the nature of breaking roads preparatory to hauling, and done in the usual mode of practical lumbermen, and the number of teams he employed was as many as would ordinarily be employed in the breaking of roads to perform a similar job. Only two teams of the number plaintiff had arranged for came at this time, and the roads were so broken up that these teams returned without hauling any logs. The plaintiff at this time hauled in all about 67,717 feet, and spent in doing it not to exceed five days.

In consequence of the condition of the weather, there being but little frost in or snow on the ground, after the road

over which said logs had to be hauled had been graded by defendants, plaintiff used all reasonable efforts and means to perform his contract in the winter of 1879 and 1880, by hauling the logs on sleighs. The plaintiff did no more under the contract than is here stated.

The amount of logs to be hauled, if measured in the winter or spring of 1879 and 1880, would be 3,618,000 feet; if the logs remained in the woods over summer, the sap would become discolored and the measurement would have to be made inside the sap, which would be a depreciation of twenty per cent., and would reduce the measurement to 2,894,400 feet of logs, and there was a risk of further depreciation by being eaten by worms and injured by fire.

The plaintiff could deliver the logs in Long lake in the winter of 1880 and 1881 for fifty cents per thousand feet, it being an extraordinarily favorable winter for lumbering. Defendant had something like a million feet of logs cut in the latter part of December, that year, and kept a force of men there cutting and skidding till some time in March following, when the cutting was complete, and the whole amount of logs cut was 3,618,000 feet.

Some time in March defendants notified plaintiff to haul the logs to Long lake, to save them from depreciation. The plaintiff refused, as they could not be hauled on sleighs, and claimed to defendants that he had a right to wait until the following winter under his contract, and he forbade the defendants removing them. In order to provide against the contingencies of depreciation in measurement and the risk of being eaten by worms and of being burned by fire, defendants went immediately to work and put said logs into Long lake, at an expense to them of $2.50 for hauling.

The defendants gave notice under their plea that they will show that they entered into the contract in question for the purpose of fulfilling a contract previously entered into by them with one Henry Stephens, to deliver to him the pine logs aforesaid, and that plaintiff agreed and bound

himself to perform his contract in such a manner as to enable defendants to carry out their contract with Stephens, etc. The referee finds as a fact that such a contract with Stephens, which he sets out in full in his return, was made by defendants. But there is no finding that this contract was made with reference to the fulfillment by defendant of the Stephens contract, and the evidence before him, to-wit, the contract in suit, and which must be taken to express the whole contract of the parties, would not authorize such finding. In our opinion this Stephens contract as entered into by the defendants, alleged as preparatory and subsidiary to the fulfillment of the principal one with the plaintiff, should be laid entirely out of view, and cannot be considered as material or pertinent on the question of the recovery of damages for the alleged breach of the principal contract. *Masterton v. Mayor of Brooklyn* 7 Hill 72.

The questions for review, then, are irrespective of defendant's contract with Stephens. The referee finds as conclusions of law: 1st. By the terms of the contract of October 25, 1879, the plaintiff had a right to haul said logs in the winter season, when there should be snow on or frost in the ground suitable to make roads to move said logs on sleighs; and there being no favorable weather to make suitable roads to haul said logs in the winter of 1879 and 1880, the plaintiff had until and during the winter of 1880 and 1881 to haul said logs under and by virtue of said contract.

It is urged that the facts found do not support this conclusion. The contract is to be construed upon what it expresses in terms, and what is necessarily to be implied from those terms. It is urged that the contract is silent upon the subject of snow and frost; and this is true. But the contract is to be construed in the light of what was the understanding of the parties respecting the manner the logs should be moved. The contract provides that the plaintiff shall deliver all of said logs "this winter next ensuing, if weather will permit. * * * If weather unfavorable, and all the logs cannot be hauled the first winter, this con-

tract shall be continued to another winter on same terms and conditions." Now it seems quite clear to us that both parties had in mind, and were in accord, that the logs were to be moved on sleighs, which require snow and a degree of frost for their use; else the provision of the contract that if the weather of the first winter is unfavorable, so that the logs cannot be hauled, the contract may be extended to the next winter, is a senseless one. If they were not, as understood by the parties, to be aided by the advantages of snow and frost, then there was no reason why they should, but many reasons why they should not, continue the contract to the next winter. The facts found support this conclusion of law.

That the defendants had no right to terminate said contract by entering upon said land and removing therefrom said logs before the time had expired in which the plaintiff had the right to haul them, and that the plaintiff has sustained damages by being prevented by defendants from the fulfillment and performance of said contract in the winter of 1880 and 1881, are the second and third conclusions of law found by the referee.

As to the fact found by the referee that plaintiff used all reasonable efforts and means to perform his contract in the winter of 1879 and 1880 by hauling the logs on sleighs, and that, except the few days in the latter part of December, 1879, and a flurry of snow in the following February, there was neither snow on nor frost in the ground for the rest of that winter, and that in the spring of 1880 defendants, against plaintiff's consent, themselves commenced to put, and did put, before the winter of 1880 and 1881, all their remaining logs into Long lake. They support these conclusions. These conclusions must stand.

The 4th and last conclusion of law relates to the damages which plaintiff should recover. The fact is found that plaintiff, in the winter of 1880 and 1881, could have delivered said logs at fifty cents per thousand feet. The objection is that the measure of damages adopted by the referee is erroneous. The damage reported by the referee was for

the loss of profits, the direct and natural result which the law presumes, springing right up under the breach of the contract complained of, in plaintiff not being allowed to fulfill his contract the second winter, on the basis of what the cost to him would have been for delivery. From the facts found the profit to him would have been fifty cents per thousand feet for the whole amount not delivered in the winter of 1879 and 1880. It is objected that the profits must be ascertained on the day of the breach; that to attempt to ascertain the damages in any other way would be speculative, uncertain and conjectural. The case of *Masterton v. Mayor of Brooklyn* is cited as authority, but an examination of that case shows that the court made the market price on the day of the breach of the contract to govern in assessment of damages to depend upon the opposite party having elected to consider the contract broken before the arrival of the time for full performance. The facts of this case were somewhat exceptional, there being a claim for a breach of a contract running through a period of five years, of which about one year and a half only had expired, the court and jury having no certain data upon which to estimate the profits for the remaining three years and a half. That case is not applicable here, where the election of the plaintiff to consider the contract broken before arrival of the time for its full performance does not appear; and upon the facts found it does appear that there are certain data for estimating the damages found. The consideration of profits cannot be separated in this case from the circumstances under which the work was to be done, and the prevention of which constitutes the breach making the defendants liable.

There is no element of uncertainty regarding the profits the plaintiff would have realized from the performance of the contract, and which must govern in the estimate of damages. There are no contingencies modifying or taking this case out of the rule laid down by this Court in the case of *Burrell v. New York & Saginaw Solar Salt Co.* 14

Mich. 34. See also *Loud v. Campbell* 26 Mich. 239; *McKinnon v. McEwan* 48 Mich. 106.

There was no error in confirming the conclusions of law found by the referee, and the judgment rendered at the circuit is affirmed with costs.

The other Justices concurred.

IN THE MATTER OF THE ESTATE OF CHARLES H. BENNETT, DECEASED, ON THE APPEAL OF HENRY HAMPER.

Peremptory challenges—Proof of claims—Partnership.

The statutory right of challenging peremptorily may be exercised so long as the jury is not sworn, and notwithstanding the previous declaration of the party exercising it that he is satisfied with the jury.

In proving a claim against an estate for services as a practical mechanic and miller in superintending the construction of a mill and in running it, witnesses may properly be asked what claimant's services therein were worth, or what they were worth per month.

An arrangement by which one person is to share the profits of a business with another does not make him a general partner in any such sense as to deprive him of his right to certain additional specific compensation which has been agreed upon.

Error to Wayne. (Speed, J.) June 6.—June 20.

Appeal from disallowance of claim against estate. The estate brings error. Affirmed.

Moore & Moore for appellant.

Moore, Canfield & Warner for claimant. Where a claim against an estate is for personal services rendered between dates specified, the claimant has a right to go to the jury upon any contract, either express or implied, which makes out to their satisfaction a fulfillment giving a cause of recovery: *Engle v. Campbell* 42 Mich. 565; where one works for another the law implies a request therefor and a promise to pay what the labor is reasonably worth, unless it

is shown that it was rendered gratuitously, or under circumstances that repel the presumption of a promise of compensation: Wood's Master & Servant § 67; *Lewis v. Trickey* 20 Barb. 387; *O'Connor v. Beckwith* 41 Mich. 657; *Torrey v. Young* 39 Mich. 429; *Guild v. Guild* 15 Pick. 129; *Dougherty v. Whitehead* 31 Mo. 257; *Hart v. Hart* 41 Mo. 441, 445; *James v. Bixby* 11 Mass. 34; *Trustees v. Allen* 14 Mass. 175; and the burden of proving the gratuitous character of the service, or that it was rendered under circumstances that repel such presumption, is on defendant: *Livingstone v. Ackeston* 5 Cow. 531; *Jacobson v. LeGrange* 3 Johns. 199; participation in profits does not of itself make one a general co-partner: *Beecher v. Bush* 45 Mich. 188.

SHERWOOD, J. Hamper presented a claim for his personal services, rendered for Bennett in his life-time, to commissioners on claims, which was disallowed. He appealed to the circuit court, where, on a trial had before a jury, his claim was allowed, and the estate brings error.

The counsel for the claimant was permitted, against objection, to peremptorily challenge a juror after he had once announced himself satisfied with the jury, but before they were sworn. It was the claimant's right to make such challenge. *Hunter v. Parsons* 22 Mich. 96; *Jhons v. People* 25 Mich. 499. The question of order of challenge is one of practice and discretionary with the trial court. Peremptory challenge, so far as it extends, is a right secured by statute, of which neither party can be deprived until the jury are sworn.

The claimant was a practical mechanic and miller, and his claim was for labor done for the deceased in his life-time, in superintending the construction and in taking charge of and running the mill. In making proof of his claim, witness Pool was asked what claimant's services were worth per month; witness Webster was asked what were his services worth for superintending and running the mill; and witness Mansfield what his services were worth as a

miller or a practical mechanic overseeing the construction of mills. These questions were all answered, against the objection of counsel for the estate that they were "incompetent and immaterial." It is difficult to conceive of questions more simple or elementary than those in eliciting the proof proper and necessary to establish the claim presented by Hamper.

Counsel for the estate claimed upon the trial that Hamper was partner with the deceased when the services claimed for were rendered, and that they were rendered to the firm, and there was testimony given tending to show that there was an agreement to that effect; also that Bennett was to give Hamper fifteen hundred dollars per year and half of the net profits of the mill for his services.

The court charged the jury in substance that Hamper should in some way be compensated for his labor in constructing the mill, and he was entitled to it in his claim, unless he had entered into some arrangement with Bennett which would preclude him from it. The court also further instructed them it would be proper for Hamper to make an arrangement for compensation for his services by which he should have fifteen hundred dollars per year, and in addition a share of the profit of the milling business which he had the charge of, and that the agreement for a share of the profits would not make him such a general partner as to prevent his recovering the fifteen hundred dollars; and it is claimed that herein the court erred.

These charges were correct, and we fail to discover upon what legal ground they could ever have been deemed otherwise. *Ambler v. Bradley* 6 Vt. 119; *Dry v. Boswell* 1 Camp. 330; *Reed v. Murphy* 2 Greene (Iowa) 574; *Benjamin v. Porteus* 2 H. Bl. 590; *Hall v. Edson* 40 Mich. 651; *Beecher v. Bush* 45 Mich. 188.

The record shows no error in the case, and the judgment must be affirmed with costs.

The other Justices concurred.

Asa Judd v. William H. Burton.

Bill of particulars—Presumption of estoppel.

A bill of particulars, in an action for wages on a labor contract, cannot cover money returned by plaintiff to defendant, as a loan, after receiving it as payment.

One who obtains a payment from his employer on the representation that it is a settlement in full, is presumptively bound by the representation, though not conclusively.

Error to Wayne. (Speed, J.) June 6.—June 20.

Assumpsit. Defendant brings error. Reversed.

Charles F. Burton for appellant.

Moore & Moore for appellee.

Campbell, J. Plaintiff sued defendant for arrears of salary as manager of a yeast factory. The special count set up a contract running from January 1, 1876, to May 11, 1878, and an employment for some months thereafter; and there were added the common counts also. A bill of particulars being demanded, it was given in a general way, as including over ten thousand dollars for services from October 30, 1871, to January 1, 1876, and between three and four thousand dollars from January 1, 1876, to May 11, 1878.

It appeared that plaintiff, a part of the time with one son and a part of the time with another, had been employed under distinct contracts covering the time specified. He claimed on the trial a balance of $240 due on the contract running from 1870 to 1876, and of $200 under the contract from 1876 to 1878. He admitted full payment of his later services.

Under the course of business, the payments from month to month or otherwise were made to plaintiff generally by

one of the sons, or if away from Detroit by a Canadian manager. Under the contract of January, 1876, it was expressly provided as a duty laid on the Judds, who bound themselves jointly to make monthly reports, showing deficiencies if the monthly receipts were short of expenses and outlays, and remitting all balances over such outlays. And Burton was monthly to send remittances for any such deficiency. This put the Judds under an obligation to keep defendant fully informed concerning their own claims as well as concerning other matters. And this monthly settlement was made obligatory for the purpose of keeping the business constantly closed up each month.

On the 11th of May, 1878, while the second contract, as originally drawn, was in force, and to run for some time longer, a written arrangement was made whereby it was terminated and full satisfaction acknowledged except as to plaintiff, who was therein referred to as claiming about $200 on wages, which was not determined. In the fall of 1878 plaintiff went to the state of New York, where defendant lived, and stated to him that there had been found due on a settlement with defendant's son and agent the sum of $169, on which he had received $40; and upon this claim defendant paid him the balance. Defendant claims this was represented to him as a settlement in full. Plaintiff claims that it did not include anything but the pay for his then recent services.

The claim of a balance of $240 on the first contract was explained by testimony that after plaintiff had been paid in full, defendant desired for a temporary business purpose to use this money, and it was handed to him on an agreement to look over the matter, and pay it up again—all that was due.

The court charged the jury that if this was the fact, they might regard it as if no payment had been made.

We think this was erroneous. At most it was no more nor less than a loan of money to defendant to be settled in subsequent dealings. It was therefore not within the bill of particulars, and defendant could not be expected to

be prepared with testimony to meet it. Under the methods of doing business adopted by these parties it is difficult to understand how any such transaction could remain open when plaintiff was drawing money constantly from the business of which he was bound to render full monthly settlements. But it could not in our opinion be treated as undoing the complete and final payment of the amount due under the first contract.

We think also that the court failed to charge fully upon the effect of the settlement of October, 1878, upon the theory sustained by defendant's testimony that it was represented to him as a settlement in full of all accounts. If plaintiff obtained money from defendant on any such representation he would be presumptively bound by the representation. Whether it would be conclusive or not might perhaps depend on circumstances. But it was misleading to tell the jury that the settlement actually made in Detroit was to govern.

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

The other Justices concurred.

RUSSELL & COMPANY v. ANTOINE BONDIE.

Contract for goods—Alteration in agreement.

An order upon a dealer contained a printed agreement binding the buyer to pay a certain sum in notes. After it was given, but before the merchandise was delivered, the buyer requested, and the dealer allowed, the addition of these words: "It is understood that no notes are to be given on this sale, but a simple Michigan mortgage." The former clause was left standing. *Held* that the latter destroyed its force, and left the dealer to rely on the mortgage security alone, and that the buyer was not personally liable.

Error to Wayne. (Chambers, J.) June 6.—June 20.

ASSUMPSIT. Plaintiff brings error. Affirmed.

Moore & Moore for appellant.

Geo. H. Prentis for appellee. Where a mortgage contains no express covenant for the payment of the amount,

and no note or other separate instrument is given to secure payment, the mortgagee's remedy is confined to the land mentioned in the mortgage: Comp. L. § 4207–8; *Howe v. Lemon* 37 Mich. 164.

GRAVES, C. J. The plaintiff company, described as an Ohio corporation, sued Bondie on the common counts, and the circuit judge directed a verdict in his favor.

The purpose of the action was to recover a portion of the purchase price of a threshing-machine which Bondie had purchased of the company by means of an order which its agents had procured from him. A copy is given below.*

*EXHIBIT A.

All orders taken subject to the acceptance of Russell & Co.

RUSSELL & CO., MASSILLON, O.:

Please furnish or ship for the undersigned, in care of your agent at Wyandotte, Mich., on or about the 9th day of June, 1880:

1 No. 22 Gear Thresher, Massillon Pattern.

State size and kind by number, also whether Geared or Belt.

.....Horse.....Engine.

State size by Horse-Power, and whether Portable, Semi-Portable, or Traction.

1 Mounted Horse.....Power.

State size; also whether Mounted or Down.

1 Truck Wagon for above Separator.

1 18-foot folding Stacker for above Separator.

State length; whether 14 or 18 feet.

with.....Attachments for thresher.

These are charged for extra.

.....

with Belting, Fixtures and Free extras, as provided in Price-list.

We, the undersigned, agree to receive the above, subject to the conditions named below, to pay the Freight and Charges thereon from Factory, and further agree to pay to your order, at the time and place above named, the sum of $610, in notes, as follows:

Cash.....	$.....	Note Due.....	$.....
Note Due, Jan. 1,'81,	$210.....	Note Due.....	$.....
Note Due, " 1,'83,	$400.....	Note Due.....	$.....
Note due.....	$.....	Note Due.....	$.....

Notes to bear interest from date at 7 per cent.; to be accompanied by security, as follows: On 80 acres of land, (60 improved,) situated S. E. ¼ of N. E. ¼, and N. E. ¼ of S. E. ¼ Sec. No. 26, Township of Whitehall, Muskegon Co.—Town 12, range 17 west. Subject to Mtg. of $500.

Post-office—Ecorse.	(Sign here.)	A. BONDIE.	[SEAL]
do. Ecorse.		.....	[SEAL]
do.		.....	[SEAL]
County and State.....		.....	[SEAL]

Purchasers.

☞ DRAW THE PEN THROUGH ANY ARTICLE NOT INCLUDED IN ORDER.

AS A CONDITION TO THIS ORDER. The above articles are warranted to be of good material, well made, and, with proper management, capable of doing as good work as similar articles of other manufacturers. If said machinery, or any part thereof, shall fail to fill this Warranty, within ten days of first use, written notice shall be given

The body was a printed blank which the plaintiff had prepared for general use, to be filled up and modified in separate cases according to the views of the parties. As here shaped and executed on the 9th of June, 1880, it provided that the purchase price should be paid by Bondie's promissory notes, secured by mortgage on certain real estate, and no other form of personal liability was provided for or contemplated. Except as he should be personally liable as maker of the notes, he was not to be personally liable at all. Such was the original character of the order; but about two weeks after it was signed, and before delivery of the machine, Bondie desired a modification, and the company assented to it. It consisted in adding these words: "It is understood that no notes are to be given on this sale, but a simple Michigan mortgage."

In the course of a few days the parties proceeded to carry out the arrangement as thus modified. The machine was delivered by the company and a mortgage given by Bondie as provided in the order. No notes were given, and the mortgage was in common form, without covenants.

The result seems very clear to the Court. Although the

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to Russell & Co., Massillon, Ohio, and to the party through whom the machinery was purchased, stating wherein it fails to fill the Warranty, and time, opportunity, and friendly assistance given to reach the machine and remedy any defects. If the defective machinery cannot then be made to fill the Warranty it shall be returned to the place where received and another furnished on the same terms of Warranty, or money and notes to the amount represented by the defective machine shall be returned, and no further claim be made on RUSSELL & Co. Continued possession or use of the machine, after the expiration of the time named above, shall be conclusive evidence that the Warranty is fulfilled to the full satisfaction of the purchasers, who agree thereafter to make no other claim on RUSSELL & Co., under Warranty. In case any casting fail through any defect in its material during the first season, defective piece shall be replaced without charge, except freight or express charges; but on any claim for replacement of defective castings, the defective pieces shall be presented to RUSSELL & Co., or the dealer through whom the machine was ordered, and shall clearly show the defects. Defects or failure in one part shall not condemn nor be grounds for claiming renewal, or for the return of any other part. All Warranties to be invalid and void in case the machine is not settled for when delivered.

Set of Tally Boxes to be included in the above. It is understood that no notes are to be given on this sale, but a simple Michigan mortgage.

ROBERTS BROS., Agents.

original terms requiring that Bondie should give notes were not physically obliterated, the addition of the new provision had the clear effect as matter of law to eliminate them from the order. They were annulled, and the machine was to be furnished by the company, if at all, in sole reliance on the provision for mortgage security. The terms prescribed by the proposal as modified excluded all others. The plaintiff was informed upon what conditions the defendant would become a buyer, and all other conditions were impliedly negatived, and the effect was to shut out the personal liability now contended for.

This disposes of the case and leads to an affirmance of the judgment, with costs.

The other Justices concurred.

MALCOLM MCDONALD v. CHARLES BEWICK, ANDREW W. COMSTOCK ET AL.

Agreement to contract.

A written instrument, dated and signed, and in these terms: "We agree to sell one million feet of Norway in town 28 N. 8 E., on our lands * * and will make a contract with him, giving him the right to go on said lands and cut and remove said timber on payment for the same. The price of said Norway to be $1.50 per M. board measure," etc., is not a contract but merely an offer to make one on stated terms, and will not of itself support an action.

Error to Alpena. (Tuttle, J.) June 6.—June 20.

ASSUMPSIT. Plaintiff brings error. Affirmed.

J. D. Holmes for appellant.

J. D. Turnbull for appellees.

GRAVES, C. J. The court committed no error in directing a verdict for defendants. The plaintiff bases his right to recover on this writing:

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"ALPENA, MICH., Dec. 5, 1879.

We agree to sell Malcolm McDonald one million feet of Norway, in town 28 N., 8 E., on our lands along Alger R. R.; said Norway to be suitable for making square timber; and will make a contract with him, giving him the right to go on said lands and cut and remove said timber on payment for the same.

The price of said Norway to be $1.50 per M. board measure, and said timber to be selected Norway. We do not guaranty any certain amount of timber on said lands that McDonald will take, but do say there is one million feet of good Norway, and more.

BEWICK, COMSTOCK & Co."

This instrument was not a contract. It was simply an offer to make one, with a statement of the terms. There was no mutuality. It was the act alone of the defendants, and it was not supported by any duty or obligation of the plaintiff, or of any other person, or by any form of consideration whatever, and there was no averment of acceptance by the plaintiff. There is no appearance of a cause of action. *The Governor, Guardians, &c. of the Poor of Kingston-upon-Hull v. Petch* 28 E. L. & E. 470; *Lees v. Whitcomb* 5 Bing. 34; *Sykes v. Dixon* 9 A. & E. 693; *James v. Williams* 5 B. & Ad. 1109; *Tucker v. Woods* 12 Johns. 190; *Quick v. Wheeler* 78 N. Y. 300.

It is needless to inquire concerning other objections.

The judgment must be affirmed with costs.

The other Justices concurred.

THOMAS B. JOHNSTON v. JOHN J. CATHRO.

Unorganized counties—School taxes.

Act 358 of 1877 "to incorporate the public schools of the township of Long Rapids" provides that the territory within the township of Long Rapids, in Alpena county, be *set off* from Union school district No. 1 of the township of Alpena. The adjacent county of Montmorency had previously been attached to the township of Long Rapids for judicial, and therefore, for all legal, purposes. Comp.

L. §§ 120, 449. Act 358 made the town clerk of Long Rapids, who might, under this arrangement, be a resident of Montmorency county, the clerk of the board of education, and provided that the trustees should meet and the records be kept at his office, which also might be in that county; it also made the township and school elections take place at the same time and on the same tickets; and it apportioned the debt of the old Union school district Number 1 of Alpena township between that district and the new one, according to proportions fixed by the assessment rolls of the two townships on the basis of the aggregate valuation of Long Rapids, which for that purpose, covered the unorganized county. *Held*, that the new school district of Long Rapids would include the territory of Montmorency county; and that school taxes for that district were properly levied on property in that county.

Error to Alpena. (Green, J.) June 6.—June 20.

TROVER. Plaintiff brings error. Affirmed.

J. D. Turnbull for appellant.

J. B. Clayberg for appellee.

COOLEY, J. This case originated in justice's court, and was removed to the circuit court by appeal. When the case came to trial in that court, the facts were stipulated as follows:

"*Thomas B. Johnston v. John J. Cathro.*

Trespass. Appeal from justice court.

It is hereby stipulated and agreed by the parties hereto, by their respective attorneys, that this case shall be submitted for trial upon the following agreed state of facts:

1st. That in 1879, and previous thereto, the unorganized county of Montmorency was attached to Alpena county for judicial and municipal purposes.

2d. That during all of 1879, and at the time of the commencement of this suit, the township of Long Rapids, Alpena county, included for said purposes all the territory in said Montmorency county, in ranges one, two, three, and four east in townships 31 and 32 north.

3d. That in 1879 plaintiff was a resident of that portion of the township of Long Rapids lying in said Montmorency county, and the property of plaintiff's, upon which the tax in this case was assessed, was situated in said Montmorency

county at the time of assessing the same; also, at the time of the collection of the tax thereon.

4th. That in 1877 the Legislature of the State passed an act, No. 358, found upon page 491 of the Local Acts of said year, which said act is hereby made a part of this stipulation; that it is by virtue of this said act that the public schools of the township of Long Rapids claim the right to assess school taxes upon plaintiff's property situated in said Montmorency county, as aforesaid: that previous to the passage of said act, Union School-district No. one of the township of Alpena embraced only the territory situated within Alpena county.

5th. That in 1879 the supervisor of said township of Long Rapids spread upon the tax roll thereof the tax raised for the support of said public schools of Long Rapids, upon all the taxable property in said township of Long Rapids, including the property situated in both counties, thus making all the taxable property in Montmorency county included in the ranges aforesaid contribute to the support of said public schools, the same as the property of said township lying in Alpena county.

6th. That defendant was treasurer of said township of Long Rapids during said year of 1879, and as such treasurer, after demand being made by him upon plaintiff for the payment of said school taxes assessed as aforesaid against plaintiff, and after refusal of plaintiff to pay the same, said defendant levied upon the property (certain oats) of plaintiff, mentioned in the declaration in this cause, of the value of eleven dollars and twenty-five cents, and sold the same to satisfy said school tax.

7th. That plaintiff paid the two-mill tax, and only refused to pay said school tax, assessed as aforesaid, for the support of said public schools; that no damages are claimed, aside from the value of the property levied upon and sold as aforesaid; that no question is raised as to any formal defects of the tax roll under which defendant acted and justifies.

8th. That immediately after the organization of the public schools of the township of Long Rapids, under Act No. 358, residents of that portion of the township of Long Rapids which lies in said Montmorency county, petitioned the school board of Long Rapids township, praying that they purchase sites and build school-houses and maintain schools in that part of said township; that in compliance with such petitions the public schools of the township of Long Rapids purchased school-house sites and built school-houses in said territory, and have ever since that time

maintained schools therein, paying all expenses out of the funds of the said public schools of the township of Long Rapids; that ever since the organization of said public schools of the township of Long Rapids, said corporation has exercised full control over that part of the said township which lies in Montmorency county, for school purposes, the same as over that part of said township in Alpena county."

The question which arises upon these facts is, whether Act No. 358 of the Local Acts of 1877 "to incorporate the public schools of the township of Long Rapids" included within the school-district, thereby organized, the territory of the unorganized county of Montmorency. If it did, the school tax in question was lawfully assessed, and the suit must fail. The circuit judge ruled that it did, and gave judgment for defendant.

The Act begins by providing that "the territory embraced within the township of Long Rapids, in the county of Alpena, be and the same is hereby set off from Union School district number one, of the township of Alpena, and declared to be a single school-district, which shall be a body corporate by the name and style of The Public Schools of the Township of Long Rapids." At the time of the passage of this act the unorganized county of Montmorency was attached to Long Rapids for judicial purposes, and was therefore to be deemed a part of it for all legal purposes. Comp. L. §§ 120, 449. If nothing else appeared in the act to cast doubt upon the intent, this fact would seem to be conclusive. But the act purports to "set off" the new district from Union School-district number one of the township of Alpena; and this indicates a legislative intent to include within the new district no territory not before within the district, which was divided in making it, and it seems that the unorganized county was not within the old district. One of these facts favors the view of the plaintiff quite as strongly as the other favors that of the defendant; and neither is conclusive. But other parts of the act seem to put beyond question the intention that Montmorency county should be included. The act provides that the township clerk of Long Rapids shall be clerk of the Board

of Education; the meetings of the trustees are to be at his office, and the records are to be kept there. §§ 4, 5 and 6. But an elector in Montmorency county is eligible to this office; so that on the construction put upon the act by the plaintiff, an important officer of the corporation might not be a corporator, and the official board would hold its meetings outside the district. The township elections are also made the school elections, and the votes for trustees are to be upon the same tickets and canvassed in the same manner as the votes for township officers. § 2. As ballots are secret and the election officers have no authority to inspect before depositing them in the box, any elector, whether living within the township of Long Rapids proper, or within the attached unorganized territory, would have it in his power to vote for trustees, and the election officers would have no means of distinguishing the ballots of those who were from the ballots of those who were not entitled to vote for school officers. Then section seven of the act provides for apportioning the indebtedness of Union School-district No. One of the township of Alpena between the old and the new districts according to proportions which were to be determined by the assessment rolls of the two townships for the year 1878; taking for this purpose the aggregate valuation of Long Rapids, which would include the unorganized county. This neither would nor could have been done if the unorganized county was to be no part of the new district.

The judgment must be affirmed with costs.

The other Justices concurred.

FRANCIS PALMS v. CHARLES W. RICHARDSON ET AL.

Notice of deposition—Circuit court rule 51.

Where notice is duly given of the filing of a deposition and no motion is made to suppress it nor any objection to it filed, or served on the

opposite attorneys, it is too late to question its regularity at the hearing.

Error to Alpena. (Emerick, J.) June 6.—June 20.

TROVER. Defendants bring error. Reversed.

J. B. Clayberg for appellants.

J. D. Turnbull and *Atkinson & Atkinson* for appellee. Formal objections are not considered when raised for the first time in the appellate court: *Matson v. Melchor* 42 Mich. 479.

CAMPBELL, J. Plaintiff sued defendants in trover for the conversion of certain logs which he had contracted should belong to one McElroy when paid for, but which he claimed were not paid for. Judgment passed for defendants.

On the trial a deposition of McElroy was ruled out on the ground that there was a defect in the notice under which it was taken, as not properly signed and as not verified by the person serving it.

But inasmuch as notice of its filing was duly given, and no motion made to suppress, and no objections were filed or served on plaintiff's attorneys, it was too late to raise the question of its regularity on the hearing. Rule 51 is express on this subject. The question was not only one of form, but a very technical one at best.

The judgment is erroneous for the reasons mentioned, and it must be reversed with costs and a new trial granted.

The other Justices concurred.

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SYLVERINE PETERSEN ET AL. v. THE DOOR, SASH & LUMBER COMPANY.

Notice of holding goods subject to order—Set-off.

Money paid in advance for goods which not only do not correspond to the contract but are worthless may be recovered back by the buyer as paid without consideration, and he can therefore treat it as set-off; and he may do so with no other notice to the dealer that the goods are held subject to the latter's order than is implied in notice of the facts, of the worthlessness of the goods, and of his refusal to take them.

Error to Saginaw. (Gage, J.) June 6.—June 20.

ASSUMPSIT. Defendant brings error. Reversed.

Tarsney & Weadock for appellant. Notice from the buyer to the vendor that the goods are held subject to the latter's order, is unnecessary if he notifies him that they do not correspond to the contract of sale and that he refuses to take them: *Hargous v. Stone* 1 Seld. 86; *Kimball &c. Mfg. Co. v. Vroman* 35 Mich. 327; *Grimoldby v. Wells* L. R. 10 C. P. 391; *Lucy v. Mouflet* 5 H. & N. 233; *Gill v. Kaufman* 16 Kan. 571; *Brown v. Corporation* 35 U. C. (Q. B.) 509.

Hanchett & Stark for appellees. A purchaser rejecting goods cannot recover back the purchase money unless within reasonable time he gives the vendor notice that he declined to accept them and that they are subject to his order: 1 Pars. Cont. 592; Benjamin on Sales 748; Hilliard on Sales 313–319; *Reed v. Randall* 29 N. Y. 362; *Coleman v. Gibson* 1 M. & R. 168; *Rogers v. Hanson* 35 Iowa 286; *Hirshhorn v. Stewart* 49 Iowa 418; *Doane v. Dunham* 65 Ill. 516, 517: 79 Ill. 131.

GRAVES, C. J. The object of this action was to recover the price of certain saw-logs sold and delivered; and the defendant, a corporation of the state of Ohio, endeavored

to set off an amount of money paid in a prior transaction concerning shingles, and claimed to be recoverable as money paid to the plaintiffs' use. The plaintiffs recovered; and now the defendant urges that the jury were misled by the charge given by the circuit judge concerning the transaction relative to the shingles. The controversy is reduced to a question respecting the defense of set-off, but some detail is necessary to an understanding of it.

The plaintiffs are situated at Midland, in this State, and the defendant is established at Columbus, in the state of Ohio. In August, 1881, the defendant bargained with the plaintiffs for two car-loads of No. 2 shingles, to be delivered at Columbus, at a price agreed on, and the plaintiffs soon afterwards sent forward the agreed quantity, and also drew against the consignment for $210. The draft was accepted and afterwards paid by the defendant. The freight was also paid, together with some other charges.

The defendant's evidence tended to show that the shingles forwarded were found to be not No. 2, but worthless culls, and were refused, and that the defendant gave due notice of these facts to the plaintiffs. The defendant's evidence tended further to establish that as matter of fact the shingles had been since held subject to the plaintiffs' order, and that in December of the same year the plaintiffs actually tried to sell to other persons at Columbus. In reply to this matter of defense the plaintiffs interposed the claim that the shingles conformed to the bargain, and were dealt with as though they belonged to the defendant, and they submitted evidence tending to disprove the showing by defendant to the contrary.

When the circuit judge came to instruct the jury he submitted the claim of set-off, and stated the grounds on which he conceived it to depend. He informed the jury that among other things necessary to sustain the claim they must find that the defendant notified the plaintiffs that the shingles were held subject to their order. This was repeated several times, and great stress seems to have been placed upon it.

Now, it seems not to have been claimed by the defendant that there was any notification in terms to the plaintiffs that the shingles were held subject to their order. The position of the defendant, which, as is contended, should have been recognized in the charge, was that the shingles, as the plaintiffs were fully informed, were not only not such as were contracted for and were actually refused, but were entirely worthless, and hence that the amount paid was proper matter of set-off, because it was a payment without any consideration, though made at the plaintiffs' request.

It appears to the Court that the point is well taken, and that the defendant was entitled to have this theory submitted. The charge excluded it. If the facts were as claimed by it,—if the shingles were not such as were bargained for but were destitute of value and were refused, and these facts were duly made known to the plaintiffs,— it is not material whether they were or were not told, either directly or indirectly, that they were held subject to order. Not conforming to the contract, and being unaccepted and at the same time wholly valueless, it was sufficient if the plaintiffs had proper notice of the facts to warrant a direct recovery back of the money paid on the draft as money paid for the plaintiffs without consideration, and was, hence, a good demand by way of set-off. As the case in this aspect of it was withheld from the jury, we think there should be a new trial.

The judgment is, therefore, reversed with costs, and a new trial granted.

The other Justices concurred.

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SUSIE A. PAGE v. ISAAC PAGE.

Divorce—Examination of witnesses.

A circuit court commissioner's examination of the parties to a divorce suit should be in the presence or under the immediate supervision of

the judge, so that it may be kept within proper limits; and as it is discretionary with the judge to allow such an examination he can prevent anything unfair or unseemly in conducting it.

A circuit court commissioner, in taking the testimony of the parties to a divorce suit, can refuse to take anything which is grossly improper if he is left to act in the absence of the judge.

Physicians cannot testify in a divorce suit to what they have found out by compulsory examination of a party thereto; and such examinations are illegal and improper and a party should refuse to submit to them.

Where the record in a divorce suit contained evidence that was grossly improper and ought, in the discretion of the trial judge, to have been rejected, it was stricken out by the Supreme Court and the case was heard on what remained.

The alleged fact that legislation was about to take effect permitting full examination of the parties to a divorce suit was not recognized by the Supreme Court as sufficient reason for withholding its decision until complainant in a case in which too much latitude had been taken could move for a dismissal of the bill without prejudice, so that in beginning anew advantage could be taken of the statute.

Where a wife, seeking divorce, is justified, by her husband's conduct, in living apart from him, he is bound to provide support for her elsewhere.

Costs were withheld on affirmance of a decree of divorce in favor of the wife, where the record was much too large and had been paid for by defendant.

Appeal from Kent. (Montgomery, J.) June 7.—June 20.

DIVORCE bill. Defendant appeals. Affirmed.

Godwin & Earle for complainant.

Padgham & Padgham for defendant.

COOLEY, J. Complainant asks for a divorce on the ground of extreme cruelty and failure to support. After the cause was at issue the circuit judge made an order for the examination of the parties before a circuit court commissioner. Under this order the defendant was put upon the stand as a witness for complainant, and he was examined concerning the most private and confidential matters in the

married life of the parties. He was also examined, against his objection, as to matters in his personal history long before the marriage, and with which the complainant had no concern whatever. Not to be outdone in this regard, the counsel for defendant, when complainant was subsequently called as a witness, subjected her to an examination concerning the secrets of the married life for which, we trust, there has never been a precedent anywhere. The parties appear to have supposed they were compelled to submit, and the examining counsel were under no restraint in respect to questions asked except their own discretion.

In *Stuart v. Stuart* 47 Mich. 566 where the testimony of the parties to a divorce suit had been taken before a commissioner without the previous order of the court, we refused to consider it, remarking at the time that there may be cases in which the circuit judge will deem it proper to have the parties examined generally to the merits, and we recognized his right to order it done. But it was never contemplated by us that the circuit judge could order such examination to be had except in his presence or under his immediate supervision, so that he might control and direct the proceedings, and keep them within proper limits. As the examination would be entirely discretionary with him, it would be within his authority to prevent anything which might be either unfair or unseemly, and it would be expected that he would prevent any improper examination or question. If the importance of his supervision needed any demonstration, we have it abundantly in this record. We do not permit ourselves to doubt that the circuit judge, had he been present, would have declined to give countenance to much that took place before the commissioner, and probably the commissioner himself would have exercised a judicious control had he understood that he possessed the power to do so. The impropriety of this testimony being manifest, we announced when the case was reached that it must be considered stricken from the record, and if the case went to hearing it must be heard on what would then remain.

There was also a most extraordinary compulsory examination of defendant by physicians, who stripped him and subjected him to oral inquisition, to compel him to give evidence which they could repeat before the commissioner for use against him. What means they could be supposed to have for compelling him to answer their questions, in case he declined as he ought to have done, we do not know; but we are certain they could not be means known to the law. We strike from the record all the evidence obtained by this inquisition also. It should be understood that there are some rights which belong to man as man and to woman as woman which in civilized communities they can never forfeit by becoming parties to divorce or any other suits, and that there are limits to the indignities to which parties to legal proceedings may be lawfully subjected.

The case has been argued before us on the other evidence, after striking out as above indicated, and has been submitted for final decision. Since the submission, however, counsel for complainant has applied informally to have the decision withheld, that he may have opportunity to move to dismiss without prejudice. The object is stated to be, to take advantage of legislation said to have been passed within a few days, whereby authority is given for a full examination of the parties in divorce suits. If any statute has been passed which will allow of such examinations as are shown by this record, we shall decline to go out of our way to bring it into pending controversies where it will have retroactive effect. It is quite time that, in the interest of the public, if not of the parties themselves, this suit should be brought to a conclusion; and we therefore proceed to dispose of it.

The case is not one in which anything is to be gained for anybody by a discussion of the merits. The evidence shows that for some time complainant has refused to live with defendant, and that he has not supplied her with the means of support while she has remained away from him. But he has apparently been ready at all times to support her at his home, and has repeatedly requested her to return. He

is not, therefore, in fault for not supporting her, unless she is living apart from him with sufficient excuse; and the case must turn upon the determination of that question. The charge of cruelty, except as involved in the failure to support, falls to the ground.

On an examination of the proofs we are brought to the conclusion that complainant was justified in withdrawing herself from defendant, and when she went it became his duty to provide a support for her elsewhere. We therefore affirm the decree for divorce. The complainant has appealed from the allowance for alimony as being inadequate under the circumstances, while defendant contends that it is excessive. We are satisfied with what was done by the circuit judge, and affirm the decree in that regard also. As we assume the printing of the immense record on appeal has been paid for by defendant, we make no allowance for costs.

The other Justices concurred.

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EDGAR G. SECKLER v. CLARENCE K. FOX.

Breach of covenant of seizin—Parol agreements.

Written agreements, however explainable, cannot be absolutely contradicted by parol.

A covenant of seizin is not broken by the existence of a subsequent written contract from a former owner for the conveyance of the legal estate to another person than the grantee; and it cannot be shown, in support of such a contract that it was made in pursuance of a previous oral agreement with the grantor to provide in this way for such person.

Error to Gratiot. (Hart, J.) June 7.—June 20.

ASSUMPSIT. Defendant brings error. Reversed.

H. & H. E. Walbridge for appellant.

Scott & Gates and *James K. Wright* for appellee.

CAMPBELL, J. Plaintiff sued for the breach of a covenant of seizin in fee, and recovered damages for the entire value of the land. It appeared from the record that the breach assigned was that one Ann Fox was in peaceable possession as lawfully entitled to hold the land as equitable owner, and entitled to the legal estate.

The proof was that Ann Fox was in possession under a written contract from her husband, Hiero Fox, whereby said Hiero covenanted to convey to her a life estate of the use and occupancy, with reversion to their infant son in fee. Defendant then held the title, and not Hiero. But defendant had given him a power of attorney authorizing him to sell and convey the land to any one, with, however, the usual clauses as to accounting for the proceeds.

Plaintiff claimed, and the court below held, that it was competent to show that while Hiero acted and covenanted in his own name, and no reference was made to Clarence, yet the contract might be shown to have been made under a former parol contract whereby Clarence took the title for the very purpose of accomplishing some such object as this contract contemplated, which was a provision for Ann Fox in prospect of a separation. It was allowed to be shown that Clarence bought the land and mortgaged it back instead of Hiero, because their differences would make a joint mortgage impracticable. It is sufficient to say as to this, that, even if Hiero had furnished the whole purchase money, and had procured the title to be taken in the name of Clarence, our statute would have prevented any trust from arising in his favor, in the absence of a writing. But where Clarence, the grantee, became personally bound on the purchase money, the difficulty would have been still more conclusive. It has been uniformly held under our statute that a parol agreement could not be of any avail to help out such a trust, for any purpose, and in the present case it is not claimed there was any resulting trust. It is placed on the actual agreement, which, if ever made—(and the rec-

ord does not go very far towards showing this very clearly,) —was a nullity.

The reason, however, for allowing this showing, seems to have been some idea that it had a further tendency to show that the agreement made between Hiero and Ann Fox was meant to cover this equity. This, again, is inadmissible for the same reasons. But the real question in the present case is only whether the contract with Ann Fox is a valid contract to bind defendant. If it is not his contract it gave her no such claim on the land as could at all violate the covenant of seizin.

It is not important to consider the question discussed on the argument, whether it can be shown by parol that the agreement executed in Hiero's own name, was in fact executed as agent under the power of attorney, and not as principal. We find no such parol evidence. But if there had been, it is certainly impossible to admit that a written document, however explainable, can be absolutely contradicted by parol. In this case it is not merely the agreement to convey this particular land that is involved. The writing explains fully its purpose, which is entirely in the interest of Ann and Hiero. It provides for their separation rights and the interests of their son. It is expressed to be in consideration of their mutual benefit and profit. It contains a covenant for paying up an existing mortgage, which agreement Clarence never authorized to be made against himself. It contains a personal covenant to furnish lumber and building materials, and reserves a right to substitute another homestead for the land in question. Ann agrees to occupy the premises and take care of the child, and relinquish all other property claims to Hiero, and to release her claim for support, and make him no further trouble, saving a right to sue for divorce.

This is the contract of Clarence or Hiero alone. It cannot be partly one and partly the other. And we think it can only be regarded as Hiero's contract. If so, the title was not affected, and there was no such breach of covenant as is sued on.

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

The other Justices concurred.

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JOHN GREUSEL, JR. v. COLLINS B. HUBBARD AND NORMAN S. CLARK.

Promissory notes—Joint makers and indorsers.

The payee of a note cannot sue, as a joint maker, one who has provisionally put his name on the back of it if he himself has afterwards indorsed the note and put his own name before the other.

The mutual rights of parties to negotiable paper are determined, in common-law actions, by their respective positions on the paper at the time it is negotiated and becomes the property of a bona fide holder.

Error to Wayne. (Jennison, J.) June 7.—June 20.

ASSUMPSIT. Defendant Hubbard brings error. Reversed.

Trowbridge & Prescott and *Wm. L. Carpenter* for appellant. Signing one's name on the back of a promissory note before the payee indorses it does not make one a joint-maker: *Clapp v. Rice* 13 Gray 403; *Prescott Bank v. Caverly* 7 Gray 217; *Dubois v. Mason* 127 Mass. 37; *Rey v. Simpson* 22 How. 341; *Good v. Martin* 95 U. S. 90; *Kirschner v. Conklin* 40 Conn. 77.

James H. Pound for appellee. A person signing or indorsing a promissory note, not payable to his order, prior to its being negotiated, is a joint maker thereof: *Higgins v. Watson* 1 Mich. 428; *Wetherwax v. Paine* 2 Mich. 555; *Rothschild v. Grix*, 31 Mich. 150; *Herbage v. McEntee*, 40 Mich. 337; *Moynahan v. Hanaford* 42 Mich. 329; *Sibley v. Muskegon National Bank* 41 Mich. 196; *Perkins v. Catlin* 11 Conn. 213; *Lewis v. Harvey* 18 Mo. 74; *Austin v.*

Boyd 24 Pick. 64; *Palmer v. Grant* 4 Conn. 389; *Allen v. Brown* 124 Mass. 77; *Union Bank v. Willis* 8 Met. 504; *Patch v. Washburn* 16 Gray 82.

CAMPBELL, J. On the 19th day of August, 1881, Clark obtained from a Detroit banking house the discount, for his personal benefit, of a promissory note, signed by himself as maker, payable to the order of John Greusel, Junior, and endorsed in the following order: "John Greusel, Jr. Collins B. Hubbard."

The note was protested. Greusel paid it, and now sues Clark and Hubbard as joint makers, putting his demand on the ground that Hubbard's name was actually signed before his own in point of time. The court below sustained this view and gave him a joint judgment. Hubbard brings error.

The evidence was that Greusel having refused to lend Clark money, but offering to become his endorser if Clark would procure another good endorser with him, the latter went away and came back with this note payable to Greusel's order, signed by Clark and endorsed by Hubbard. Greusel was satisfied, and signed his name above Hubbard's. It was in proof, also, that Hubbard declined to sign except as a second endorser. The two names were required by bank-discount usage.

We do not think there is any foundation for Greusel's present suit against Hubbard as a joint maker. What rights he may have against him as a fellow-surety are not now before us.

The doctrine on which the cases have held a signer on the back of a note to be a joint maker all rests on the same ground with the cases on endorsements generally. The rule is substantially uniform that the mutual rights of parties to be determined in common-law actions, must be determined by their respective positions on the paper at the time when it is negotiated and becomes the property of a holder. If, at that time, a name appears on the back which, from its position, would not bind the party signing it as endorser, he must respond in such other capacity as it indicates. If, on

the other hand, he signs in such a way as to make him an endorser, in the commercial-law sense, he is to be so treated. In this State an original signing on the back, if it is not a regular endorsement, becomes a joint making, because it fits no other form of liability. *Sibley v. Muskegon National Bank* 41 Mich. 196. As remarked by Judge Marston: "We hold him to be a joint maker of the note, because otherwise he could not be chargeable at all."

The liability attached to such a signing is not the same everywhere. But it everywhere rests on the principle applying to all contracts, that when they become operative and binding as executed and delivered obligations, each man is bound to the holder precisely as he purports to be bound.

If Mr. Greusel had himself been the money lender and advanced money on the note payable to his order with Hubbard's name on it, the case would have been within our previous decisions, because, the note having been delivered to him in that condition, Hubbard could only be liable as maker, and must be so treated. But by the agreement of all these parties this note was inchoate until all the parties had signed it, and was not intended to be negotiated with any less number. If Greusel had signed after Hubbard, the latter would have been liable to any bona fide holder as maker. Whether Greusel could have so held him, under the circumstances, we need not consider. But when Greusel deliberately chose to put Hubbard in the position of a second endorser, he could not then, by afterwards taking up the note from a holder, turn round and treat him, in a suit on the note itself, as having signed in any other character. This is the doctrine which seems to be necessary in dealing with negotiable paper. Each party must be held as on the face of the paper he has agreed to be held, and if there is any other obligation arising out of extrinsic facts, it cannot be enforced in a suit on the note as it reads, but must be enforced by some count of a different character. Our own decisions do not favor any other rule, and it is expressly held in good authorities, among which may be

mentioned *Rey v. Simpson* 22 How. 341; *Good v. Martin* 95 U. S. 90; *Clapp v. Rice* 13 Gray 403.

The judgment as to Hubbard is erroneous and must be reversed with costs of both courts.

The other Justices concurred.

PETER CALL v. RAYMOND O'HARROW.

Ejectment—Boundary for twenty years.

Ejectment will not lie for land adjoining plaintiff's premises but on the other side of a fence which for twenty years the adjoining owners and occupants have treated as the boundary between their lots, Comp L. § 7137.

Error to Muskegon. (Russell, J.) June 7.—June 20.

EJECTMENT. Defendant brings error. Reversed.

C. C. Chamberlain for appellant.

Cook, De Long & Fellows for appellee.

SHERWOOD, J. Call brought ejectment against O'Harrow for a strip of land about 12 feet wide, being a part of lot 10 in block 13, according to Newell's enlarged and corrected plat, in the city of Muskegon. Plea, general issue, with notice that the strip claimed adjoined lot 9, with which it had been enclosed by a fence understood to be on the line between the two lots by the owners and occupants thereof for more than 20 years before suit brought, and that defendant had had the peaceable, uninterrupted possession, occupancy and use of the strip claimed, cultivating it and growing fruit-trees thereon in connection with lot 9; that he entered into possession in 1858, under a written contract for purchase, and received his deed therefor in 1867; and

that the fence inclosing the disputed parcel with lot 9, was built upon a line agreed upon by one of plaintiff's grantors and the defendant.

The facts set up in the defendant's notice all seem to have been substantially proved; in fact, they do not appear to have been controverted; and the testimony further shows, without controversy, that the defendant's possession had always been under a claim of title which had never been brought in question until about the time of this suit, and that suit was commenced April 10, 1882. The original plat was introduced in evidence, and other testimony given showing that the disputed tract was a part of lot 10, as originally platted.

At the close of the trial the counsel for the defendant requested the court to charge the jury: "If the jury find from the evidence that the defendant entered into the possession of the land described in the plaintiff's declaration, in the year 1858 or 1859, under the impression that it was land for which he had contracted, and under such impression built and repaired its fences, planted fruit-trees and vines in and cultivated it, and that he has since that time, continuously to the commencement of this suit, been in such possession, quietly and peaceably cultivating and caring for the same without disturbance from any one," your verdict must be for the defendant. The court refused to so charge. The verdict was for the plaintiff and judgment was entered thereon.

We think the court erred in failing to give this request, and from the undisputed facts, as they appear to us in this record, the court might have very properly instructed the jury to return a verdict for the defendant. 2 Comp. L. 1871 p. 1973 § 7137; 2 Comp. L. 1857 p. 1403 § 5350;*

*Comp L. (1857) § 5350. No person shall commence an action for the recovery of any lands, nor make an entry thereupon, unless within twenty years after the right to make such entry or bring such action first accrued, or within twenty years after he, or those from, by or under whom he claims, shall have been seized or possessed of the premises, or shall have received the rents and profits of the same or some part thereof, except as hereinafter provided. (See next page.)

Price v. Hopkin 13 Mich. 318. The statute herein referred to is a limitation upon the right of plaintiff to bring this action, and ought to have been applied to the facts in this case.

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

The other Justices concurred.

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ROBERT J. BRADLEY v. EDWIN P. ANDREWS.

Affidavit for appeal from before a justice.

An appeal from justice's court will not be peremptorily dismissed on the ground that the affidavit for the appeal was sworn to before a notary who was an attorney in the case. The proper course would be to enter a rule nisi, instead.

Error to Lenawee. (Howell, J.) June 7.—June 20.

ASSUMPSIT. Defendant brings error. Reversed.

Westerman & Westerman and *Millard, Weaver & Weaver* for appellant.

Richard A. Watts for appellee.

Comp. L. (1871) § 7137. That after the thirty-first day of December, in the year of our Lord eighteen hundred and sixty-three, no person shall bring or maintain any action for the recovery of any lands, or the possession thereof, or make any entry thereupon, unless such action is commenced, or entry made, within the time herein limited therefor, after the right to make such entry or to bring such action shall have first accrued to the plaintiff, or to some person through whom he claims, to wit:

First. Within five years, where the defendant claims title to the land in question, by or through some deed made upon a sale thereof by an executor, administrator, or guardian, or by a sheriff or other proper ministerial officer, under the order, judgment, decree, or process of a court or legal tribunal of competent jurisdiction within this State;

Second. Within ten years, where the defendant claims title under a deed made by some officer of this State, or of the United States, authorized to make deeds upon the sale of lands for taxes assessed and levied within this State;

Third. Within fifteen years in all other cases.

GRAVES, C. J. Bradley sued Andrews before a justice of the peace, and the latter, being unable to attend in person, employed Mr. Westerman, an attorney of this Court, to appear and act for him. The attorney failed, however, to appear in season, and Bradley obtained judgment for damages, $231.34, and costs, $3.45. Andrews proceeded to appeal, and complied with all the statutory formalities. The court, on motion of the plaintiff, made a peremptory order dismissing the appeal, and the defendant alleges error.

The ground of dismissal was that the affidavit for appeal was sworn to before Westerman as notary public, it being claimed that his professional relation to the cause brought him within the statute of 1877, which enacts "that it shall not be lawful for notaries public who are attorneys and counselors at law, or solicitors in chancery, to administer oaths in causes in which they may be professionally engaged." Pub. Acts 1877, p. 3.

Our attention must be confined to the actual case presented. The question concerns an affidavit for appeal from the judgment of a justice, and it cannot be properly disposed of without giving due consideration to a specific provision relative to affidavits for that purpose. The chapter giving the right of appeal and prescribing the affidavit contains several provisions to obviate what would otherwise be absolute fatalities; and the purpose of the Legislature is very plain to secure the right, as far as practicable, against mere errors and mistakes. Among the provisions mentioned is the following: "No appeal shall be dismissed on the ground of a defective affidavit, nor because the same does not conform to the provisions of this chapter: provided, the appellant, his agent or attorney, shall make an affidavit which shall conform to said provisions." Comp. L. § 5453.

It may be argued, no doubt, that this provision is not applicable because it supposes something which amounts to an affidavit in point of law, though more or less defective; whereas the paper in question is not an affidavit at all, but only an unsworn statement. There is room for a

great deal of subtlety in reasoning in this direction, and it might be carried so far as to render the statute altogether useless. In any case of a fault so serious as to jeopard the appeal or destroy it, unless corrected, it might be argued that the supposed affidavit was void. But the question is a practical one, and it must be so dealt with, and the construction should be in harmony with the spirit of the legislation on the subject, and in furtherance of the remedy.

Where the party has acted in evident good faith, and has made what he intends and supposes to be a proper affidavit, but, by some mistake or inadvertence, has fallen into an error which makes the paper insufficient as it stands, what difference can exist whether the error is want of capacity in the officer, or consists in something else? The result must be just the same unless the error is cured. If there be any defect whatever which demands the aid of the statute, the affidavit is for that reason wholly futile, except as an excuse for a good one.

We have held that the omission of the affiant's signature from the affidavit, and the omission from the jurat of the signature of the officer, he being the justice whose judgment was appealed from, were not incurable defects. *Dickinson v. Simondson* 25 Mich. 113. And, acting on the same principle and in furtherance of the plain purpose of the statute, we decide that the present case was within the provision quoted.

We think the *Detroit & B. P. R. Co. v. Judge of Wayne Circuit* 27 Mich. 303, should have been followed, and a rule nisi entered instead of a peremptory dismissal. We entertain no doubt that the point is presented by the writ of error, and the result is that the order of dismissal must be reversed with costs, and the case remanded for further proceedings by due course of law.

The other Justices concurred.

JACOB WIDRIG, BY NEXT FRIEND v. LESTER B. TAGGART.

No recoupment against infant for breach of contract.

Recoupment is, in effect, a cross-action; and it cannot be enforced against one who, like an infant, could not be compelled by an independent action to respond for damages.

Adults who contract with infants do so at their own risk, as they are bound by their contracts while infants are not.

Error to Eaton. (Hooker, J.) June 7.—June 20.

ASSUMPSIT. Defendant brings error. Affirmed.

Cobb & Ely for appellant. Recoupment may be had against an infant suing for the value of his services: *Moses v. Stevens* 2 Pick. 332; *Thomas v. Dike* 11 Vt. 273; *Hoxie v. Lincoln* 25 Vt. 210; *Judkins v. Walker* 17 Me. 38; *Vehue v. Pinkham* 60 Me. 142.

Geo. W. Mead for appellee. In an infant's action for the value of his services no deduction can be made for his own breach of the contract of employment: *Whitmarsh v. Hall* 3 Den. 375; *Derocher v. Continental Mills* 58 Me. 217; *Robinson v. Weeks* 56 Me. 102; *Vent v. Osgood* 19 Pick. 575; *Gaffney v. Hoyden* 110 Mass. 137; *Meeker v. Hurd* 31 Vt. 642; *Dallas v. Hollingsworth* 3 Ind. 537; *Meredith v. Crawford* 34 Ind. 399; *Ray v. Haines* 52 Ill. 485; *Kearney v. Doyle* 22 Mich. 294.

GRAVES, C. J. The plaintiff, a minor of the age of nineteen, labored as a farm hand for defendant from the last of March until the early part of July, a space of eighty-five days, and brought this action to recover for the service. The defendant had previously paid him $45. The jury found in his favor, and allowed him $5.87, and the defendant brought error to this Court.

At the trial the defendant proposed to recoup damages by

showing that the labor sued for was performed under an express contract with the plaintiff to serve for seven months at $17.50 per month, and that he quit during the term and just before harvest; but the court ruled out the defense. The plaintiff admitted he was not entitled to recover at as high a rate as $17.50 per month; and the circuit judge told the jury that the measure of recovery would be what the services were worth at that season, after bearing in mind that the value might be less than in case the labor had been extended or continued through the summer. The value found by the jury was at the rate of $15.50 per month,—a sum less than the lowest value in the evidence. We discover no error.

The plaintiff, in consequence of his infancy, was not compellable to pay damages for withdrawing from his contract engagement. Recoupment is, in substance and effect, a cross-action, and unless the party whom it is attempted to subject to it could be compelled to respond for the damages by an independent action against him, he cannot be reached by recoupment; and such was the position of the plaintiff.

Persons who contract with minors must understand that they do so at the risk of greater or less disadvantage. The adult binds himself, but the infant does not. And the law has not found it possible to maintain these conditions of inequality, and at the same time secure to the adult the same measure of remedial right which obtains where both parties are of full legal capacity.

The judgment must be affirmed with costs.

The other Justices concurred.

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ORRIS S. FERRIS AND EPHRAIM W. WILCOX v. OLIVER M. WILCOX.

Contracts—Construction—Change in mortgage security—Deed absolute and defeasance—Right of possession.

Contracts must be construed in the light of their circumstances and by taking, as nearly as possible, the position occupied by the parties when they used the words, in which the contracts are expressed, to evidence their intent.

The mortgager of land that was worth considerably more than the mortgage debt, deeded it to the mortgagee and took back a contract of sale, which provided that in case of default in payment, the party of the first part should be entitled to immediate possession, and should also have a lien on the crops. *Held*, that the deed and contract together should be construed as a mortgage, amounting, only, to a change in the form of a security for a continuing liability, and that it was unimportant that the conveyance and defeasance were, as indeed, was formerly customary, separate instruments.

A deed absolute given by way of security conveys no right of possession, if the papers show that the relation between the parties thereto is that of mortgager and mortgagee, and that the mortgager is left in possession under an arrangement which amounts to a defeasance of the deed.

A mortgager of land is entitled to possession until foreclosure and does not forfeit this right by failure to make payments as stipulated.

Error to St. Joseph. (Pealer, J.) June 7.—June 20.

EJECTMENT. Defendant brings error. Reversed.

Corbin & Cobb for appellant. Where a deed and defeasance are executed together, they are considered one instrument: Powell on Mortgages 67, and have the effect of a mortgage: *Brockway v. Wells* 1 Paige 617; *Montgomery v. Spect* 55 Cal. 352.

William Sadler and *John B. Shipman* for appellee.

COOLEY, J. On October 19, 1878, defendant was the owner of a parcel of land containing thirty acres, situate in the county of St. Joseph. The land was encumbered by

two mortgages, then overdue and owned by the plaintiffs, amounting to seven hundred and eighteen dollars and seventy-six cents. On the day named defendant executed to the plaintiffs a warranty deed of the land, and it appears to be assumed in the case, though not directly proved, that the notes which the mortgages secured were given up and cancelled. On receiving the deed plaintiffs executed and delivered to defendant a contract, a copy of which is given in the margin.* Defendant, after receiving the contract, remained in possession of the land, and made payments on the contract as follows: $60, April 1, 1879; $65, August 16, 1879; $30, August 23, 1879. On October 1, 1880, $60 was due on the contract, and this not being paid, plaintiffs on

*This agreement, made this 19th day of October, 1878, between O. S. Ferris and E. W. Wilcox of the first part, and Oliver M. Wilcox of the second part, witnesseth, that said Ferris and Wilcox, in consideration of the covenants and undertakings on the part of said Oliver M. Wilcox hereinafter named, has bargained and sold, and by these presents does bargain and sell, unto said Oliver M. Wilcox, all that certain parcel of land in the township of Leonidas, county of St. Joseph and State of Michigan, described as follows: The west thirty acres of the west half of the south-east quarter of section number three, in township number five south, of range number nine west, for the sum of seven hundred and eighteen dollars and seventy-six cents, which the said party of the second part agrees to pay as follows: One hundred and eighteen dollars and seventy-six cents, with interest on same at ten per cent., on or before the first day of April next, and six hundred dollars on October first, 1882, with interest at ten per cent. per annum, payable on the first day of October of each and every year; and the party of the second part further agrees to keep said farm in as good order and as well fenced as it now is, and that he will pay all taxes and assessments chargeable to or upon said premises after the delivery to him of the possession thereof, and that if default be made by the party of the second part thereof, then the parties of the first part shall be at liberty to consider this contract as forfeited and annulled, and may re-enter possession of said premises, and that the crop or crops growing upon said premises at the time of said default, shall become the property of said party of first part for purpose of securing any sum of principal or interest that may be due upon this agreement.

And said parties of the first part on their part agree that on receiving the said purchase price, principal and interest at ten per cent., they will, at the cost of said O. M. Wilcox, execute and deliver to said party of second part a good and sufficient deed for conveying and affirming to him said premises.

It is mutually agreed that the party of second part shall have possession of said premises from and after the 19th day of October, 1878, and that the stipulations herein are to apply to and bind their heirs, executors and administrators and assigns of the respective parties.

E. W. Wilcox.
O. S. Ferris.
Oliver Wilcox.

the nineteenth of the same month served on defendant a notice to quit and surrender possession. This notice being disregarded, the present action was instituted.

In bringing this action the plaintiffs assume that the relation existing between themselves and the defendant is that of vendor and purchaser. Having become the owners of the land by the conveyance of the defendant, they have made with him, as they might have done with any other person, a contract to sell and convey to him the land for a sum named as the purchase price, upon condition that he pay the purchase price at times specified. Meantime, until default, they have allowed him to remain in possession. Default has occurred, and thereby the rights of defendant under the contract have come to an end, and plaintiffs, as owners of the land, have become entitled to possession. This was the view taken of the case by the circuit judge who gave judgment for the plaintiffs.

The defendant contends that this view is altogether erroneous. Having been mortgagor to the plaintiffs at the time the deed was given, he insists that his relation to the land was not changed by the transaction which then took place; that he did not cease to be debtor nor the plaintiffs to be creditors; that he simply changed, at the request of plaintiffs, the form but not the nature, of the security; that the conveyance, though absolute in form, was a conveyance by way of security and therefore necessarily a mortgage; that the contract purporting to be a contract of purchase was merely a defeasance of the contemporaneous deed; and that he, being mortgagor still, as he was before, is entitled to all the rights of a mortgagor, among which is the right to possession of the land until foreclosure. *Baker v. Pierson* 5 Mich. 456; *Caruthers v. Humphrey* 12 Mich. 270. This right can never be forfeited by failure to make payments as stipulated. *Batty v. Snook* 5 Mich. 231.

The controversy thus stated is not one which necessarily must be determined upon the face of the papers; if it was, the plaintiffs would unquestionably be entitled to retain their judgment. By the contract the defendant appears to be

purchaser, not mortgagor; and the surrender or cancelment of the notes would indicate payment and the determination of the relation of debtor and creditor. But these facts are not conclusive. All contracts are to be read in the light of the surrounding circumstances which are sometimes quite as significant as the words themselves, and we interpret the words by placing ourselves as nearly as possible in the position occupied by the parties when they made use of them to evidence their intent.

Looking, then, at the position of the parties when these papers were executed, we find the defendant debtor and mortgagor to the plaintiffs for a certain sum of money. He deeds them the land, and they surrender to him the evidences of his indebtedness. But they immediately give him a writing promising to reconvey to him the same land provided he shall pay to them a sum of money which corresponds exactly to the sum before owing. Meantime, until default in payment, they leave him in possession and enjoyment of the land as before. These are the facts which we are to have in mind when seeking the intent of these papers. But there is a further and very pregnant fact which is shown by the evidence of the defendant: the land, when conveyed to the plaintiffs, was worth several hundred dollars more than the sum due upon the mortgages. It is quite improbable that the defendant understood he was paying his debt by making an absolute surrender of property considerably exceeding in value its amount. But what is still more significant is that the plaintiffs, in the contract which they gave, have caused a provision to be inserted giving them a lien on such crops as defendants may raise upon the land, and contemplating a continuance of defendant's liability to them as a debtor even though the contract should be forfeited.

If, upon the face of the papers examined in the light of surrounding facts, there were any doubt of the intent, the law, taking notice of the advantage the creditor must always have over his debtor whose property he holds in mortgage, would give the debtor the benefit of the doubt, and hold his equity of redemption to be still existing. *Odell*

v. Montross 68 N. Y. 499; *Trucks v. Lindsey* 18 Iowa 504; *Montgomery v. Spect* 55 Cal. 359. But there is no such doubt in this case. It is entirely clear that the plaintiffs have simply given up certain papers which secured debts, and have taken a new paper for the payment of the same amount, and in the last paper, as much as in the first, they are creditors of defendant, holding securities from him and his absolute promise to pay what is owing them. *Peterson v. Clark* 15 Johns. 205; *Odell v. Montross* 68 N. Y. 399; *Pardee v. Treat* 82 N. Y. 385; *Colwell v. Woods* 3 Watts 188; *Reitenbaugh v. Ludwick* 31 Penn. St. 131; *McLaughlin v. Shepherd* 32 Me. 143; *Taylor v. Weld* 5 Mass. 109; *Nugent v. Riley* 1 Met. 117; *Crassen v. Swoveland* 22 Ind. 427; *Steel v. Black* 3 Jones (N. C.) Eq. 427; *Marshall v. Stewart* 17 Ohio 357; *Davis v. Hemenway* 27 Vt. 589; *Graham v. Stevens* 34 Vt. 166; *Caruthers v. Hunt* 18 Iowa 576; *Scott v. Meewhirter* 49 Iowa 487; *Howe v. Carpenter* 49 Wis. 697; *Clark v. Finlon* 90 Ill. 245.

But it is said that the decisions of this Court recognize the right of the grantee by absolute deed to possession of the land even when the deed is given by way of security. There is certainly a dictum to that effect in *Wetherbee v. Green* 22 Mich. 311, 321, and decisions in *Bennett v. Robinson* 27 Mich. 26 and *Jeffery v. Hursh* 42 Mich. 452. But those were cases in which the party claiming against the deed was entitled to the rights of a mortgagor in equity only. In none of them had the mortgagee given any writing in the nature of a defeasance, and in none could the debtor's right be shown except by proving an oral understanding. Nothing of the sort is necessary here, nor is any oral understanding relied upon. The papers show that the relation of mortgagor and mortgagee continues, and the contract of sale is nothing but a defeasance, and the mortgagor is in possession under the permission given by it. It is of no moment that the conveyance and defeasance are in two instruments, instead of being incorporated in one as is customary; the old method was

always to have two, and it is just as admissible now as it ever was.

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

The other Justices concurred.

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HENRY S. BENJAMIN v. ALEXANDER C. RICHARDS.

Recoupment—Separate transactions.

Where one makes several distinct purchases from another by different instruments but at the same time, they will be treated, for purposes of recoupment, as items of one transaction.

Error to Schoolcraft. (Steers, J.) June 7.—June 20.

ASSUMPSIT. Defendant brings error. Reversed.

W. F. Riggs for appellant.

Geo. K. Newcombe for appellee.

CAMPBELL, J. Plaintiff sued defendant for the price of a buggy sold him upon written order. Defendant under the general issue gave notice of a defense arising out of the non-delivery of a stage-wagon, purchased at the same time as the buggy. The chief dispute on the trial arose out of a controversy whether these articles had been purchased in one transaction, or in two independent transactions,—it being claimed by plaintiff that there could be no recoupment, because there was no connection between the bargains.

The business was all done at once, but separate orders were given for the buggy and the stage-wagon,—each having all the elements of a bargain. The court below held that, having put the orders in this distinct shape, they must be regarded as having no bearing on each other, so that a fail-

ure by plaintiff to do as he agreed about one, could not be shown in reduction of recovery on the other.

This does not seem to us correct. Usually, when several things are done together, the various documents are treated as belonging to one transaction. We can see no good ground for holding these purchases to have been disconnected which would not have a similar effect on any number of purchases of separate articles at distinct prices. There was some testimony tending to show that a single price was during the bargaining set upon the two vehicles. But whether this was so or not, they were in our judgment but two items of the same purchase, and ought not to be dealt with otherwise.

The court below erred in refusing to allow the recoupment to be considered, and in ordering a judgment for the full amount of plaintiff's claim.

The other points, being mere matters of practice, and not likely to come up again in the same shape, we need not pass upon.

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

The other Justices concurred.

JACOB BEHLER v. LEWIS A. DRURY.

Findings—Conversion by sheriff.

The assignment of error that there is no evidence to support the finding covers the whole group of facts found and is too broad where the finding contains some unquestioned facts.

Judgment in trover for conversion is sustained by a finding that defendant, in making levy as sheriff, upon wheat belonging to plaintiff's father-in-law, had taken away part of a common mass and put the rest in another bin after being warned by plaintiff that he had wheat there which must not be taken.

Error to Gratiot. (Hart, J.) June 7.—June 20.

TROVER. Defendant brings error. Affirmed.

James K. Wright and *L. T. Wright* for appellant.

C. J. Willett and *C. W. Giddings* for appellee.

GRAVES, C. J. This is a case of trover for twenty-six bushels of wheat, which was tried on appeal before the circuit judge without a jury, and decided in favor of the plaintiff. The wheat was taken by the defendant, as sheriff, on certain process against one Wilson, the plaintiff's father-in-law.

It was lying in a bin in Wilson's barn, along with a few bushels belonging to Wilson. There were three other bins, —one containing about 175 bushels, another about 10 bushels of poor red wheat, and still another which was empty. The plaintiff was about starting for a funeral when the defendant called and made known his business, and the plaintiff told him he had wheat there and that he must not take that. The defendant suggested that the parties for whom he was acting would have to be responsible, and he immediately went to the granary. When the plaintiff returned from the funeral he found about 45 bushels in the bin that was previously empty, but all the residue gone except the parcel of poor red wheat. The bin in which the plaintiff had left his wheat was empty.

A demand was made subsequently of the defendant, and he virtually admitted the taking, but referred to those for whom he acted as the persons to be looked to.

The whole evidence is set out in the bill of exceptions. The charges of error are—1st, that there is no evidence to support the finding; 2d, that the finding does not support the judgment; and 3d, that the conclusion of the circuit judge that there was a conversion was obtained by inference.

The first charge of error is too broad. It applies to the entire group of facts found, and not to any one in particular; and there are some which the defendant does not pretend

to question. But this is not very important, because neither of the facts is destitute of evidence. The second charge of error is not borne out. The finding is quite sufficient. The third objection has no force, either upon principle or in fact.

No error is shown, and the judgment must be affirmed with costs.

The other Justices concurred.

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OSCAR WEBBER ET AL. v. CHARLES G. BOLTE ET AL., BUILDING COMMITTEE OF ST. PETER'S CATHOLIC CHURCH OF IONIA.

Garnishment—Laches—Amendment of declaration as to initials—Contingent claims.

Pendency of a cause for fifteen months will not, of itself, warrant the dismissal of garnishment proceedings if the defence have raised no question of laches.

An amendment to a declaration on a promissory note so as to show the full name of defendant instead of the initial by which he had signed the note, should be allowed at any time if there is no question of identity.

Garnishment process cannot reach sums that will not come due until the performance of a contract at some future time; and claims for the payment of such moneys are not "contingent" within the reason of Act 256 of 1879, which permits contingent claims to be garnished.

Error to Ionia. (V. H. Smith, J.) June 8.—June 20.

GARNISHMENT. Plaintiffs bring error. Reversed.

A. A. Ellis for appellants.

Mitchel, Bell & McGarry for appellees.

COOLEY, J. Two of the questions which were argued in

this case seem to us to require no discussion, and we simply announce our conclusions.

1. The court should not have dismissed the case against the garnishees. The ground of the dismissal was delay in the proceedings. The case was begun September 16, 1881, and was being tried in December, 1882, when the trial judge on his own motion dismissed it, relying upon *Blake v. Hubbard* 45 Mich. 1, for his authority. The defense raised no question of laches, and it is shown that jury trial had been demanded, and it could not have been tried at the preceding August term because no jury was summoned for that term.

2. The plaintiffs should have been allowed to amend the proceedings against the principal defendant so as to show his name in full. He had been sued upon promissory notes in the name by which he signed them, J. V. Consaul. The plaintiffs proposed to amend by substituting Jacob for J. No question of identity was made, and the amendment should have been permitted at any time when it was found important.

3. Upon the main question we think both parties have been laboring under some misapprehension. Consaul had contracted with defendants for the erection of a church building which was to be completed November 1, 1881. The contract price was $8563. Payments were to be made as the work progressed, to the amount of ninety per cent. of the estimates, and the balance after completion. A forfeiture was agreed upon in the event that the work was not done by the time stipulated. When the suit in garnishment was begun defendants had made large payments, and they insist that nothing was then due from them to Consaul. Plaintiffs dispute this, but they claim that whether that was so or not, they had a right to hold the defendants for anything that might subsequently become owing to Consaul for work done by him under the contract. This claim is made under an amendment to the garnishment statute, which provides that the garnishee shall "be liable on any contingent right or claim against him in favor of the principal defendant."

Public Acts 1879, p. 270. Consaul's right, it is said, was contingent on his performing his contract; so that the case is within the very words of the statute.

The case may seem to be within the words of the statute, but it is not within its intent or reason. To permit garnishment upon such claims would be a most unwarrantable interference with the contracts of third parties, and must in many cases deprive them of substantial rights. It would be especially mischievous in the case of building contracts; for in a very large proportion of all cases of such contracts, the means for their fulfillment must be obtained from payments on the estimates; and if these can be garnished in advance, performance would be rendered impossible. This would be a great hardship to the debtor, but it would be quite as much so to his employer, who might have his arrangements broken up and serious injury inflicted without on his part any fault whatever.

No doubt the employer has a claim in such a case that the builder shall perform his contract; but the contingency on which money is to be payable is one depending on the subsequent earning of money. It is therefore a contingency depending on the will and ability of the debtor to earn money; a will which it may generally be assumed will not be exerted where earning is not to be followed by enjoyment. If there is a contingent claim here, so there is when a laborer hires out for a year to be paid at the end of the year; and his creditor may garnish the claim as soon as the hiring takes place. It would be a safe assumption that very little labor would be done under the hiring after the claim was garnished.

Whatever, if anything, was due at the time the process was served in this case, the plaintiffs are entitled to reach. The ten per cent. kept back as security for final performance might perhaps be considered a sum already contingently earned; but no question upon that can arise in this case, as it was conceded that Consaul did not complete his contract. The question of fact, then, is narrowed to this: whether the ninety per cent. to which Consaul was entitled

on the estimates, exceeded at the time this case was begun the amount which had been paid to him up to that time. Upon that question the parties are entitled to produce their evidence.

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

The other Justices concurred.

MATTHEW B. SMITH v. ANDREW ROSS AND DEWITT C. SPAULDING.

Contract—Common counts—Averment of demand—Costs.

Certain building contractors agreed that when they got the payment on the contract they would pay a certain sum to a specified person on an order from the painter. *Held* that an action for this money could not be brought until after the order had been presented or some demand made; and that if the agreement implied an obligation on defendants' part to take active measures to collect the money, the failure to do so must be averred.

Costs of both courts were allowed on reversal where recovery was had on a declaration which made out no cause of action.

Error to the Superior Court of Detroit. (Chipman, J.) June 8.—June 20.

ASSUMPSIT. Defendants bring error. Reversed.

J. T. Keena for appellants. Where time of payment is regulated by the occurrence of a certain event, recovery cannot be had without proof of its occurrence: *Breaux v. Lauve* 24 La. Ann. 179; *Snell v. Cheney* 88 Ill. 258; *Wolf v. March* 54 Cal. 228; *Drake v. Hill* 53 Ia. 37; *Wiggins v. Gill* 59 Tenn. 140; *Belcher v. Loveland* 119 Mass. 539; *Thompson v. Houston* 31 Tex. 610.

George W. Radford for appellee. A promise to pay money, when the promisor recovers his demands of a third

person, is absolute, though he has no such demands, or does not use reasonable diligence to collect them: *White v. Snell* 5 Pick. 425.

CAMPBELL, J. In this case defendants became assignees of a contractor named Spier, who had a contract to build some houses for one Dinan. After taking the assignment, they made arrangements to complete the houses, and plaintiff desired to get a job of painting for $200. Thereupon one J. A. Degaw, to enable him to do so, undertook to become security, as the parties termed it. Degaw entered into a written contract with defendants on the 21st of November, 1881, which is the only contract in writing bearing on the issue, and which is agreed to be the contract under which plaintiff sets up his rights. Plaintiff's name does not appear in it, although he was the intended painter.

By this paper Degaw agreed to become security for the painting of the houses, and to pay any damages for any delay,—"the same to be commenced to-day." Defendants agreed, upon the completion of said work and acceptance by the architect, "to pay to John A. Degaw the sum of two hundred dollars, when he presents order from painter, the money to be paid when A. Ross and Spaulding gets the last payment upon said contract." The buildings were accepted by the architect in January, 1882, when, if the contract had been properly performed, the land-owner, Mr. Dinan, was bound to pay. Dinan, however, refused to pay, and on defendants' suing him, tied up the case in chancery, and they did not get their pay till after this suit was commenced.

Neither Smith nor Degaw ever demanded payment before suit brought, and Smith never gave Degaw an order for payment.

Defendants asked the court to hold that no cause of action had been made out, which was refused. The court put the case to the jury that unless defendants used diligence to collect the debt from Dinan they were liable for principal and interest from such time as it might have been collected.

This was an action on the common counts entirely. The parties seem to make no question as to Smith being entitled to the money, and put the case on the other questions. And the defendants insist that inasmuch as the suit is for the price or value and there is no averment of negligence or failure on the part of defendants to do their duty, there is no ground of recovery strictly at all, and none to recover interest or costs, the principal being now arranged.

We think the defense is correct. A suit on the terms of the contract only entitled the party to be paid when defendants were paid. If, as is probable, this implied an obligation to take active measures to collect the money, the failure to do so should have been specially averred as well as shown, and this was not done. We have not ourselves discovered evidence of any lack of diligence. And it is also plain under the contract that inasmuch as they were to pay Degaw and not plaintiff, and then only on a written order, it is difficult to see how they could be held at fault, unless, by presentation of such order or other demand before suit, they were put under obligation to meet the claim.

As the record is presented to us the judgment should be reversed with costs and a new trial granted. As no cause of action at all was made out under the declaration, the defendants should have prevailed below and should have had costs there.

The other Justices concurred.

PIERRE A. SUTTON v. GEORGE W. GREENE.

Trover—Ownership of converted goods.

In trover by the claimant of goods seized on an execution against another, a verdict against the plaintiff is conclusive against his claim of ownership. And the actual owner can have no redress in this suit.

Error to Jackson. (Huntington, J.) June 12.—June 20.

TROVER. Plaintiff brings error. Affirmed.

Lewis M. Powell and *Thos. A. Wilson* for appellant.

Geo. H. Fay and *G. Thompson Gridley* for appellee.

COOLEY, J. Trover for the conversion of personal property by seizure and sale in January, 1880. The defendant at the time was township treasurer of the township of Norvell in Jackson county, and the plaintiff's case is that defendant seized and sold his personal property to satisfy a tax assessed against one Fielding. The fact principally contested on the trial concerned the plaintiff's ownership of the property sold. The admitted facts appear to be the following: Fielding, in April, 1879, was owner and occupant of a farm in Norvell, and sold the same to Chloe Sutton, the plaintiff's wife, who resided in Chicago. In May following, when the annual assessment was made, the land was assessed to Fielding, who had remained in possession. When the time arrived for the collection of the taxes, defendant went upon the land and seized the personal property for the conversion of which this suit was brought, claiming that it was the property of Mrs. Sutton and that he had a right to seize and sell it to satisfy the tax assessed against her land. The property seized had been the property of Mrs. Sutton, but plaintiff claims that it was assigned to him the preceding November. Defendant contested this, and the question of the assignment was submitted to the jury as a disputed question of fact.

It was also contended on the part of the plaintiff that the statute did not authorize defendant to make the levy, even if the property had still belonged to Mrs. Sutton. The circuit judge ruled otherwise, and this ruling is assigned for error. But we fail to perceive that it has any materiality. The circuit judge instructed the jury that if plaintiff was owner of the property at the time of the seizure, he was entitled to recover; and the verdict of the jury against him

is conclusive against his ownership. If the wife has any grievance for an unauthorized seizure and sale of her property, it cannot be redressed in this suit.

The judgment must be affirmed with costs.

The other Justices concurred.

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Charles M. Williams v. City of Saginaw.

Taxation of partnership property.

The charter of Saginaw provides for a board of review with jurisdiction of appeals from the assessment of city taxes, and makes its decision, on such appeals, final. Act 300 of 1875, p. 295. *Held*, that the question whether an assessment is excessive is not for the courts to try.

One is not bound to notice or to appeal from an assessment of personal taxes against him if jurisdiction to assess them did not exist.

Personal property belonging to a partnership is assessable in the locality where it is, if the firm has its place of business there.

Error to Saginaw. (Gage, J.) June 13.—June 20.

Assumpsit. Defendant brings error. Reversed.

D. P. Foote for appellant.

Wisner & Draper for appellee.

Cooley, J. It appears by the finding of facts that the partnership of which plaintiff is the survivor was lawfully assessable in the city for personal property for the year 1879, and that there was no want of jurisdiction in the comptroller in the assessment which he made. The question, then, resolves itself into this: whether the assessment was excessive. This is not a question for the courts to try: the statute has provided a board of review to which appeals may be taken, and has declared that its decision shall be final. Local Acts 1875, p. 295.

The plaintiff contends that inasmuch as the partners were not residents of the city they were not bound to take notice of any assessment made against them there, or to appeal from it if they deemed it unjust. This would be true if there were no jurisdiction to assess a personal tax against them there. *Bemis v. Boston* 14 Allen 366; *Fairbanks v. Kittredge* 24 Vt. 9; *Charlestown v. County Com'rs* 109 Mass. 270; *Judkins v. Reed* 48 Me. 386; *McCoy v. Anderson* 47 Mich. 502.

But this, we have seen, was not the case. The partnership had a place of business within the city, and personal property there which confessedly was taxable. Nothing more was necessary to render legal the assessment actually made. No fraud is charged against the comptroller, and it affirmatively appears, though the fact is not legally important, that the partnership was not assessed elsewhere for such of its personalty as was within the city.

The defendant is entitled to judgment on the finding with costs of both courts.

The other Justices concurred.

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WILLIAM EDWARDS ET AL. v. EDWARD D. NELSON AND FREDERICK BRAASTAD.

Findings—Weight of testimony—New promise to pay after discharge in bankruptcy.

The credibility of testimony and its sufficiency to support a finding are to be determined by the trial judge when he sits without a jury.

The moral obligation to pay a debt is a sufficient consideration for a new promise to pay it, even though any legal liability therefor has been suspended by discharge in bankruptcy.

A finding may be construed in connection with the pleadings, if these contain sufficient data to support it.

Error to Marquette. (Grant, J.) June 13.—June 20.

ASSUMPSIT. Defendant brings error. Affirmed.

Ball & Hanscom for appellant.

M. H. Maynard for appellee.

SHERWOOD, J. Plaintiffs, merchants doing business in Cleveland, Ohio, brought this suit against the defendants, who formerly did business at Ishpeming under the firm name of Nelson, Braastad & Co., in assumpsit, declaring upon the common counts, and gave notice under same that they would offer in evidence on the trial, a note, of which the following is a copy:

"$200. ISHPEMING, MICH., July 3, 1878.
Seven months after date we promise to pay to the order of Edwards, Townsend & Co., two hundred dollars, at Bank of Ishpeming, Mich. Value received.
NELSON, BRAASTAD & Co."

Defendant Braastad appeared and pleaded the general issue, accompanying the same with a denial of the execution of the note by him, under oath, and also gave notice under his plea that on the 1st day of May, 1878, the defendants were adjudicated bankrupts under the laws of the United States; that the indebtedness for which this suit was brought existed prior thereto; that on the 2nd day of May, 1878, in pursuance of the bankrupt law, defendants proposed a composition at 50 cents on a dollar with all the creditors, and the composition was accepted by the bankruptcy court; that on the 16th day of July, 1878, plaintiffs received 50 cents on the dollar of their demand against the defendants, in full satisfaction thereof, by force and effect of the bankruptcy law; that the note in this suit was made without his (Braastad's) consent, knowledge or authority, and upon no other consideration than the indebtedness of defendants discharged by the bankruptcy proceedings.

Trial was had before the court without a jury, and the plaintiff had judgment for $284.04, upon the facts and law as found by the court. The defendants alone were sworn upon the trial, and the case is now before us for

review upon the findings of the court, and upon a bill of exceptions containing all the evidence given in the case.

The court finds, among other things, that the defendant firm made the note in question for goods purchased of the plaintiffs at Cleveland, Ohio, about the 13th of April, 1878; that the purchase at that time amounted to $412.40; that ten days thereafter defendants filed their petition to be adjudicated bankrupts, and were so adjudicated on the first day of May following; that the goods reached the depot about the time the petition was filed, and that, after a few had been removed by defendants, it was agreed between them and the plaintiffs no more should be taken to the store by defendants; that the goods were not included in the schedule of the bankrupt's assets, but were in the indebtedness; that when they took the remainder of the goods to the store they promised to pay the full amount of indebtedness for them, and afterwards gave the note in question in part payment therefor.

The first, second, seventh and eighth assignments of error are all based upon the want of testimony to support the findings, or omissions to find referred to. Without going into a detail of the testimony here, it is sufficient to say that an inspection of the bill of exceptions discloses testimony given upon all the points included in the findings tending to support them. It was for the court to determine the credibility of the testimony and its sufficiency.

There was no error in the court's refusing to find as requested by defendants' counsel in their first and fifth requests.* This disposes of the defendants' fifth and ninth assignments of error. It is alleged as error that the court refused to find that a new promise to pay the discharged debt under bankruptcy proceedings must be assented to by Braastad to bind him. The court so found expressly, and

* These requests were:

1. That under the testimony of the plaintiff's witness, the alleged promise to pay the plaintiff's debt in full, and the note in suit given in pursuance of such promise was in fraud of the Bankrupt Law and void.

5. The plaintiff has failed to show a new promise by defendant Braastad to pay the debt compromised and settled under the bankruptcy proceedings, and said defendant is entitled to a judgment in his favor.

necessarily so again when he found defendant assented to the giving of the note.

The remaining assignments all relate to the question of consideration for the note, claiming that the promise, though in writing, to pay the balance of the compromised account in the bankruptcy proceeding, was insufficient. It appears that the defendants continued their business at Ishpeming the same, and in the same name, after as before the institution of the bankruptcy proceedings; and we are unable to discover from the findings or in the testimony that any other matter or thing entered into the consideration for said note, except the goods received by the defendants.

The Bankrupt Law, it is true, suspends the right of action on the balance of a debt partially paid under its discharge of the debtor, but the indebtedness remains the same after as before the discharge, and the moral obligation to pay still continues, and requires payment to be made by the debtor whenever he is of sufficient ability so to do. We know of no law which prevents a man from voluntarily paying his honest debts, or securing the payment thereof, if he desires, although the right of creditors to enforce payment may by the law be suspended; and this moral obligation to pay has always been held a good consideration to support a written contract for payment in a case like the present.

Counsel for defendants insists that the finding of facts does not show how much was due on the note. The finding must be construed in connection with the pleadings in the case, which contain a copy of the note. From these all the data necessary for the court to consider in determining the amount due upon the note appear fully, and this is sufficient. *Bell v. Ardis* 38 Mich. 609.

The judgment must be affirmed with costs.

The other Justices concurred.

HERMAN PISTORIUS v. SAGINAW COUNTY SUPERVISORS.

Circuit court commissioners' fees.

Act 214 of 1879 fixing the fees of a circuit court commissioner in criminal examinations applies where he takes the evidence in person. Where it is done by a stenographer the board of supervisors are the final judges of proper compensation.

Mandamus. Submitted June 19.—Denied June 20.

W. S. Tennant for the writ.

Frank E. Emerick against.

PER CURIAM. A majority of the Court are of the opinion that the statute of 1879, prescribing the fees of circuit court commissioners on criminal examinations, refers to cases where the evidence is taken by the officer in person, and does not apply to cases where the service is mainly vicarious. Here the commissioner did not take the evidence in person, but employed a stenographer to do it. What should be paid for what was done was therefore not dependant on the tariff of rates in the fee bill, but was such amount as would be a reasonable recompense, and of this the board of supervisors had the lawful right to judge, and their decision is controlling.

Writ denied.

HORATIO N. HOWARD v. THE FIRST PRESBYTERIAN CHURCH AND SOCIETY OF PONTIAC.

Statute of limitations—Cause of action.

If B borrows from A to lend to C, the running of the statute of limitations on C's debt to B is not postponed to the date of the enforcement of B's liability to A.

Error to Oakland. (Stickney, J.) June 12.—June 22.

ASSUMPSIT. Defendant brings error. Reversed.

J. W. Robbins and *C. I. Walker* for appellant.

A. C. Baldwin for appellee. Where one borrows money for the use of another as the latter's security, the statute of limitations does not run against his claim for reimbursement until he himself has been compelled to pay: *Odlin v. Greenleaf* 3 N. H. 270; *Ponder v. Carter* 12 Ired. 242; *Crosby v. Wyatt* 23 Me. 156; *Thompson v. Stevens* 2 N. & McC. 493; *Scott v. Nichols* 27 Miss. 94; *Wesley Church v. Moore* 10 Penn. St. 273; *Maxey v. Carter* 10 Yerg. 521; *Lowndes v. Pinckney* 1 Rich. Eq. 155; *Sherwood v. Dunbar* 6 Cal. 53; *Preslar v. Stallwarth* 37 Ala. 402.

GRAVES, C. J. This action was brought on the 5th of April, 1881, to recover $388, alleged to have been paid to the defendant's use, by the plaintiff, on the 6th of April, 1875. The plaintiff recovered a verdict for the amount, with interest, and the defendant brings error. The defendant urged several reasons against the maintenance of the action, of which one was that the claim was barred by the statute of limitations.

It appears that in March, 1870, the society passed a resolution appointing the plaintiff, together with A. C. Baldwin, E. W. Peck, Goodman Jacobs, D. C. Kellam, and A. A. Lull, a committee to proceed to build and furnish a new church, according to their best judgment; and that, pursuant to this initial step, a church edifice was subsequently erected, which has now been occupied by the congregation for many years.

The work of building proceeded slowly, and changes occurred in the committee. As usual in such cases, the scheme contemplated that the necessary means would be contributed, but, as often happens, that resource was neither as prompt nor prolific as the exigency required. In January, 1872, the fund was exhausted and a small debt existed. A

pause ensued; the work of building stopped. Mrs. Peck and Mrs. Howard, the plaintiff's wife, came forward and urged that it was out of character to suffer a suspension of the building for lack of funds, and it was agreed between them and their husbands, and Mr. Baldwin and Mr. Lull, to raise what money was then necessary on their joint notes. Accordingly, those persons, in the course of a few weeks, made three $1000 notes and obtained the money upon them at the banks in Pontiac, and the proceeds were immediately put into the building fund and subsequently applied accordingly. These notes were individual obligations to the banks, and they were several times renewed. The last renewals were at length sued, and judgment against the makers was obtained on the 12th of October, 1874. A portion of it was paid by contributions, but a balance remained of $1552, and this was divided into four equal parts, of $338 each, of which one was paid by Mr. Peck, one by Mr. Lull, one by Mr. Baldwin, and the remaining quarter by Mr. or Mrs. Howard. The jury found that it was by Mr. Howard.

There was no evidence of any specific corporate act after 1870 bearing at all on the subject-matter of this contention. Subsequent to the resolution of that date we find no fact connecting the legal entity made defendant with the transaction on which the plaintiff grounds its liability. But we find testimony of various gatherings of the congregation and of portions of the members where there were consultations in regard to the debt held by the banks and other indebtedness, and in regard to obtaining means to pay the different demands, and it appears by this testimony that on some, at least, of these occasions the persons participating appeared to consider the debt going to the banks as one to be discharged either by the corporate society or by the congregation. The whole of this portion of the case is very vague, and there is reason for saying that it affords no clear legal indication as to what opinion was entertained in respect to the existence or assumption of liability by the defendant.

The exact position of the plaintiff is thus explained in

his brief: "The trustees and committee had authority to contract a debt to build the church, in any way they saw fit; they could extend the time of payment of that debt; and they did not, nor did either of them, have any claim against the church till payment was made, and the corporate liability of the church began. That prior to such payment no liability attached, and so far as this claim is concerned it was recognized as a church debt after it was in judgment. In other words, they acknowledged the debt."

We fail to discover evidence to countenance this theory. If the record contains anything favoring the notion that the defendant was ever at any time under a legal liability to the plaintiff, it must have been as early as 1872, and on account of the advance which was then made.

At that time it was that the defendant was the recipient of the money which the plaintiff had hired on his own credit from the banks. The transaction with defendant, if not a gift, was a loan, and an obligation immediately arose to repay it. The facts are wanting to give the arrangement the character claimed for it. Had the plaintiff called for repayment it could not have objected that it was only bound to repay after the plaintiff had himself paid those from whom he had borrowed. The circumstances would not have justified the position.

Is the case taken out of the statute of limitations, as intimated in the proposition quoted from the brief? We think not. We find no evidence that the corporation has, at any time within six years next prior to the suit, either acknowledged or recognized the note or judgment as a debt of its own. The defendant was entitled to have its second request submitted.* There are other serious points in the record, but it is needless to discuss them.

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*This was as follows:

"That if the proceeds of the original notes given February 3d, March 12th and April 17th, 1872, of which the notes of March 17th, and May 3d, 1873, upon which the judgment in evidence was obtained, were paid over at the time of their discount, about the time they were made to the treasurer of the building fund of the defendants, and used by them in the construction of their church, then the defendants, if liable to the makers of the said several notes, became liable at once, and the plaint-

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

The other Justices concurred.

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LEWIS M. POWELL v. JACKSON COMMON COUNCIL.

Title of statute—Enacting clause—Notice of election—Amendments to bills.

"An act to amend the charter of the city of Jackson," changed the office of city attorney from one of appointment to one of election. *Held* that its title sufficiently complied with the constitutional requirement that the purpose of every act shall be expressed in its title.

A statute is not invalidated by the fact that the bill, when introduced, had no enacting clause.

Statutory notice of an election was held to be dispensed with, in the particular instance, where the statute was so amended as to require the election of an officer not previously provided for but the amendment went into effect too late to give the statutory notice before the election.

Amendments made to a bill after the expiration of the period limited by the Constitution for the introduction of new bills, are not invalid for that reason if they indicate no purpose to violate the Constitution and do not exceed the proper limits of legislative discretion.

Mandamus. Submitted June 12. Granted June 22.

L. M. Powell in person, and *T. A. Wilson* for relator.

City Attorney *Chas. A. Blair* for respondent.

SHERWOOD, J. Under the charter of the city of Jackson, as it stood previous to March 28, 1883, it was the duty of the common council, on nomination made by the mayor of the city, to elect a city attorney. On the 28th day of March, by an amendment of the charter, which took effect on that day, the office of city attorney became elective.

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iff's right accrued immediately and there can be no recovery in this action because of the statute of limitations."

The provision under which the change was made reads as follows: "Section 1. The following officers shall be elected from among the electors of said city, viz: A mayor, recorder (who shall be school inspector), treasurer, city attorney, two school inspectors, and four constables."

At the annual charter election, held April 2, 1883, the relator was a candidate for the office of city attorney, and received a majority of the votes cast for that office, as shown by the returns made from the various voting precincts in the city to the recorder of the city.

The notice of the annual election in the city for officers in 1883 did not contain the office of city attorney, there not being sufficient time to include the same after the passage of the amendment of the charter and before the election was to take place.

The common council of the city, whose duty it was to canvass the votes given for the various candidates, as returned from the several wards, refused to canvass or declare the votes given for the relator, and he now prays that the council may, by writ of mandamus, be required to determine and declare the result of the election for city attorney, and that the recorder of the city make and file the proper certificate of such determination, as required by the charter.

There were several questions presented in the briefs of counsel on both sides which cannot be considered on this motion, and are, therefore, not further alluded to. It is claimed by respondents that the title to the bill amending the charter providing for the election of city attorney was defective in not sufficiently stating the object of the bill, and that the bill contained no enacting clause, and the amended charter was, therefore, unconstitutional and of no effect. Upon these points this case comes within the ruling of this Court heretofore made, and which is against the position taken by respondents. *People v. Mahaney* 13 Mich. 481; *Kurtz v. People* 33 Mich. 279; *People ex rel. Chapoton v. Common Council of Detroit* 38 Mich. 636; *People ex rel. Comstock v. Judge Sup. Ct. Grand Rapids* 39 Mich. 195; *People v. State Insurance Co.* 19 Mich. 398.

By the provisions of the revised charter of the city, passed in 1875, notice of the time and place of holding election and the officers to be elected is required to be given by the recorder of the city eight days before the election, by posting up such notice in three public places in each ward in which the election is to be held, and by publishing a copy thereof in a newspaper published in the city. This notice was not given or publication made, as required by the statute. The amended act failed to provide for any notice of the election of city attorney to be given; and it is claimed by respondent, by reason of the impossibility to give the notice required under the old charter, no valid election of city attorney could be had. The requirement of notice was omitted.

It was competent for the Legislature, by its enactment, to dispense with all notice whatever of the election of this officer, and in this case it seems to have done so; at least, for the election in 1883.

The writ must be granted in accordance with the prayer of the relator, and with costs to the relator.

CAMPBELL, J. concurred.

COOLEY, J. I concur in the result. The case of *People v. Mahaney* 13 Mich. 481, and other cases previously decided by this Court, dispose of the objection to the title of the bill. The argument that the bill as passed had been so amended after the time for the introduction of new bills had gone by as to have become substantially a new bill, and that to sustain the act would be to sanction an evasion of the Constitution, is plausible but not sound. The amendments were extensive, but they indicate no purpose to violate the Constitution, or to exceed the proper limits of legislative discretion. *Pack v. Barton* 47 Mich. 520.

The principal question in the case is whether the election could be valid which took place with only such notice as is implied from the law itself. I think it could be and was. The necessity for the publication of notice comes from the statute, and when that is so changed as to provide for an

election within a time so short that the notice previously required is impossible, the amendment must be understood as doing away with the requirement for that election.

GRAVES, C. J. concurred.

BALFOUR LEE v. CHRISTOPHER BURRELL.

Contract to pay debts—Damages.

The measure of damages for the failure to perform a contract to pay joint debts owing by the parties thereto, and to obtain the discharge of a mortgage on their property, is the full amount of the debts if the original liability therefor has been enforced. Whether it would make any difference if the enforcement had been in fraud of defendant's rights—*Q.*

Error to Alpena. (Emerick, J.) June 12.—June 22.

ASSUMPSIT. Defendant brings error. Affirmed.

Clayberg & Sleator for appellant.

J. D. Turnbull for appellee.

CAMPBELL, J. Lee sued Burrell for failure to perform a contract whereby he agreed to pay certain joint debts, and to have a mortgage discharged. On the trial these enumerated debts were shown to have passed into judgment, and the mortgage to have passed into decree. There was also evidence of sales of property in each of the cases.

Objection was made to some general questions concerning the extent of the joint obligations, but inasmuch as the recovery was confined to the three debts which had passed into judgment or decree, and as to these it is not claimed the proof was deficient, those questions are of no consequence.

The only tangible question supposed to be presented is whether there was not evidence that defendant had in fact aided in paying the claims out of his own property to such

an extent as to reduce the right of recovery. The sale under the decree and judgments is not shown to have been in any way unusual, nor to have been made in fraud of Burrell. Under the agreement the debts should have been paid without any sale, and an action arose for the full amount. *Hall v. Nash* 10 Mich. 303; *Pratt v. Bates* 40 Mich. 37. The creditors collected these claims, and made no deductions. If Burrell had paid them, Lee would not have had his property disturbed at all. It cannot concern Burrell that his friends purchased it, or that it has since been made a source of profit by their generosity. There is no evidence tending to show that any steps were taken by any one in fraud of Burrell.

It is not clear that had such a claim been set up he could have availed himself of it under the pleading. As we read the declaration it counts for a breach and for damages on the failure to pay the debts and have the mortgage released. For these, under the decisions above mentioned, the plaintiff was entitled to recover the full amount of each debt, and that is precisely what the court allowed him to recover. There is certainly reason to consider any special defenses not amounting to release or payment as requiring notice. The allegations in the declaration concerning the sale of particular property of Lee do not constitute the entire claim, but are only explanatory of the proceedings to judgment and execution which followed defendant's failure to pay the claims. The claim of damage covers the entire breach, and is in the sum of five thousand dollars. The allegations of sacrifice of Lee's property might, perhaps, serve by way of aggravation, if such a claim could be maintained, upon which we need not now spend any time, because no recovery was asked or allowed on any such basis. But there is nothing whatever to authorize any reduction of the face of the judgments and decree, or to show that Burrell or his property paid anything that entitles him to such reduction.

The judgment was correct, and must be affirmed with costs.

The other Justices concurred.

HENRY BEEBE v. SETH A. L. WARNER AND GORDON H. DAVIS.

Assumpsit—Triangular agreement.

N agreed to deliver lumber to W. & D. Both parties to this agreement afterward agreed with B that payment for the lumber should be made to B. *Held,* that on N's fulfilment of the agreement for delivery, B could maintain assumpsit under the later agreement, for an unpaid balance of the payment due on delivery.

Error to Alpena. (Emerick, J.) June 13.—June 22.

ASSUMPSIT. Defendants bring error. Affirmed.

Clayberg & Sleator for appellants.

J. D. Turnbull and *J. C. Shields* for appellee.

GRAVES, C. J. A former report of this case will be found in 47 Mich. at page 435. The plaintiff has a second time recovered, and again the defendants allege error.

On the last trial the right to recover was rested by the judge on the transaction at the bank. And under his instruction, which the evidence fully warranted, the jury must have found that it was mutually agreed between these parties and Naylor that the latter should make delivery as agreed between him and defendants, and that the latter should pay the agreed price to the plaintiff; and further, that Naylor made the delivery and the defendants paid $200 of the consideration and refused to pay the residue. At the same time two items sought to be deducted were thrown out. The conflicting claims of the parties were fully and clearly submitted, and we discover no error. It would serve no useful purpose to repeat the record or enlarge upon the case.

The judgment should be affirmed with costs.

The other Justices concurred.

JOHN GALLOWAY v. JOHN T. GIBSON.

Arbitration and award.

An arbitration which does not conform to statutory requirements may nevertheless be good at common law; and a common-law action will lie to enforce it if it fairly disposes of matters in dispute and leaves nothing open to controversy.

Parties to an amicable settlement may be presumed to intend what they carry out; and if it is lawful and practicable a mere mistake as to statutory requisites should not prevent its enforcement in some suitable proceeding.

Error to Wayne. (Full Court.) June 13.—June 22.

ASSUMPSIT. Plaintiff brings error. Reversed.

Stewart & Galloway, for appellant, cited in support of the right to recover on the award, as one good at common law, *Burnside v. Whitney* 21 N. Y. 148; *Diedrick v. Richley* 2 Hill 271; *Wells v. Lain* 15 Wend. 99; *Cope v. Gilbert* 4 Den. 347; *French v. New* 20 Barb. 481; *Day v. Hooper* 51 Me. 178; *Hamilton v. Hamilton* 27 Ill. 159; *Low v. Nolte* 15 Ill. 368; *Weinz v. Dopler* 17 Ill. 111; *Eisenmeyer v. Sauter* 77 Ill. 515; all intendments and reasonable presumptions will be made in favor of an award of arbitrators: *Bush v. Davis* 34 Mich. 190; *Smith v. Milnor* 1 N. J. L. 16; *Karthaus v. Ferrer* 1 Pet. 222; *Haywood v. Harmon* 17 Ill. 477; *Strong v. Strong* 9 Cush. 560; *Ott v. Schroeppel* 5 N. Y. 482; *Kendrick v. Tarbell* 26 Vt. 416; *Armstrong v. Armstrongs* 1 Leigh 491; *Dolph v. Clemens* 4 Wis. 181; *Green v. Franklin* 1 Tex. 497; *Carter v. Sams* 4 Dev. & B. [N. C.] L. 182; *Kimble v. Saunders* 10 S. & R. 193; *Roloson v. Carson* 8 Md. 208; *Fryeburg Canal v. Frye* 5 Greenl. 38.

Alex. D. Fowler for appellee. A submission and award cannot be sued on as at common law, if they were made under a statute and were invalid: *Deerfield v. Arms* 20 Pick. 480; *Clement v. Comstock* 2 Mich. 361; *Allen v.*

Chase 3 Wis. 249; *Estep v. Larsh* 16 Ind. 82; *Williams v. Walton* 9 Cal. 142; *Sargent v. Hampden* 32 Me. 78; *Benjamin v. Benjamin* 5 W. & S. 563.

CAMPBELL, J. Galloway, as assignee of Margaret Burrowes, brought suit before a justice, on an award, and recovered judgment, which was reversed on certiorari. He now brings error to review this reversal. Although several formal matters were alleged in the affidavit for certiorari, the only question of real substance was whether the arbitration was a good common-law arbitration on which suit could be brought.

The form of the arbitration proceedings came before this court in *Gibson v. Burrows* 41 Mich. 713. We were then compelled to hold that in the absence of certain statutory requisites it could not be treated as a good statutory arbitration so as to warrant the statutory judgment. It is now claimed that it cannot be treated as a common-law arbitration because the parties intended to make it statutory.

This is not a very manifest deduction. It might be a sufficient answer to it to say that in law parties may fairly be supposed to intend to do the very thing which they execute; and if they mistake the law, and are disappointed under that mistake, they should not be prevented from carrying out their agreement, if lawful and practicable, in some other way.

The case before us presents an agreement for the settlement of a controversy by the unaided judgment of arbitrators in a very judicious manner, and the arbitrators fully carried it out and gave their award in dollars and cents. Nothing else remained to be done except to enforce it, if not paid. We cannot see that after this settlement, which left nothing whatever open to controversy, the mere question whether judgment should be entered by one process or by another process should interfere to hinder the completion of this settlement. All that the parties desired on the merits has been accomplished. To hold that they should now be compelled to litigate over again before the courts what they

desired to avoid litigating, would be to trifle with the substantial interests of parties, and to discourage amicable settlements which the law ought to favor.

The circuit court erred in reversing the judgment, and the justice's judgment must be affirmed and the circuit judgment reversed, with costs of all the courts.

The other Justices concurred.

ANNIE HARDIN v. THE TRUSTEES OF THE SECOND BAPTIST CHURCH OF THE CITY OF DETROIT.

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Religious societies—Expulsion from the church.

A religious society incorporated by voluntary association under Comp. L. ch. 108 is a temporal body and distinct from the church organized from it, with which it has nothing to do except as it provides for its wants.

An action in damages for expulsion from the church will not lie against the religious society connected therewith, even though the church be an integral part of the society.

Error to Wayne. (Jennison, J.) June 13.—June 22.

CASE. Plaintiff brings error. Affirmed.

Sylvester Larned for appellant.

Wilkinson, Post & Wilkinson for appellee.

COOLEY, J. The preliminary objection to the maintenance of this action is so unmistakably fatal that there can be no occasion or excuse for considering any other.

The plaintiff, who, previous to February 2, 1881, was a member in good standing of the Second Baptist Church of Detroit, brings suit against the defendant to recover damages for having been on that day unwarrantably and without trial upon charges expelled from membership. The

suit is against the corporate body known in law as "The Trustees of the Second Baptist Church of Detroit," and which was organized by voluntary association under authority conferred by the Revised Statutes of 1838. The provision contained in that Code is substantially the same which has always existed in this State, and which is simple and easily understood. Persons desirous of forming themselves into a religious society sign articles of association for the purpose, agree upon a name, elect trustees and put their articles on record when duly perfected. They thereby become a corporation by the name agreed upon, and may take, hold and convey property and exercise the ordinary functions of corporate bodies. The associates are not necessarily professors of any particular belief or faith, or members of any church; and corporate succession is kept up by conferring the privileges of corporators on all who regularly attend worship in the society and contribute to its support. And the trustees who are to manage the temporal affairs of the corporation may or may not be church members.

Connected with the corporation the statute contemplates that there will be a church, though possibly this may not be essential. In this case there is one. The church has its members who are supposed to hold certain beliefs and subscribe some covenant with each other if such is the usage of the denomination to which the church is attached. The church is not incorporated, and has nothing whatever to do with the temporalities. It does not control the property or the trustees; it can receive nobody into the society and can expel nobody from it. On the other hand, the corporation has nothing to do with the church except as it provides for the church wants. It cannot alter the church faith or covenant, it cannot receive members, it cannot expel members, it cannot prevent the church receiving or expelling whomsoever that body shall see fit to receive or expel. This concise statement is amply sufficient to show that this suit has no foundation. The corporation is sued for a tort which it neither committed nor had the power to prevent, and which has occurred in a proceeding where the

interference of the corporation would have been an impertinence.

But it is said that the church is an integral part of the corporation; or rather that it is the corporation in its spiritual capacity. Its being an integral part of the corporation proves nothing: counties, towns and school-districts are integral parts of the State, but the State is not for that reason liable for their torts. And as to spiritual capacity, the corporation has none; it is given capacity in respect to temporalities only. If the corporation had assumed to expel this plaintiff from the church, she might treat its action with contempt. But as she makes no complaint of wrongful corporate action, we must assume that the corporation has never invaded her rights. If the church has done so, the church alone is culprit.

The distinction between church and corporation in these cases is sufficiently explained in the following authorities: *Baptist Church v. Witherell* 3 Paige 296: s. c. 24 Amer. Dec. 223; *Lawyer v. Cipperly* 7 Paige 281; *Robertson v. Bullions* 11 N. Y. 243; *Bellport v. Tooker* 29 Barb. 256, and 21 N. Y. 267; *Burrel v. Associate Reformed Church* 44 Barb. 282; *Miller v. Gable* 2 Denio 492; *Ferraria v. Vasconcellos* 31 Ill. 25; *Calkins v. Cheney* 92 Ill. 463; *Keyser v. Stansifer* 6 Ohio 363; *Shannon v. Frost* 3 B. Mon. 253; *German etc. Cong. v. Pressler* 17 La. Ann. 127; *O'Hara v. Stack* 90 Penn. St. 477; *Sohier v. Trinity Church* 109 Mass. 1; *Walrath v. Campbell* 28 Mich. 111. See also *Hale v. Everett* 53 N. H. 9.

The judgment must be affirmed with costs.

The other Justices concurred.

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FRANK B. SPEAR v. WILLIAM H. ROOD, GARNISHEE OF JOHN E. WARD.

Garnishment—Transfer to official bail—Fraud.

Garnishment process will not reach property transferred absolutely and in good faith by a public officer to a surety on his official bond to enable the latter to secure his own and his principal's liability.

The sufficiency of the consideration for a conveyance may bear on the honesty of the grantor's intent; but excess in value over the amount of consideration is not conclusive evidence of fraud.

Fraud in making a conveyance must be found as a fact before the conveyance can be avoided as fraudulent.

Error to Marquette. (Grant, J.) June 13.—June 22.

GARNISHMENT. Plaintiff brings error. Affirmed.

Ball & Hanscom for appellant.

E. E. Osborn for appellee. A debtor has the right to prefer one or more of his creditors, and pay them in full to the exclusion of all others: *Clarke v. White* 2 Pet. 178; *Blakey's Appeal* 7 Penn. St. 449; *Uhler v. Maulfair* 23 id. 481; *Hopkins v. Beebe* 26 id. 85; *Nostrand v. Atwood* 19 Pick. 281; *Wakeman v. Grover* 4 Paige 23; *Hollister v. Loud* 2 Mich. 309; transfers of some specific article, or one or more descriptions of property directly to some favored creditor and for his exclusive benefit, are valid even where preferences are forbidden: *Seymour v. Wilson* 19 N. Y. 417; *Hessing v. McCloskey* 37 Ill. 341; *Archer v. O'Brien* 7 Hun 146; *York County Bk. v. Carter* 38 Penn. St. 446; an assignment directly to a particular creditor for the payment or security of his debts is not "an assignment for the benefit of creditors:" *U. S. v. McLellan* 3 Sumn. 345; *Leitch v. Hollister* 4 N. Y. 211; where preferences in assignments are prohibited, the prohibition is confined to cases of general assignments where the preferences are given by the assignment itself and

not extended to specific transfers of property in payment or security of some particular debt: *Meredith Mfg. Co. v. Smith* 8 N. H. 347; *Henshaw v. Sumner* 23 Pick. 446; it is bad faith that makes a conveyance void as to creditors: *Holbird v. Anderson* 5 Term 235; *Wood v. Dixie* 7 Q. B. 892; *Hall v. Arnold* 15 Barb. 599; sureties and endorsers can be preferred as well as actual present creditors: Burrill Assignments, §§ 113–175; *Cunningham v. Freeborn* 11 Wend. 240; *Stevens v. Bell* 6 Mass. 339; *Halsey v. Whitney* 4 Mason 206; *Jewett v. Warren* 12 Mass. 300; *Rice v. Southgate* 16 Gray 142; *Barney v. Grover* 28 Vt. 391; *Kramer v. Bank* 15 Ohio 253; *Uhler v. Semple* 20 N. J. Eq. 288; *Perkins v. Mayfield* 5 Port. 182; *Hawkins v. May* 12 Ala. 673; *Lane v. Sleeper* 18 N. H. 209; *McWhorter v. Wright* 5 Ga. 555; *Bellume v. Wallace* 2 Rich. (Law) 80.

Campbell, J. Rood was garnished as holding property belonging to Ward, under the provisions of the garnishee act, which allow persons holding property by assignment in fraud of creditors to be treated as garnishees.

Ward, who was county treasurer of Marquette county, discovering a deficiency in his accounts to the amount of about $18,000, for which he was personally liable, turned over considerable property to Rood, who was a surety on his official bond. The transfers were absolute in form, and no written declaration of trust or defeasance was made, but it was understood to be a transfer to secure Ward's liability, and to enable Rood to provide for his own liability as Ward's surety.

The court below found there was no fraud in fact, and that the consideration was sufficient to uphold the conveyance. In this we can see no legal error. Ward was equitably bound to provide for this deficit, and to do so in such a way as to enable his sureties to be saved from difficulty. They were absolutely bound to the county, and it was right that property should be placed in their hands which they could convert and use to pay the debt. Where there is any considera-

tion of a valuable nature for a conveyance, its sufficiency in point of fact may be evidence on the question of honest intent, but an excess of value over the amount of consideration cannot be conclusive evidence of fraud, which must be found as a fact before the conveyance can be invalidated. There was, in our opinion, abundant evidence of good faith in this transaction, and the finding was warranted by the testimony.

Under the statute of frauds no trust whatever was made to result in this case, and the questions applicable to trusts are foreign to the issue, which was one of fraud or good faith.

We think there is no reason for disturbing the judgment, which must be affirmed with costs.

The other Justices concurred.

ANDREW KRUEGER v. THE GRAND RAPIDS & INDIANA RAILROAD COMPANY.

Agency—Continuing injury—Limitations—Fraud.

Whether persons, while acting in their own interest and making a request exclusively for their own advantage, can be deemed as agents of a third person who would participate in the benefits that would arise from its being granted—*Q.*

An action by a private person as for continuing injury in keeping a railway track in the street near his premises, is subject to the six-year limitation, if defendant relies on permission given longer ago and plaintiff seeks to show by such evidence as remains, that his permission was obtained by fraud.

One who seeks to set aside a transaction for fraud must move promptly; and delay is gross that extends beyond the time necessary to bar an action.

Error to Kent. (Montgomery, J.) June 13.—June 22.

CASE. Defendant brings error. Reversed.

Hughes & Smiley for appellant.

H. E. Thompson for appellee.

COOLEY, J. Plaintiff, who is and has been for many years owner and occupant of a dwelling-house fronting on West Division street in the city of Grand Rapids, brings suit against the railroad company on the special case to recover damages for the occupation by the railroad company with their tracks and cars of a part of the street to his prejudice and injury.

The occupation of the street by the railroad company, as alleged, is not disputed, but defendant shows that it has taken place with the full consent of the common council of the city, granted in the year 1873 on the application of the people living and owning property in that neighborhood. Defendant also shows that previous to consent being so given its track was in the street but was about to be taken up, and that plaintiff, among others, petitioned the common council for consent to defendant's occupation on condition that defendant should, on or before January 1, 1874, erect and maintain a passenger station in the neighborhood, which condition was complied with. Plaintiff does not dispute his having united in such a petition, but he claims that his signature to it was obtained by fraud, and that for that reason it is not binding upon him.

The fraud, if any was practiced upon the plaintiff—which is disputed—was practiced by two of his neighbors who were anxious to secure the permanent location of the railroad station in the vicinity, from a belief that the neighborhood would be greatly benefited, and who are said to have promised that the defendant would do in that vicinity more in the line of improvements than it has since done, and, so far as there is any showing, more than its officers ever contemplated. There is no evidence connecting the defendant with the promises of these men, and it can be held responsible for their acts only upon an implication of law that, because they were making a request of which defendant was to take the benefit, therefore, in whatever they did looking

to that result, they must be deemed the defendant's agents.

Whether any such implication can arise when parties are acting in their own interest, and preferring a request exclusively for their own advantage, may well be questioned. But in this case the point is not material. It conclusively appears that defendant is in the street with the full consent of the public authorities, and also with the full consent of the plaintiff, unless his consent is invalidated by the fraud which is relied upon.

The fraud, if there was any, was committed in 1873, and the railroad company immediately acted upon it, and has been in the enjoyment of the privileges obtained by means of it ever since. Plaintiff has been aware of the facts all the time, and has constantly felt the inconvenience which he says has resulted. This suit was begun in 1882. By statute, actions on the case must be brought within six years from the time when the right accrued. Comp. L. § 7148. The action for the original wrong was barred at least two years before this suit was instituted. The only ground, therefore, on which this action could be maintained at all, must be that the injury is a continuing injury, and an action arises upon it day by day. This might, perhaps, be a correct view to take of the plaintiff's case if it were unembarrassed by the consent he gave and upon which the defendant has acted. There is no wrong at all if that is valid; and to show that it is invalid it is necessary for plaintiff to go back eight years or more, and show the alleged fraud. He must, therefore, rely upon making out a wrong done to him more than eight years before suit was instituted, and for which any action, counting directly upon it, would have been barred. After such a lapse of time the evidence of facts is supposed to have become obscure and uncertain, and it is contrary to the policy of limitation laws that they should now be investigated for the purposes of a remedy which the party might have had at any time during the statutory period.

It may be said that, as the fraud is not counted upon but is only used by way of meeting a defense, the case is not

within the words of the statute. But if this be conceded, it will not aid the plaintiff. It is a familiar principle that a party seeking to set aside a transaction for fraud must move promptly. *De Armand v. Phillips* Wal. Ch. 186; *Campau v. Van Dyke* 15 Mich. 371; *Wilbur v. Flood* 16 Mich. 40; *Craig v. Bradley* 26 Mich. 353; *Dunks v. Fuller* 32 Mich. 242; *Wright v. Peet* 36 Mich. 213.

A delay for a longer period than the time required to bar an action is far from being prompt; it is on the other hand very gross delay, and must be held to amount to an affirmance of his original action.

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

The other Justices concurred.

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THE DIAMOND MATCH COMPANY v. MICHAEL POWERS, REGISTER OF DEEDS.

Mandamus—Continuing rights—County—Foreign corporations.

The remedy by mandamus contemplates the necessity of indicating the precise thing to be done; it is not adapted to cases calling for continuous action, varying according to circumstances.

Obedience to the writ of mandamus is enforcible by process for contempt.

Comity to a foreign corporation cannot extend to the point of granting it privileges which its charter does not permit it to exercise; and in applying for privileges it must show that it has power to exercise them.

Mandamus. Submitted June 13. Denied June 22.

Edward Cahill and *G. V. N. Lothrop* for relator. The right of a citizen to inspect the records of a public office in which he had an interest, and to take transcripts therefrom if he desired, was long ago settled by judicial decision:

King v. Shelley 3 Term 141; *People v. Cornell* 47 Barb. 329; *Hawes v. White* 66 Me. 305.

Ira Scott and *M. V. Montgomery* for respondent.

GRAVES, C. J. This is an application for the writ of mandamus to compel the respondent, who is holder of the county office of register of deeds, to permit the relator, by its agent, W. Wallace Warner, and solely for its own private purpose, to have access, so long and so far as it is found necessary, to the place of records of said office, and to the books, records, files and papers thereof, to ascertain the state and character of the titles of all the real property in the county, and to construct a complete abstract of such titles. As serving to show that what is insisted on by relator is not in point of law impertinent but reasonable, it is stated that relator has in a few years become purchaser of about thirty thousand acres of pine land in said county of Ontonagon; has erected extensive saw-mills, and invested nearly, if not quite, $200,000, and is constantly purchasing more land in said county; that it is cutting large quantities of pine, and in so doing is incurring much risk of damage on account of defective titles; that in view of the circumstances the course considered expedient to protect its rights and interests is to provide a system of abstracts of its own, covering the whole county, and to which it can always have ready recourse.

It appears by the record that respondent has not excluded relator from opportunity to examine and make abstracts so far as it has ownership or interests, present or prospective. The matter in dispute is whether relator has legal right to go further and insist on having the office accommodations, and the handling of the books, records, files and papers, to make up a system for the rest of the county.

A single consideration of a practical nature may be suggested here. Granting that no other difficulties appear, it seems evident that in any case where the claim is for a continuous use of the record office and its public contents from day to day and week to week, and not merely for a single

occasion, with all its material facts defined, there must be great, is not insuperable, difficulty in enforcing the claim by mandamus. The register has rights and duties which must be respected; so the general public have rights as well as the claimant; and the conditions are not steadily the same. They are subject to variation. On every occasion each must act reasonably, and with proper regard for the rights and duties of the others. As the circumstances vary the conduct must vary, so as to secure conformance to the rule of reasonable action by which the right is to be regulated.

When the case presents a single occasion, and calls for an act which is presently determinate, it is entirely practicable to direct the act by mandamus. But where the case contemplates something continuous, yet variable in its conditions and aptitudes, the remedy by that process seems an unfit one. It is the office of mandamus to direct the will, and obedience is to be enforced by process for contempt. It is, therefore, necessary to point out the very thing to be done; and a command to act according to circumstances would be futile.

Waiving further reference to the fitness of the proceeding on this ground, does the record in other respects present a proper case?

The relator is not a citizen nor an inhabitant, nor even a domestic corporation. It is not a natural person, but a private foreign corporation. It does not show its charter, nor give any evidence of its powers or artificial capabilities. We have no means of knowing that it has capacity to buy or hold lands or deal in titles anywhere; or to carry on the business in which its petition alleges it to be engaged; or to apply itself to such an enterprise as making a system of abstracts of all the titles of all the real property in a county. The case is bare of information in regard to the true legal status of the relator, and as to whether it is other than a mere intruder in what it now demands.

Unless the state of Delaware, to which it owes its existence and within whose dominion it belongs, has legally empowered it to deal in land and in land titles, it cannot

engage in such affairs in Michigan. *Thompson v. Waters* 25 Mich. 214. For the purpose of exercising any business activities here it must rely on the comity of the State, and not on any inherent and absolute right, because it has none. And the State, in extending its comity, may go no further than its pleasure dictates. It may stop short and tolerate but a part of relator's chartered powers or a limited rather than a full exertion of them. But it will never concede permission to go beyond the charter.

It follows, from what has been said, that the relator fails to show any title to the right it claims. The authority given to it by the state by which it was created is not disclosed and cannot be assumed, and therefore, if all other questions are waived, this is sufficient to forbid allowance of the writ.

I am therefore of opinion that the motion should be denied with costs.

The other Justices concurred.

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MARY E. BEAM v. JOHN M. BENNETT, WILLIAM H. BENNETT, HENRY M. BAKER (EXECUTOR FOR CHAS. H. BENNETT), LEWIS H. BENNETT, WILLARD ELDRED, SAMUEL BAKER, CALVIN B. CROSBY, MARY WESTFALL AND JAMES B. PATTERSON.

Bill in aid of execution—Transfer in fraud of creditors—Costs.

A bill in equity will lie for the double purpose of aiding an execution and of reaching property that is not open thereto.

A man fraudulently transferred his property to his son to anticipate the judgment in a suit pending against him. The son agreed, in the instrument of transfer, to pay his father's debts to certain bona fide creditors, and while the action was still pending, executed mortgages to them therefor. After the verdict but before judgment he executed other mortgages to brothers of defendant. *Held*, on a bill filed by the judgment creditor in aid of execution, that the property, relieved of the later mortgages, should be sold on execution, and that if the proceeds were not sufficient to pay the judgment and the bona fide claims, they should be applied ratably thereon.

Where a bill in aid of execution was dismissed as to all the defendants while it should have been sustained as against some, costs were allowed against the latter on appeal; but neither complainant nor the other defendants were allowed costs of the Supreme Court as against one another.

Appeal from Wayne. (Chambers, J.) June 14.—June 22.

BILL to set aside conveyances. Complainant appeals. Reversed and decree ordered.

C. B. Lothrop and *G. V. N. Lothrop* for complainant.

J. W. Voorheis and *Moore & Moore* for defendant. One who recovers in an action of tort against another for fraudulent conduct is not defendant's creditor within the meaning of the act invalidating conveyances as against creditors: *Hill v. Bowman* 35 Mich. 191; *Sheahan's Case* 25 Mich. 145.

GRAVES, C. J. The bill in this cause was filed for the double purpose of aiding an execution and to reach property not open to execution. It is perfectly regular. *Williams v. Hubbard* Wal. Ch. 28.

In November, 1878, the complainant brought her action at law against the defendant John M. Bennett to recover damages for breach of promise of marriage, and due notice of trial was given for the term which began May 5, 1879, and the trial was immediately set down to take place on the 28th of the same month. In this interval between the commencement of the term and the day fixed for trial, the defendant John M. Bennett executed a conveyance of the land in question to his son, the defendant William H. Bennett, a young man twenty-two or twenty-three years of age. This transaction was on the 16th of May. No consideration was paid; but an instrument of which the following is a copy was given back:

"Whereas, John M. Bennett has this day conveyed to William H. Bennett certain real estate in the county of Wayne and certain mortgages on property in the State of Michigan;

And whereas, said John M. Bennett is indebted to Mrs.

John Westfall in the sum of about $600, to William Eldred in the sum of about $325, to Samuel Baker in the sum of about $214, to Calvin B. Crosby in the sum of about $150, and James B. Pattison in the sum of about $400;

'And whereas, it is intended by the parties hereto that said John M. Bennett shall be supported during his natural life by the said William H. Bennett;

Now therefore said William H. Bennett, for and in consideration of the conveyance to him of said lands and said mortgages as aforesaid, hereby expressly promises and agrees upon demand to pay said Westfall, Eldred, Baker, Crosby and Pattison the full amount due to them from the said John M. Bennett, be the same more or less, with the interest which has or may hereafter accrue on each and any of said claims, and have the said John M. Bennett released from all liabilities to said parties.

He further agrees to supply and provide for the said John M. Bennett, during his natural life, a suitable and proper maintenance and support.

This contract is secured by a real estate mortgage of even date herewith. The property covered by said mortgage is the same property this day deeded by said John M. Bennett to said William H. Bennett.

WILLIAM H. BENNETT. [SEAL.]

Detroit, May 16, 1879."

The mortgage specified at the close of this document was never executed.

The defendant John M., who had in immediate prospect the trial on the charge against him of breach of promise, and who was here making provision to be protected and maintained by his youthful son, was of good age and ability to take care of himself. He was only fifty-one, was strong and robust, and an efficient blacksmith.

On the 29th of May young Bennett mortgaged the property to Westfall, Eldred, Baker, Crosby and Patterson, the persons spoken of as creditors of John M. in the contract given in return for the deed. It provided for the payment of their demands against the defendant John M. These persons are made defendants, and relief is prayed against them. They appear to be honest creditors, and nothing is shown to impeach their share in the transaction.

On the 17th of June the complainant's action at law was

brought on for trial, and two days later she obtained a verdict for $7000. Judgment was entered on the 21st; but on the day between the verdict and judgment, namely, on the 20th, the defendants John M. and his son William H. joined in executing two mortgages on the premises,—one to Charles H. Bennett, for $1556.21, and the other to Lewis H. Bennett, for $759.24. These persons were brothers of John M. Bennett. In August the costs were taxed, and an execution issued in the case for breach of promise. The sheriff was unable to find any property to proceed against on the process except the premises in the bill, and these he levied on, but declined to sell on account of the conveyances referred to. The bill was filed in April, 1880, and in February last the cause went to hearing, and the circuit judge dismissed the bill as to all the defendants.

We are not informed of the reasons which influenced this decision. To our minds the case, upon the admitted facts, is a clear one in complainant's favor, except as against the mortgagees in the mortgage of May 29th.

The evidence is most distinct and certain in its effect that the deed made to young Bennett was given and received in anticipation of an unfavorable verdict in the case at law, and with the specific intent to frustrate the justice of that proceeding and defeat any right the complainant might establish. The mortgages made the day succeeding the verdict to Charles and Lewis Bennett, brothers of the defendant John M., are in no better plight. At the time they were executed the complainant's claim to be recognized as a creditor of John M. Bennett was substantially settled. The jury had decided in her favor, and had liquidated and reduced to certainty what was previously undetermined and uncertain. And the direct evidence and surrounding circumstances are such as to generate an inference too strong to be resisted, that they were concocted and received for the purpose of rendering the verdict abortive. They were dictated by the same motive which influenced the giving of the deed.

We now come to the mortgage of May 29th.

As we have seen already, the persons to whom that was given were bona fide creditors of John M. Bennett, and entirely free from all fault and misdoing. Such was their situation that had John M. Bennett retained the title and himself executed the mortgage, the complainant would have had no equitable color for requiring that it should be set aside in her favor. 1 Jones on Mortg. § 627. The consideration was not a debt or transaction of William H., the fraudulent grantee of John M., but a valid debt from the latter, who is the common debtor of complainant and the mortgagees. And as they are innocent, why should the fraud of their debtor against complainant be made a pretext for depriving them of all benefit from their security? Their equity does not seem to be inferior to that of complainant, and why should their mortgage be annulled at her instance and in her favor when the necessary effect must be to appropriate the whole of the debtor's means to her demand, and render their debt uncollectible and worthless?

I fail to perceive any principle that would justify such discrimination. There need be no technical difficulty. The mortgage was substantially the act of John M., and the consideration was his debts, and I see no reason why the property may not be sold on the execution, relieved from this mortgage; and in case the proceeds are insufficient to pay in full the amount going to complainant and the actual amount of the mortgage debt, as seems certain, that then the fund be applied ratably as far as it will go.

Except as to this, the prayer of the bill should be granted, with costs against the defendants other than the mortgagees of the mortgage of May 29th; but neither they nor complainant should recover costs of this Court as against the other. The decree below should be reversed, and the cause remanded with directions to enter a decree in conformity with this opinion, and to take such other steps as shall be found necessary.

The other Justices concurred.

Frances A. Phillips v. James Jamieson.

Res judicata—Inconsistent instructions.

Judgments are admissible in evidence when the same subject-matter again comes in controversy between the same parties.

J's agent moved a division fence that stood between J's premises and P's. P moved it back again in the night. J tried to tear it down, and as P's wife resisted, he assaulted her. In an action therefor by Mrs. P she could not show, as res judicata, that in a former suit between the agent and a third person concerning other premises, but in which the principal matter in issue was the true location of a section line that P claimed as the boundary to the premises in suit the result was adverse to the agent.

A judgment for plaintiff in an action for an assault committed by defendant while defending his possession, was reversed for an instruction permitting the jury to award to plaintiff her actual damages even though defendant did not exceed his just rights in defending; and this, too, though there were other instructions inconsistent with this.

Error to Wayne. (Speed, J.) June 14.—June 22.

Trespass. Defendant brings error. Reversed.

Cutcheon, Crane & Stellwagen for appellant.

Moore & Moore and *John Atkinson* for appellee.

Cooley, J. Trespass for assault and battery. Defendant denied the assault, and in addition claimed that whatever was done by him was in defense of his possession.

It appeared in evidence that plaintiff was owner and occupant of a lot in the village of Wayne, and that defendant, as agent for one Clark, was in possession of an adjoining lot on the north. The section line between sections twenty-nine and thirty-two was the dividing line between these lots as they were originally laid out. For many years prior to 1871 a fence had stood as a division fence between these lots where the section line was supposed to be, but in that year Clark had caused it to be surveyed and the surveyor had located the line twenty feet further south. Clark there-

upon moved the division fence twenty feet to the line as then located, and there it stood for eleven years, when plaintiff's husband in the night-time took it up and restored it to the old location. Discovering in the morning what had been done, defendant attempted to tear the fence down, and the plaintiff, while resisting this attempt, claims to have been assaulted.

On the trial plaintiff claimed exemplary damages, and sought to make it appear that defendant knew the real dividing line was where her husband had placed the fence. For this purpose she offered in evidence the record of a suit and judgment between Clark and one Phillips respecting another lot some distance away, bounded by the same section line, in which suit it was claimed that the true location of the line was in issue and passed upon. This evidence was objected to, but received, and it appeared that the result of the suit was adverse to Clark.

Judgments are admissible in evidence when the same subject-matter again comes in controversy between the same parties; but here was neither identity of parties nor identity of subject-matter. All that could be claimed was that the same question of fact had arisen in another case in which defendant's principal was a party, and had been passed upon by jury. If it were a sound principle that such a decision ought to be accepted as conclusive in other controversies, it would have been ruled so long before this, for the occasions for the ruling have been abundant. But it has never been so decided and we know of no good reason why it should be. Every controversy is likely to present some facts peculiar to itself, and it will only introduce confusion if we attempt to judge and decide it in the light and by the decision of other controversies that may appear to have been similar, but must nevertheless have had their own peculiarities. And in cases of ejectment and trespass there are frequently questions of possession and acquiescence that must be peculiar, and may be more conclusive than the questions of original right. In this very case it was only claimed that "the principal matter in issue" in the first case

was the true location of the section line, but the case may not have turned upon it.

As defendant claimed that in what he did he was merely defending a possession that had continued for eleven years and which plaintiff's husband had attempted surreptitiously to take away from him in the night-time, it became necessary to give instruction respecting the right to defend one's possession, and the limits which must be observed in exercising the right. In giving these the judge had something to say of very doubtful legality about the jury giving exemplary or punitive damages by way of punishment or as an example to prevent other persons making the like assaults; but he also gave instructions which we think were inconsistent, and one of which would authorize the jury to award to the plaintiff her actual damages even if the defendant did not exceed his just right in defending his possession. For this the judgment should be reversed, even though the instructions inconsistent with this were correct. *Dodge v. Brown* 22 Mich. 446.

A new trial will therefore be ordered, with costs.

The other Justices concurred.

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Susannah Wilkinson v. John Williams.

Proceedings to recover possession—Certiorari.

Summary proceedings before a circuit court commissioner, to recover possession under Comp. L. §§ 6706-7 are maintainable against a builder who refuses to turn over a building at the time fixed by his contract.

Ejectment and the statutory proceeding to recover possession are the only possessory remedies known to the law, in Michigan.

Certiorari should not be resorted to for the review of statutory proceedings to recover possession unless there is some fair ground for it on which the whole case can be disposed of justly and finally; but if a full review is desired an appeal should be taken.

Error to Wayne. (Full Court.) June 14.—June 22.

Proceedings to recover possession. Defendant brings error. Affirmed.

S E. Engle for appellant. A builder who keeps possession of a house after finishing it, is only a trespasser: *Shaw v. Hoffman* 25 Mich. 169; *Ferrell v. Lamar* 1 Wis. 8; the statutes permitting summary proceedings to recover possession of premises are confined to the particular cases specified in them, and cannot be enlarged: Taylor's L. & T., (6th ed.) § 713, 720; *Rawson v. Babcock* 40 Mich. 331; *Raynor v. Haggard* 18 Mich. 74; *Foss v. Van Driele* 47 Mich. 204; forcible entry and forcible detainer are distinct offences, and the complaint is the declaration and must allege the offence to be relied on: *Hoffman v. Harrington* 22 Mich. 54; *Bryan v. Smith* 10 Mich. 233.

Fred. T. Sibley and *Jas. C. Smith, Jr.*, for appellee.

Campbell, J. Williams having been employed to build a house for Mrs. Wilkinson, and a disagreement having arisen concerning a small balance on its completion, he, instead of resorting to his statutory remedy for his lien, sued her at common law, but retained the keys and would not give up possession. Thereupon she commenced summary proceedings before a circuit court commissioner, filing a complaint in the form prescribed by section 6707 of the Compiled Laws, applicable to cases where a party holds over contrary to the agreement under which he entered. § 6706.

When the hearing came on before the commissioner the respondent raised a large number of objections claiming that the proceeding would not lie either under the earlier sections of the statute which originally applied to strictly forcible entries or detainers, or under the sections applicable to various cases of unlawful holding over without criminal force. The commissioner rendered a general decision indicating, as far as it indicates any particular ground of recovery, that he acted under sections 6706 and 6707. The

circuit court on certiorari affirmed the proceeding. The return does not set out the case precisely as claimed by the affidavit for certiorari, as it does not show that the commissioner treated it as a case of force.

Under this record the complaint and the facts both conform to sections 6706 and 6707. The builder was certainly bound at the end of his contract to turn over the house to the owner, and it would be a great hardship to compel her to resort to ejectment, which is the only other possessory remedy known to the law. We think the holding over was a holding over contrary to the terms of the agreement under which he held, and that the statutory remedy is a proper one.

In these cases of statutory certiorari, where the proceedings are summary, and the record is not required to show anything beyond the general conclusions of the tribunal, the statute requires the court from which the writ issues to do substantial justice irrespective of mere form. If a party desires a full review he should appeal and have the whole case reheard. Certiorari is not a remedy which should be allowed to be used without some fair ground which will dispose of the case justly as well as finally. The statute is express that they shall be governed by the rules applicable to certiorari from justices. § 6721.

We think that the commissioner had enough before him to enable him to make the decision which he made. This being so there is nothing else to review.

The judgment must be affirmed with costs.

The other Justices concurred.

WILLIAM RIGGS v. WILLIAM STERLING AND SALLIE M. STERLING.

Proceedings to recover possession—Homestead.

Questions of title are not triable in mere summary proceedings before a circuit court commissioner to recover possession of real estate; and

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a homestead right, though not strictly an estate, sufficiently involves the question of title to fall within this rule.

A justice of the peace has the same jurisdiction as a circuit judge in summary proceedings to recover possession; and the judge can decide no question therein that could not have been decided by the justice.

Adverse and paramount homestead rights, claimed by an execution defendant, may be brought under consideration in ejectment brought by an execution purchaser; or the defendant can move to set aside the execution sale, or file a bill in equity.

Error to Wayne. (Chambers, J.) June 14.—June 22.

Proceedings to recover possession of land. Complainant appeals. Proceedings set aside.

S. E. Engle for complainant appellant.

Sawyer & Knowlton for defendant.

GRAVES, C. J. In 1874 the defendant William bought the premises in the record, and from thence hitherto he and his wife, the defendant Sallie, have continued to occupy them as their home and residence. The premises are less than 40 acres and lie in the country, and not within any recorded town plat, or city or village. They were worth $2000. In January, 1880, the plaintiff recovered a judgment against the defendant William, and in February levied on this property. The defendants had notice of the levy, but paid no attention to it, and the plaintiff made no attempt to have an appraisal. In April the sheriff sold to the plaintiff for $1720, and the latter paid the money to the officer, who subsequently satisfied the execution and retained the residue, $1506.62, for the defendants. No redemption being made, the plaintiff received a deed, and subsequently brought this proceeding before a commissioner, under subdivision 3 of § 6706 of the Compiled Laws, to recover possession, and the cause went by appeal to the circuit court, where judgment was given for defendants, and the plaintiff alleges error.

The case was determined by the circuit judge without a

jury, and it appears from his finding, as also from the argument here, that the real issue between the parties was upon the existence of a right of homestead, adverse and paramount to the right claimed by the plaintiff under his purchase on the execution sale.

Before advancing a step we encounter a question of jurisdiction. It is one which cannot be avoided. Was this matter of homestead capable of adjudication by collateral means in this kind of action? It seems to me not. The controversy was within the principle which forbids the trial of adverse titles in these summary proceedings. *Bennett v. Robinson* 27 Mich. 26; *Vos v. Dykema* 26 Mich. 399; *Foss v. Van Driele* 47 Mich. 201.

Although a right of homestead may not be in strictness an estate, it is a matter of title, and one which may, as it does frequently, involve questions of the greatest difficulty, and it is not to be supposed that the Legislature intended to make such questions triable in a proceeding of this character. A justice of the peace has the same jurisdiction as a circuit judge in trying these cases, and the latter can decide no question in them that could not be adjudged by the former, and it has never been the policy to confide such inquiries to magistrates, or to any summary tribunal. Comp. L. § 5250, as amended in 1875, p. 258; sections from 5325 to 5333, inclusive, and amendments of 1881, p. 23; *Roberts v. Highway Commissioners of Cottrellville* 25 Mich. 23; *Campau v. Button* 33 Mich. 525; *Willson v. Gifford* 42 Mich. 454. These references sufficiently illustrate the policy.

When it appeared to the commissioner that the contest was really one concerning the existence and validity of the right of homestead, the proceeding should have been dismissed, and the parties have been remitted to other and proper methods. The plaintiff, no doubt, might have brought the question under judicial consideration by an action of ejectment, and perhaps in some other way; and the defendants might have moved to set aside the sale, or might have filed a bill in equity.

The case should be remanded, with directions to set aside

the proceedings; and we see no ground for requiring either party to pay costs to the other.

CAMPBELL and SHERWOOD, JJ. concurred.

COOLEY, J. I do not concur in the foregoing opinion. The point upon which it is decided is not raised by any assignment of errors, and has not been argued by counsel, and I am not prepared to say what opinion I might have upon it if it were deliberately considered. As at present advised, I should not be inclined to agree in the views expressed, but I place my non-concurrence on the ground that the point has neither been argued nor made by counsel.

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ROBERT F. EDWARDS AND ANN EDWARDS v. ANDREW MCENHILL AND THOMAS MOORE.

Married woman's contract.

In Michigan married women have no general capacity to make contracts, their common law disabilities being only partially removed by the Married Woman's Act.

One who relies upon a contract made by a married woman must show the facts in order that it may appear whether she had capacity to make it. So *held* where the contract relied on was one of partnership between herself and her husband.

A was the successful bidder for certain carpenter work, and B & Co., for certain masonry. It was arranged, for the convenience of the party for whom the work was to be done, that A should take a contract for the whole, though B should do the masonry, whereby A stood in the place of surety for B. A was afterwards garnished by judgment creditors of B, but B refused to allow the amount of the judgments to be applied on what was due him from A, claiming that the judgments had been recovered against him individually while his contract was in the name of a firm, his wife being his partner. A refused to pay B unless he allowed the judgments, and B sued him. *Held*, that an instruction that if A had had an opportunity to know that B's bid was in the name of a firm he was estopped from denying that he knew it, was error.

Error to Wayne. (Chambers, J.) June 14.—June 22.

ASSUMPSIT. Defendants bring error. Reversed.

Alex. D. Fowler for appellants. At common law, a married woman could not be a partner in business with any one: *Glover v. Alcott* 11 Mich. 471; *Jenne v. Marble* 37 Mich. 323; 2 Bish. Mar. Women § 435; 2 Colly. Partnership 1008; Story on Partnership §§ 12, 306; Dixon on Partnership § 35; the Constitution and statutes are clearly against her right to make a mere personal obligation, unconnected with property, and not charging it; so that she cannot become personally bound jointly with her husband, nor as a surety, by mere personal promises: *De Vries v. Conklin* 22 Mich. 255; *Emery v. Lord* 26 Mich. 431; *West v. Laraway* 28 Mich. 464; *Ross v. Walker* 31 Mich. 120; *Kitchell v. Mudgett* 37 Mich. 81; *Carley v. Fox* 38 Mich. 387; *Russel v. Savings Bank* 39 Mich. 671; *Johnson v. Sutherland* 39 Mich. 579; *Gantz v. Toles* 40 Mich. 725; *Kenton Ins. Co. v. McClellan* 43 Mich. 565; *Reed v. Buys* 44 Mich. 82; anything tending to destroy the value and confidence of the marital relation is against public policy: *Snyder v. People* 26 Mich. 106; *Randall v. Randall* 37 Mich. 571; there is nothing to authorize a husband to sue his wife to enforce an executory contract: *Bunt v. Jones* 45 Mich. 392; *Chapman v. Kellogg* 102 Mass. 246; for a woman to enter into a partnership with her husband would subject her property to his control in a manner hardly consistent with the separation which it is the purpose of the Married Woman's Act to secure, and might subject her to an indefinite liability for his engagements; the property invested in such an enterprise would cease to be "her sole and separate" property: *Lord v. Parker* 3 Allen 127; *Plumer v. Lord* 5 Allen 460; 7 Allen 481: 9 Allen 455; when such business as milling may be carried on by the joint efforts and credit of the two, it must usually be considered in law the business of the husband, and its avails liable to the payment of his debts: Lindley on Part. p. 118 § 78; 1 Pars. Cont. 351; *Swasey*

v. Antram 13 Am. L. Reg. (N. S.) 577; *Bitter v. Rathman* 61 N. Y. 514.

Adolph Sloman for appellees. The Married Woman's Act enables married women in Michigan to contract with reference to their separate property, as though they were single: *People v. Horton* 4 Mich. 83; *Durfee v. McClurg* 6 Mich. 231; *Starkweather v. Smith* id. 380; *White v. Zane* 10 Mich. 333; *Farr v. Sherman* 11 Mich. 33; *Watson v. Thurber* id. 457; they can carry on boarding houses and engage generally in business: *Tillman v. Shackleton* 15 Mich. 705; *Rankin v. West* 25 Mich. 195; *Campbell v. White* 22 Mich. 178; *Powers v. Russell* 26 Mich. 179; a wife can make gifts directly to her husband: *Durfee v. McClurg* 6 Mich. 223; *Penniman v. Perce* 9 Mich. 509; or receive them from him: *Burdeno v. Amperse* 14 Mich. 94; *Ransom v. Ransom* 30 Mich. 328; she can carry on the butchering business with her husband as her agent: *Rankin v. West* 25 Mich. 195; *Dayton v. Walsh* 47 Wis. 113; she can contract with him except as her power is limited by statute: *Hamilton v. Hamilton* 89 Ill. 349; *Beard v. Dedolph* 29 Wis. 236; *Hoxie v. Price* 31 Wis. 82; she may be his creditor, and when the debt is bona fide he may prefer her to the exclusion of all his other creditors: *Pierce v. Rehfuss* 35 Mich. 53; *Hill v. Bowman* id. 191, 209; *Allen v. Antisdale* 38 Mich. 229; she may sue him at law or in equity, in regard to her separate property: *Markham v. Markham* 4 Mich. 305; *Emerson v. Clayton* 32 Ill. 495; *Chestnut v. Chestnut* 77 Ill. 346; *Cannel v. Buckle* 2 P. Wms. 243; or a firm of which he is a member: *Devin v. Devin* 17 How. Pr. 514; she can form a co-partnership with her husband: *In re Kinkead* 3 Biss. 405; *Penn v. Whitehead* 17 Gratt. 503; see *Cosio v. DeBernales* 1 C. & P. 266; 1 Pars. on Partnership 25.

COOLEY, J. Defendants are in partnership as carpenters and builders in the city of Detroit. Plaintiffs are husband and wife and claim to be in partnership as masons and plasterers in the same city. In the year 1881 the board of

education of that city, having occasion for certain carpenter and mason work upon two of their school buildings, advertised for proposals. Defendants sent in a bid for the carpenter work, and R. F. Edwards & Co., which is the name in which plaintiffs claim to be doing business, sent in a bid for the mason work. These were the lowest bids for the two kinds of work respectively. Mr. Edwards and Mr. McEnhill met, apparently without concert, at the office of Mr. Utley, the secretary of the board, and were then informed that the board preferred to have one contractor for the whole work. It was suggested that defendants take the contract for the whole work and allow Edwards to do the mason work, and Mr. McEnhill expressing his assent, the board made its contract for the whole work with defendants.

It is testified by Mr. Edwards and Mr. Utley that the Edwards bid in the name of R. F. Edwards & Co., was present on the table at this time, but McEnhill swears that he never saw it, and knew nothing of Edwards' having any partner. He says he supposed his dealings were with Edwards alone. Edwards disputes this, and claims that in their talk together at this time he spoke of R. F. Edwards & Co. as the party putting in the bid, and the party to do the work under the arrangement made with Mr. Utley.

The parties respectively went on and performed the work, and defendants paid Mr. Edwards the major part of what would be payable for the mason work and plastering. Before it was all paid several persons had brought suit against Robert F. Edwards and garnished defendants as his creditors and had recovered judgments in the garnishee suits. Edwards refused to recognize these judgments, or to allow the amounts upon the contract with defendants, for the reason that the suits were against him alone, while the contract, as he claims, was with R. F. Edwards & Co. Defendants aver that they never heard of any such firm as R. F. Edwards & Co., or of the wife of Edwards being in partnership with him, until after these proceedings in garnishment, and they refused to make payment on the

Edwards contract unless the amount of the judgments against them was allowed. This suit was therefore instituted.

The price which was to be paid for the mason and plaster work was not in dispute, and so far as concerned the facts, the case turned on the question whether the arrangement made in Mr. Utley's office was to be deemed an arrangement between the defendants and R. F. Edwards & Co., or between them and Robert F. Edwards. Among the instructions given by the circuit judge were the following:

"If the jury believe the testimony of Henry M. Utley, secretary of the board of education, that during the conversation the bids of R. F. Edwards & Co. for doing this work were spread upon the table before and in the presence of Mr. McEnhill, and his attention was called to the same, or if his attention was not called to the same but he had the opportunity of examining the bid before agreeing to pay for the work done under the same, and he did not look at them, though he might and could have done so, had he wanted to, he is now estopped from saying that he did not know that Edwards & Co, were the bidders.

"If the jury believe the testimony of Mr. Utley as to the conversation had at his office, and find that the defendants paid the plaintiffs or Robert F. Edwards any money on the work done under the bid, that these amounted to a recognition of the agreement that the defendants would pay the plaintiffs for the work done under the bid as put in; that it was the duty of the defendants, when they agreed to pay for the work to be done under the Edwards & Co. bid, to ascertain to whom they were to pay for the same, and with whom they made the agreement; that if they shut their eyes to this necessity, they cannot now be heard to complain when it appears that the bid was put in by the plaintiffs and they are sued by them."

We cannot concur in these instructions. The question involved is, who were the contracting parties in the contract made in Mr. Utley's office. This is a question of understanding and intent, and the contract is no more to be made out by applying an estoppel to defendants than to the plaintiffs. It was no more the business of the defendants to make sure that they understood whom they were

dealing with than it was for Edwards to make certain that he clearly apprised them. Defendants had nothing to do with the bid Edwards had handed in, except to add the amount of it to the amount of their own in making their contract; and even this was for the convenience of the board and not of themselves. They did not understand they were to have anything to do with the work of the mason and plasterer, except as by including it in their contract they would become responsible for its being done. But in that respect they would stand in the place of sureties for the person or persons doing it.

It would be the most natural thing in the world for McEnhill, under the circumstances, knowing Edwards as a man who took such contracts, and not being aware of any associate in business, to assume that he had made the bid in his own name. It would be the last thing in the world to occur to him that Edwards not only had a partner in this business, but that this partner was his wife; and if he had been notified of it, as nobody pretends that he was, he would have been likely to be somewhat surprised. That a mason should take his wife into partnership in his business may well excite surprise, and McEnhill, if told of it, might not unnaturally have queried in his mind what it could mean and what good and honest reason there could be for it. Such an arrangement is so very unusual, not to say extraordinary, that the parties to it in common fairness when dealing with others whose pecuniary interests may be affected, ought to leave them in no uncertainty concerning it, and not allow them to fall into traps, as defendants seem to have done if plaintiffs sustain their case. This is the more obligatory upon the plaintiffs when, as seems to have been the case here, the wife does not appear in the business except when the dues are to be collected or when creditors are to be prevented from reaching them.

Defendants raise the question that husband and wife are incapable in law of becoming partners in business. The same question has been suggested before, but not under circumstances requiring an opinion from us upon it. Nor is

any called for in the present case, as it is quite certain that if such a partnership can be formed the facts to show its actual existence between these parties were not proved. The only evidence given on this subject is that of the parties themselves that they are in partnership. The agreement to form it, and the circumstances under or in view of which it was made, are not shown.

It seems to have been overlooked on the part of the plaintiffs that married women in this State have no general capacity to make contracts. The statute removes the common-law disabilities only partially; and it therefore becomes necessary, when a contract by a married woman is counted on or relied upon, to show the facts, that it may be seen that they were such as would enable her to make it. Under a variety of circumstances this has been explained under the following among other cases: *Tillman v. Shackleton* 15 Mich. 447; *Campbell v. White* 22 Mich. 178; *De Vries v. Conklin* 22 Mich. 255; *Powers v. Russell* 26 Mich. 179; *Emery v. Lord* 26 Mich. 431; *West v. Laraway* 28 Mich. 464; *Ross v. Walker* 31 Mich. 120; *Gillam v. Boynton* 36 Mich. 236; *Jenne v. Marble* 37 Mich. 319; *Kitchell v. Mudgett* 37 Mich. 81; *Carley v. Fox* 38 Mich. 387; *Johnson v. Sutherland* 39 Mich. 579; *Russel v. Savings Bank* 39 Mich. 671; *Gantz v. Toles* 40 Mich. 725; *Kenton Insurance Co. v. McClellan* 43 Mich. 564; *Buhler v. Jennings* 49 Mich. 538. A reference to these cases must render it entirely unnecessary that we should discuss in this case the general purpose, intent or scope of the statute. It is sufficient to say now that a contract of partnership is the basis of the relation, and that to show the validity of the contract it is necessary to show the facts which under the statute give capacity to make it.

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

The other Justices concurred.

JAMES THORN v. GARDNER W. THORN.

Rescission of deed unfairly procured.

An octogenarian, who had been living with one of his sons, went to live with another to whom he gave a general power of attorney to dispose of his real estate, worth about $5000. He was feeble and in such condition as to be easily wrought on, and he was induced to convey his land to this son, for an expressed consideration of $4000, most of which was illusory. He did not understand, however, that he was absolutely depriving himself of his property. Such securities as he received in return, from his son, he gave up or destroyed. *Held,* on his bill for rescission of the conveyance, that the son's dealings, especially as they were carried on while acting in a fiduciary capacity as his father's agent and factotum, were intrinsically wrong, and that rescission should be granted; also that the son had no equity to recover his outlays on his father, as he had been in possession of the property, and had taken advantage of his father's residence with him to further his designs.

A decree for the rescission of a deed and for reconveyance may stand in lieu of the reconveyance until made.

Appeal from Jackson. (Gridley, J.) June 15.—June 22.

Bill to set aside deed. Complainant appeals. Reversed, and decree ordered.

E. Baldwin, Austin Blair and *Edwin Willits* for complainant. One who is in the relation of equitable guardian to another cannot be a purchaser or a donee of his ward's property: *Clute v. Baron* 2 Mich. 192; *Moore v. Mandlebaum* 8 Mich. 433; *Tabor v. Mich. Mutual Life Ins. Co.* 42 Mich. 669; *Bishop v. Aldrich* 48 Wis. 619; Adams' Eq. Jur. 185; Story's Eq. Jur. 307.

O. E. Angstman for defendant. If a grantor has power to contract, his mental weakness alone is not ground for setting aside his deed: *Campbell v. Campbell* 51 Ia. 713; the burden of proving incompetency of a grantor is on those assailing the deed: *Brown v. Brown* 39 Mich. 792; *Gibbons v. Dunn* 46 Mich. 146; and complainant must prove his case

beyond a reasonable doubt: *Hourtienne v. Schnoor* 33 Mich. 274; *Case v. Peters* 20 Mich. 298; *Hunter v. Hopkins* 12 Mich. 227; *Reynolds v. Campbell* 45 Mich. 529; *Tilden v. Streeter* 45 Mich. 533; *Haines v. Thomson* 70 Penn. St. 434; an agreement for support is a sufficient consideration for a deed: *Goff v. Thompson* Har. Ch. 60; inadequacy of price will not defeat a deed unless gross and sufficient to imply fraud: *Haynes v. Swann* 6 Heisk. 560; settlements between father and son are not to be discouraged: *Bowen v. Lockwood* 26 Mich. 441; gifts are favored: *Millicin v. Millicin* 24 Tex. 426; long acquiescence on a grantor's part estops him equitably from contesting his deed: *Disbrow v. Jones* Har. Ch. 104; *Street v. Dow* id. 427; *Campau v. Van Dyke* 15 Mich 371; *Truesdail v. Ward* 24 Mich. 134; *Wilbur v. Flood* 16 Mich. 40; *Rath v. Vanderlyn* 44 Mich. 597.

CAMPBELL, J. Complainant brought this suit in equity to obtain the rescission of a deed made by him to defendant of a farm in Monroe county, which was worth not far from $5000, and which was his chief estate. The deed was made in 1875, when complainant was about eighty years old, defendant being one of his sons with whom he had then lived since 1872. The deed is claimed to have been obtained by fraud and undue influence. The circuit court of Jackson county, into which the case was removed because the judge of Monroe had been of counsel, dismissed the bill, and complainant appeals.

The testimony is prolix, and it would not be useful to enlarge upon the facts. In our opinion the transaction as it stands, viewed in the light of circumstances, is not open to any serious doubt as to its true character.

In 1872 complainant who had been living with his son Enoch, in Washtenaw county, went down to visit his son Gardner, the defendant, and remained with him for several years. At this time he had no other children living, but had some grandchildren. He owned the farm in question, which was under a lease for three years from March 1, 1872, to William Thorn and William H. Collar, on a rent

of $150 a year in addition to all taxes and assessments, ordinary and extraordinary. The lessees under this lease had an option of purchase at $5000. Complainant had also some personal property, and a sum of money not ascertained in amount.

Not a great while after going to live with defendant, complainant gave him a general power of attorney not only to lease but also to sell his real estate, and to collect rents. He also seems to have executed several different wills. He is shown to have been in some way induced to believe that his son Enoch had defrauded him of eighteen hundred dollars, and that he was only safe under defendant's watchfulness. This idea about Enoch was absolutely unfounded. It was such a delusion as either indicated mental unsoundness—which we do not think existed—or such a working upon his suspicions as completely led him astray. The facts seem to be that, while at this period he was not insane, he was affected by a disorder which rendered him weak in mind and body, and peculiarly liable to be handled by designing persons. Between the arrival at defendant's and the execution of the deed in 1875, complainant gave defendant a voluntary note for $1000, and signed with him a note to one Stone for $500, which defendant claims was borrowed for complainant, but which we are satisfied was for defendant's own benefit. During this same period also, there were opportunities for selling the farm for $4500, which were not accepted by defendant.

On the 23d of February, 1875, complainant made the warranty deed now in suit to defendant for an expressed consideration of $4000, and defendant claims that it was an actual sale and not a gift. Complainant claims he did not understand that he was making such a transfer to defendant, but supposed he was making a will. There was no occasion for his selling to defendant or to any one, inasmuch as he had an income beyond his wants. The sale, if made for $4000, was at a large sacrifice for which no reason appears But the alleged consideration and the fact of a sale, prop-

erly so called, cannot be reconciled with any plausible theory of a fair transaction.

To make up the $4000, or $4500, whichever is claimed to have been the real sum, defendant explains that his father had willed him $2000; that defendant gave up the beforementioned note of $1000, and agreed to pay the Stone note of $500 and interest; and the balance was made up out of an agreement to support complainant, for which a security of $1000 was given. Apart from the agreement to support, these considerations were entirely illusory. Complainant was not bound on any of them, and none of them could have been enforced. But the facts do not indicate that any such consideration was agreed on. It is entirely clear that when this deed was made complainant made some kind of a will, and that then or thereafter some bond or other agreement was made by defendant, which was intended for something more than mere support. Complainant, if he understood the matter at all, which is doubtful, understood that he was not depriving himself entirely of property, as he would have done if defendant's claim is true. These papers were left with the judge of probate who afterwards delivered them to defendant on his suggestion that his father desired it. These papers have disappeared, and according to defendant were voluntarily destroyed by complainant who chose to remain without written security. In 1876 defendant procured a receipt in full to be prepared, whereby complainant acknowledged full payment for his property, but it is clear he received nothing for it, and was left utterly destitute.

If we gave credit to defendant's own version of these transactions, complainant has, while living with defendant, allowed him to absorb his personal property and all of his real estate, and is left without anything to represent it, and without any security whatever for his support. He has been rendered practically a pauper, and has destroyed or given up such partial assurances as he at one time had. That such a result has been the deliberate and understood purpose of a person of sound mind and free from fraud or un-

due influence, is preposterous. Such a state of things indicates beyond question either incapacity or dishonest management or both. We think there is enough appearing in the case to indicate cunning and deception. But the dealings, however managed, are intrinsically wrong when a person in the fiduciary relation occupied by defendant as his father's agent and factotum, manages to get all that his father possesses into his own hands. Nothing but a clear and satisfactory explanation could under any circumstances save dealings which have such an outcome. The old man's feebleness of memory left him very much at defendant's mercy, but defendant's own showing is anything but satisfactory.

Upon the whole case we think complainant has made out a case for rescission. Defendant's counsel suggested that he should be allowed compensation for his expenditures, and for the care of the old man. We think his possession of the property has given him sufficient compensation for what he has spent on it, and that he has no equity to recover his other outlays, which we cannot but think greatly exaggerated, when the old man's residence with him was constantly taken advantage of to further defendant's unlawful designs.

The decree must be reversed with costs of both courts, and the deed rescinded and a reconveyance decreed,—the decree to stand meanwhile in lieu of a conveyance.

The other Justices concurred.

The People v. Dan Van Wagner.

Limitation on review in criminal cases—Certiorari.

Writs of error and of certiorari are barred after five years from judgment, and if sued out will be dismissed.

The writ of certiorari is appropriate to accompany the writ of error in criminal cases, if issued in time.

Error to Kalamazoo. (Hawes, J.) June 19.—June 22.

ASSAULT with intent to kill and murder. Respondent brings error. Dismissed.

Blanchard & Cagwin for appellant.

Attorney General *Jacob J. Van Riper* for the People.

CAMPBELL, J. Respondent, who pleaded guilty to a charge of assault with intent to murder, now seeks on writ of error to reverse the judgment for an alleged irregularity.

It is sufficient to say that the writ was not sued out until about six years after judgment, five years being the statutory limitation, allowing for all disabilities, both for writs of error and writs of certiorari; the latter writ being appropriate to accompany the writ of error, if issued in time.

The writ must be dismissed.

The other Justices concurred.

THE PEOPLE v. FRANK LEWIS.

Examination as to plea of guilty—Age of offender.

A prisoner who had pleaded guilty was asked by the judge if he understood that if the plea was entered he would not be entitled to trial but would be subject to sentence. He said he so understood and wished the plea to be entered. He was sentenced the same day, the judge asking him if he had any reason to urge why judgment should not be passed against him, to which he answered that he knew of none. The judge made no other examination as to whether the prisoner's plea was voluntary, and this was in the presence of the prosecuting attorney and other officers of the court, but he made return that he was satisfied at the time from the prisoner's statements that the plea was voluntary. *Held*, sufficient.

It is presumed that a judge before sentencing a convict performs his duty as to ascertaining the latter's age, unless the contrary is implied in the record of the proceedings.

Certiorari to Oceana. (Russell, J.) June 19.—June 22.

LARCENY from a dwelling in the day time. In response to a writ of certiorari from the Supreme Court, the trial judge returns that the information on which respondent was arraigned was distinctly read to him by the prosecuting attorney, and on being asked by the court whether he was guilty or not guilty, he stated that he was guilty and desired to have that plea entered. The court then asked him if he understood that in case he entered a plea of guilty, he would not be entitled to a trial, but would be subject to sentence, and he stated that he so understood and desired to enter a plea of guilty. The plea was then entered, and on the same day he was brought to the bar, and on motion of the prosecuting attorney the court proceeded to pass sentence by asking him if he had any reason to urge why judgment should not be passed. He said he knew of none. The judge then asked him his age and occupation and sentenced him. The judge adds "I was satisfied at the time from respondent's statements that the plea of guilty was voluntary. I further return that I made no examination outside of the regular routine court business as to whether the plea of guilty was voluntary or otherwise, or as to his age, and that all examination that was made was in the presence of the prosecuting attorney and other officers of the court." Respondent was convicted and sentenced to the State House of Correction and Reformatory at Ionia for one year and three months. Affirmed.

Gurney & Stevens for respondent appellant.

Attorney General *Jacob J. Van Riper* for the People.

GRAVES, C. J. We think no error was committed by the circuit judge against the statute requiring a certain examination before sentence on plea of guilty. Pub. Acts 1875, p. 140. The case is governed by *People v. Coveyou* 48 Mich. 353, and *Bayliss v. People* 46 Mich. 221.

We are referred to the note in *People v. Stickney* 50

Mich. 99, as authority for a contrary view. It is sufficient to observe that what is there shortly said must have proceeded from some misapprehension, because it is directly opposed to the settled view of the Court as repeated in prepared opinions.

The point suggested that it does not appear that the defendant's age was ascertained, is not well taken. The intendment is that the circuit judge performed his duty in that regard, there being nothing to imply the contrary. *Matter of Mason* 8 Mich. 70.

The judgment is affirmed.

The other Justices concurred.

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Philip S. Hamilton's Case.

Habeas corpus—Defects in criminal proceedings.

Technical defects in a justice's warrant of commitment are not reviewable in habeas corpus proceedings; redress must be sought in some way prescribed by statute for review by an appellate court.

Habeas corpus is the proper remedy for a conviction without jurisdiction.

A circuit judge is not an appellate tribunal for proceedings taken before a justice of the peace in a county not belonging to his circuit and where he is not acting; and if in such proceedings he exercises authority by writ of habeas corpas, he has only the powers of a circuit court commissioner and he cannot review the judgment.

An appellate court can use the writ of habeas corpus as one means of exercising its supervisory power; but tribunals which have no appellate power cannot use it as a writ of error.

Certiorari to Ionia. (V. H. Smith, J.) June 19.—June 22.

Attorney General *Jacob J. Van Riper* for the People.

Blanchard & Cagwin for respondent.

COOLEY, J. Hamilton was convicted by a justice of the peace of the county of Schoolcraft for that "on the 30th day of December, A. D. 1882, at Seney, in the township of Manistique, in said county of Schoolcraft, said Philip S. Hamilton did engage in and carry on the business of selling and offering for sale, by retail, spirituous and intoxicating liquors, and did sell, at retail, spirituous and intoxicating liquors, without first having paid the tax upon the business of selling or offering for sale spirituous or intoxicating liquors by retail, in violation of Act number 268 of the Session Laws of 1879, approved May 31st, 1879, and the Act number 156 amendatory thereof, approved May 19th, 1881, of the Laws of Michigan." On this conviction he was sentenced to the House of Correction at Ionia for the period of ninety days, and was duly committed by the warrant of the justice. He thereupon obtained from the judge of the circuit court for the county of Ionia a writ of habeas corpus, and on a hearing upon return to that writ he was discharged.

The discharge necessarily assumed that the record of conviction failed to show the commission of any offense. This conclusion was reached apparently upon a somewhat critical and technical examination of the commitment, and we are not satisfied that the criticism was not overnice. But the point is not very material, as it is plain that technical defects are not reviewable on this process.

If the warrant showed a conviction without jurisdiction, habeas corpus would be the proper remedy; but when the defects are mere irregularities the party must seek redress in some of the modes provided by statute for review by some appellate tribunal. The circuit judge of the Ionia circuit is not an appellate tribunal in respect to proceedings which take place before justices of the peace of the county of Schoolcraft, and in exercising authority by the writ of habeas corpus he is commissioner merely, and what he may do, the circuit court commissioner of the county may claim the right to do also. Nor would the authority be limited to convictions by justices of the peace, but the circuit court commissioner might in the same way assume to review the

judgments and sentences of the circuit courts, and we might witness the spectacle of these inferior officers sitting as judges of review upon the action and judgments of courts of general jurisdiction. A sense of propriety might restrain such action, but we cannot fail to perceive what possibilities are involved in sustaining this discharge. An appellate court may no doubt make use of the writ as one means of exercising its supervisory power, but it is not to be employed as a writ of error by tribunals not possessing the appellate authority.

The order of discharge is vacated.

The questions above mentioned were the only ones presented on this hearing, and we are not to be understood as deciding, by implication or otherwise, any others.

The other Justices concurred.

The People v. John Allen.

Waiver of irregularity by pleading not guilty.

Pleading to a complaint presented in justice's court waives the irregularity of omitting to issue a subpœna before serving the warrant.

Exceptions before judgment from Allegan. (Arnold, J.) June 19.—June 22.

Complaint for drunkenness. Respondent was convicted below. Affirmed.

Padgham & Padgham for respondent appellant.

Attorney General *Jacob J. Van Riper* for the People.

Sherwood, J. The respondent was convicted before a magistrate, under the liquor law of 1881, of the offense of "being drunk in a public street" in the village of Allegan.

From this conviction he took a general appeal to the circuit court, where his case was retried; a conviction was again obtained, and from this judgment he brings error, and the proceedings at the circuit are now before us for review.

When respondent appeared before the magistrate he pleaded not guilty to the complaint, and the case was adjourned for trial. On the adjourned day he appeared with counsel, and "moved to set aside his plea," that he might make a motion to dismiss. The motion was denied by the magistrate.

On the trial at the circuit the complaint, warrant, bond on appeal, and return were offered in evidence by the respondent, and thereupon his counsel moved the court to dismiss the case for want of jurisdiction, because no subpœna was issued for respondent before the service of the warrant upon him. The court denied the motion, and error is assigned upon this ruling.

We think the ruling was correct. The irregularity complained of, and upon which the exception is founded in this case, was waived by respondent when he appeared before the magistrate and made his plea. *Crane v. Hardy* 1 Mich. 56; *Falkner v. Beers* 2 Doug. (Mich.) 117; *Tower v. Lamb* 6 Mich. 362; *People v. Clark* 33 Mich. 113; *Stewart v. Hill* 1 Mich. 265; *Lewis v. Brackenridge* 1 Blackf. 112, 115; *Pierce v. Rehfuss* 35 Mich. 53.

The judgment must be affirmed.

The other Justices concurred.

WOOLSEY CRONKHITE v. JEROME DICKERSON.

Fraud—Remote evidence—Prejudicial instructions.

In an action for fraud in selling plaintiff a second for a first mortgage, it is admissible to show that at the time of making the mortgage defendant said he did not want it to contain an exception in the covenant against encumbrances, as it might prejudice its sale.

In an action for fraud in selling a second mortgage for a first, it was objected that testimony was too remote which showed that defendant, in giving the mortgage, had said he wanted it to trade, and could not do so if there was anything to show a prior mortgage. Defendant's counsel said the testimony was that the buyer of the mortgage had sought defendant, and not defendant him. *Held*, prejudicial to defendant for the court to add in the hearing of the jury: "Yes, but he might have been lying in wait. If it had contained a covenant against incumbrances, and was a true statement of the situation of the property, it would itself have given the lie to the statement he is claimed to have made."

Judges must take great care to say nothing in the hearing of jurors while a case is progressing, which can possibly be construed to the prejudice of either party.

Error to Kent. (Montgomery, J.) June 20.—June 22.

CASE. Defendant brings error. Reversed.

Taggart & Wolcott for appellant.

Fletcher & Wanty for appellee.

SHERWOOD, J. The plaintiff brings case for alleged fraud in the sale of a note and mortgage to him by the defendant. The fraud charged consisted in the defendant's falsely representing to the plaintiff that the mortgage he then offered to sell to the plaintiff was a first mortgage on real estate, and thereby induced the plaintiff to purchase the same, when in fact it was a second mortgage and of little value. The plaintiff recovered on a trial before a jury at the circuit. Two errors only are assigned upon the record, and both relate to rulings in receiving testimony.

Counsel for plaintiff offered the statements of the defendant at or about the time of the making the mortgage, to the effect that he did not want the mortgage to contain an exception in the covenant against incumbrances, giving as a reason that it might prejudice its sale. This testimony was objected to as irrelevant and too remote. We think the testimony was properly received and within the former rulings of this Court. *Kost v. Bender* 25 Mich. 515; *Com-*

stock v. Smith 20 Mich. 346; *Beebe v. Knapp* 28 Mich. 65; *Cook v. Perry* 43 Mich. 627.

On receiving the testimony just alluded to, counsel for plaintiff stated to the court, in the presence of the jury: "I expect to show that Mr. Dickerson said at the time that he wanted the mortgage to trade, and could not if anything was in it showing a first mortgage, and, in pursuance of his statement, he did trade it off to the plaintiff." Counsel for defendant thereupon remarked: "That is pretty remote; the testimony is that he sought Mr. Dickerson, and not Mr. Dickerson him." The court then suggested: "Yes, but he might have been lying in wait. * * If it [meaning the mortgage] had contained a covenant against incumbrances, and it was a true statement of the situation of the property, it would itself have given the lie to the statement that he is claimed to have made."

It is insisted by defendant's counsel that these suggestions by the court were calculated to make an impression unfavorable to the defendant upon the minds of the jury. Of course, nothing of the kind was intended by the court; still, we think the suggestions open to the criticisms made by defendant's counsel, and it is impossible to tell to what extent the defendant's rights may have been prejudiced by the remarks. Certainly, the natural tendency was in that direction, and in this there was error.

Jurors are very vigilant in scrutinizing all that is said by the trial judge in the progress of a cause before them, and great care should be observed that nothing is said which can, by any possibility, be construed to the prejudice of either party. Courts cannot be too circumspect in this regard.

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

CAMPBELL, J. concurred.

GRAVES, C. J. In view of the fact that the question before the jury was whether the defendant had been guilty of a gross fraud in putting off a worthless mortgage, I agree

with Mr. Justice Sherwood that the circuit judge was not sufficiently guarded, and that his inadvertent remark was likely to affect the jury unfavorably towards the defendant.

COOLEY, J. I doubt after examining the record in this case, if the circuit judge understood, or had any reason to understand, that the remark he made was excepted to, and I therefore do not concur in reversal.

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DETROIT CITY STREET RAILWAY COMPANY v. JACOB GUTHARD, RECEIVER OF TAXES.

FORT WAYNE & ELMWOOD STREET RAILWAY COMPANY v. JACOB GUTHARD, RECEIVER OF TAXES.

Tram railways—Rate of taxation—Tax-law.

The Tram Railway Act prescribes the rate and manner of taxing such railway companies, but elsewhere provides that the act may be at any time amended or repealed, though this shall not alter the *corporate rights* of companies formed under it. The subsequent tax law changed the mode of taxation, but the other clause was not disturbed. *Held*, that the companies came within the tax law; and that the term *corporate rights*, used alone, meant only such essential and fundamental rights as attach to corporations, and did not include incidental privileges and immunities, such as a special standard of taxation.

The effect of legislation, where the Legislature has full power, bears on the question of intent and construction.

Error to the Superior Court of Detroit. (Chipman, J.) June 21.—June 22.

REPLEVIN and ASSUMPSIT. Defendant brings error. Reversed.

City Counselor *Henry M. Duffield* for appellant.

Brennan & Donnelly and *Fred A. Baker* for The Detroit City Railway, appellant in the case in replevin.

Otto Kirchner for the Fort Street & Elmwood Railway, appellant in the case in assumpsit.

Cooley, J. The plaintiff in these suits respectively is incorporated under "An act to provide for the construction of train railways," approved February 13, 1855. Comp. L. p. 818. The twenty-second section of that act provided that

"Each and every railway company formed under this act shall pay to the treasurer of the State of Michigan an annual tax, at the rate of one half of one per cent. on the whole amount of capital paid in upon the capital stock of said company; which said tax shall be estimated upon the last preceding report of said company, and shall be paid to the said treasurer on the first Monday of July in each year, and shall be in lieu of all other taxes upon all the property of said company."

The thirty-first section of the same act is as follows:

"The Legislature may at any time alter, amend, or repeal this act; but such alteration, amendment, or repeal shall not operate as an alteration or amendment of the corporate rights of companies formed under it, unless specially named in the act so altering or amending this act, nor shall the dissolution of any such company take away or impair any remedy given for or against such corporation, its stockholders, or officers for any liability which shall have been previously incurred."

Section twenty-two remained in force and the companies were taxed under it until 1882, when in the general revision of the tax laws by the adoption of the plan of the Tax Commission it was repealed, and corporations generally, including train railway companies, were for the purposes of taxation put upon the same footing with natural persons, and made taxable upon an assessed valuation of property. But there was no repeal of section thirty-one, and there was no express declaration that the repeal of section twenty-two should be applicable to corporations previously formed and specially named.

The business operations and offices of the plaintiffs are in the city of Detroit, and they were named on the tax rolls of the city for the year 1882, and taxed with other persons.

The defendant, who is Receiver of Taxes, proceeded to make collection, and these suits are the result. One of them is a suit in replevin for property distrained; the other is assumpsit to recover moneys paid for taxes under protest.

No question is made of the regularity of the assessment and levy of the taxes, provided the plaintiffs are lawfully taxable by the city; but the questions raised are questions of power under existing legislation. The contention is that so long as section thirty-one remains in force it is not competent to tax the companies formed under this general incorporation act, otherwise than as provided by section twenty-two.

This contention does not raise a question of constitutional power. By the Constitution of 1850 all acts of incorporation which should be thereafter passed were expressly made subject to alteration, amendment and repeal; and this act may therefore be changed in the legislative discretion. The Legislature might therefore have repealed section thirty-one had it chosen to do so. It has not repealed it, and so long as it stands unrepealed, it must be given effect. The question then is whether with section thirty-one in force, taxation by any other standard than that provided by section twenty-two is competent and admissible.

Different views may be taken of section thirty-one, and were taken or suggested on the argument. It may be regarded as a contract between the State and the corporations, limiting the power of the State for their protection so long as it remains in force, or as a stipulation in respect to the method in which legislation affecting them shall be adopted while it is allowed to stand, or as a legislative rule for the construction of subsequent legislation. It is not important which one of these views is taken; for if to be taxed according to the provisions of section twenty-two is one of the corporate rights of these companies within the meaning of section thirty-one, as plaintiffs contend it is, then they must be taxed under that section while section thirty-one remains in force, or they cannot be taxed at all.

The term "corporate rights" is so general that it is not

surprising questions should arise as to what is included within it. In speaking of corporations it is very common to say generally that they possess certain rights, privileges and immunities; but each of these terms may be employed without any very precise meaning in mind, and the same franchise or exemption may be spoken of at one time as a right and at another as a privilege without seeming error or confusion. But where one term only is made use of in a statute, it must obviously have a somewhat restricted meaning: we cannot suppose it was meant to have the same scope and force as the three terms would have had if all had been employed. And this is very manifest in a case like the one before us. Any alteration or amendment of the general incorporation act which is applicable to companies formed under it, must in some way affect, and therefore may be said to alter or amend, some of their franchises, privileges or immunities, so that all change in the law would be rendered impossible if the term "right" were made to embrace everything which constituted a privilege or an immunity.

Is, then, taxation by the standard and in the mode provided by section twenty-two a corporate right of these corporations within the meaning of section thirty-one? We think not. The rights intended by that section, we think, are the essential and important rights of corporations formed for the particular purposes which the act had in view, as distinguished from the privileges and immunities which are not so fundamental, but which may nevertheless have value. An attempt to enumerate the rights here would be presumptuous and without value; but in general terms it may be said that the franchise to construct and operate a road and to levy and collect remunerative tolls or charges would be corporate rights, while exemption from the customary and uniform operation of the essential powers of government, like the power to tax and the power of police regulation, must be regarded as a privilege rather, or an immunity. And considering the standard of taxation provided by section twenty-two as a privilege, the right of the

Legislature to change it was undoubted. It had value, no doubt, while it remained the law, but in so far as it operated to the advantage of these corporations, it was a disadvantage to all other corporations and persons, and therefore lacked the element of equality which we expect to find in whatever we dignify as a right in contradistinction to a privilege or immunity, either of which suggests discrimination, advantage or favor.

Another view of the case is to our minds conclusive. So long as the Legislature possesses full power over the subject, the question of the effect of what they have assumed to do must be a question of intent and construction. Now that the Legislature intended to make these corporations taxable under the Act of 1882 is plain from the fact that they repealed section twenty-two, leaving them not otherwise taxable at all. No one suggests or supposes it was the intention to give them complete exemption.

The judgments must be reversed. In the case first named judgment will be entered for defendant for the amount of the tax in question, with costs; and in the second he will recover his costs only, the tax having been paid.

The other Justices concurred.

ADELBERT C. MARTIN v. WILLIAM B. TRIPP, ASSESSOR, ETC.

Mandamus—Payment of interest on school orders.

Mandamus to compel a school district assessor to pay a school order was allowed where the Court was satisfied there was no valid defense.

Interest from the time of demand may be allowed in granting mandamus for the payment of a school order when it is such a settled demand as would sustain a recovery of interest at law.

Mandamus. Submitted June 19. Granted June 20.

Hughes & Smiley for the writ.

L. A. Tabor against.

This is a motion for a mandamus to compel the respondent to pay an order issued to the plaintiff by the proper school officers of the district, in payment for services as a teacher, and which respondent, at a time when he had money in his hands applicable for the purpose, refused to pay. Various defenses were set up,—among them a violation of contract by the relator, irregularity in the making of the contract, and a vote of the district not to pay.

The Court being satisfied there was no valid defense, ordered that the writ should issue; and as the order was such a settled demand as interest would be recoverable upon at law, interest was allowed from the time of demand.

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Erhard Kundinger v. The Detroit, Grand Haven & Milwaukee Railway Company.

Conclusiveness of findings of fact.

A finding of fact in a case at law tried without a jury, is conclusive where there is any evidence to found it upon, even though the evidence is conflicting.

Error to Wayne. (Jennison, J.) June 22.—June 22.

Case. Defendant brings error. Affirmed.

William H. Russell and *George Jerome* for appellant.

Edward A. Gott for appellee.

Per Curiam. The only question in this case is whether the evidence in the case conclusively made out negligence on the part of plaintiff contributing to the injury of which he complains. Unless it did, he was entitled to recover. We find, on examination, that there was evidence of such

negligence, and also evidence of due care; and the question having been decided on the facts in plaintiff's favor, the finding is conclusive, and no question of law arises for decision now.

The judgment is affirmed with costs.

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JOHN G. RUMNEY v. AMANDA M. COVILLE, JOHN WEBSTER ET AL.

Action on note deposited as security on a contract.

A party to a contract has no right to bring suit upon a note placed by the other party in the hands of a third person as security, merely, for his fulfilment of the contract, so long as it is not agreed that the note shall be liquidated damages for non-performance, and the damages therefor have not been determined in a suit on the contract.

Error to the Superior Court of Detroit. (Chipman, J.) Jan. 17.—Feb. 27; rehearing on briefs: April.—July 2.

ASSUMPSIT. Defendants bring error. Reversed.

Hawes & Phelps for appellants. Suit on a note deposited with a trustee must be brought in the trustee's name: Hill on Trusts 503.

Charles M. Swift for appellee. A party to a contract, who has performed, can sue on a note deposited with his agent by the other party as security for the latter's performance: Story Bailm. § 321; *Comstock v. Smith* 23 Me. 202; *Nelson v. Wellington* 5 Bosw. 178; *Brown v. Ward* 3 Duer 660; *Androscoggin R. R. v. Auburn Bank* 48 Me. 335; *Jones v. Hawkins* 17 Ind. 550.

COOLEY, J. This case was argued and submitted at the last January term, and a decision made reversing the judgment and ordering a new trial. Subsequently, on applica-

tion of the plaintiff, the parties were allowed to file briefs in reargument.

The action is upon a promissory note for the sum of $598.25, given by the firm of A. M. Coville & Co., payable to the order of defendant, John Webster, and by him endorsed. The question in the case is whether this ever became an effective promissory note. The facts bearing upon the question appear to be the following:

In the year 1878, Martha J. Rumney of Detroit died, leaving a last will and testament whereby, after a specific gift not necessary to be here described, and after a residuary gift of her property to her five children equally, she made the following provisions:

"I will and direct that the share of my estate hereinbefore bequeathed and devised to my sons Benjamin Rumney and Henry R. Rumney shall remain in the hands of my executors until they reach respectively the age of twenty-five years, receiving meantime the income from the same; leaving it, however, to the wisdom and discretion of my executors to deliver to them respectively their shares of said estate at any time after they reach the age of twenty-one, or any part thereof, if said executors are fully satisfied in either case that said share will be safely, wisely and judiciously used.

"I hereby nominate and appoint my son John G. Rumney and my friend Guy F. Hinchman the executors of this, my last will and testament, with full power and authority to sell and convey any real estate of which I shall die seized."

The will was probated and John G. Rumney duly qualified as executor and received letters testamentary, but Hinchman renounced the trust.

April 4, 1882, John G. Rumney made a bargain with defendant Webster to sell to him the homestead property of the Rumney estate, for a price agreed upon, and gave him a contract by the terms of which the trade was to be consummated within a reasonable time, and "all the heirs and executors" were to be grantors in the conveyance. The following recital appears in the written contract: "To secure the fulfillment of this agreement said Webster has delivered said Coville & Co.'s note, and said John G. Rum-

ney $250 in cash, to Benjamin Vernor of Detroit, Michigan." The note now in suit and the money above mentioned were deposited with Vernor according to this recital.

May 5, 1882, Webster notified Rumney that he would not take the property. Rumney caused a deed of it, signed by all the living heirs,—one having died without issue—to be tendered, and this having been refused by Webster, Rumney procured the Coville note from Vernor and brought suit upon it. Hinchman was living when suit was brought. Benjamin and Henry Rumney were respectively over the age of twenty-one, but had not reached twenty-five.

On the original hearing such of the members of the Court as were present were of opinion that the power given by the will did not under the circumstances authorize John G. Rumney to make sale of the land. A change had taken place in the Court at the time of the rehearing, and on reviewing the case we find that while all agree that the judgment already entered is correct, we do not all agree in the grounds of the first decision. The first opinion is therefore withdrawn, and the decision placed upon a ground in which all concur.

The suit, it will be noticed, is upon the Coville note, which was deposited, as the written contract stated, "to secure the fulfillment of this agreement," and which Webster at the time endorsed. The note was at the time deposited in the hands of a third party. It is not stated in the agreement that the note was to be liquidated damages in the event of non-performance by Webster; and the fact that the deposit made by Rumney as security on his part, was less than half the amount of the note, would indicate that such was not the understanding. The note, then, must be deemed held by Vernor as mere security. But if held as security, it did not pass to Rumney as his property, and he would be entitled in any event to recover upon it only such damages as might be awarded to him. But as yet he

has recovered no damages, and has not, so far as we are informed, even brought suit upon the contract.

This is fatal to the present suit. The plaintiff was not entitled to take the note from Vernor for the purposes of a suit upon it; and this appears in his own showing.

The motion to vacate the judgment is denied.

The other Justices concurred.

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Henry Adams v. Elijah Bowman.

Sale of worthless paper—Evidence—Consideration.

In an action for damages for selling to plaintiff, through a third person, a worthless note and mortgage, it is proper to lay before the jury the documents themselves if their suspicious character and the tokens of their fabrication are primary facts in the controversy.

An action for causing worthless paper to be sold to plaintiff should not be taken from the jury if there is evidence that defendant suggested and was concerned in getting up the paper; that he purposed using it to get money; that he let the person who made the sale have it, without consideration, in order to trade it off, and that he expected part of the proceeds.

Where a note was altered and made to correspond to a mortgage which was drawn for fraudulent purposes, and both papers were sold, and the buyer brought suit for damages against the person who caused the sale, a rule of damages was *held* correct which treated the money as paid without consideration.

Error to Kent. (Montgomery, J.) June 7.—July 2.

Case. Defendant brings error. Affirmed.

Henry J. Felker and *Taggart & Wolcott* for appellant. The measure of damages for false and fraudulent representations of value is the difference between that stated and the true value: *Page v. Parker* 43 N. H. 363; *Stiles v. White* 11 Met. 356; *Hamilton v. Billingsley* 37 Mich. 107; *Page v. Wells* id. 415.

Frank G. Holmes for appellee.

CAMPBELL, J. Adams sued Bowman for having, through one Nelson Bowman, sold and passed off on plaintiff a worthless note and mortgage purporting to secure $400, and to have been made by one Rebecca Shaw, wife of Sted C. Shaw.

The testimony, which was however contradictory, tended to show that on the 19th of September, 1879, plaintiff bought of Nelson Bowman the note and mortgage in question, dated February 13, 1878, and payable in one year with ten per cent. interest. Nelson Bowman purported to hold the papers under a regular assignment from defendant describing the documents, made July 26, 1879, and recorded September 16, 1879. The mortgage itself was recorded July 25, 1879. Plaintiff paid $350 for the securities. The assignment from defendant covenanted that the whole sum of $400 and interest was due.

The testimony relied on to show that defendant was the party responsible for the fraud consisted of a history of the origination of the paper, and various declarations of defendant that he had let Nelson have it to trade it off. The showing made was, in substance, that defendant got Mrs. Shaw to execute the mortgage for the purpose of annoying or defrauding a purchaser of the land,—defendant agreeing to save her harmless and to pay her half of what he might collect on the mortgage. The note was made up by taking an old note and changing the sum and terms of it. The papers were very clumsily drawn, but the mortgage was recorded, so that the record did not show its peculiarities, and the note as altered corresponded precisely with the mortgage.

The court charged the jury sufficiently upon the question whether the plaintiff was careful enough in the purchase of the papers; and while there are several matters which were open to comment, the facts were for the jury who have found in his favor. The testimony was also directly conflicting on important points, but that also the jury have disposed of.

We can see no reason why it was not proper to lay before the jury the documents themselves out of which the fraud arose. Their suspicious character, and the ear-marks of fabrication, were among the primary facts of the controversy.

Neither do we think the court could rightly be asked to direct a verdict for defendant, or take the case from the jury. There was full and positive evidence that he was concerned in and suggested the getting up of the paper and that he purposed to use it for getting money out of somebody. There was evidence that he let Nelson have it without consideration for the purpose of trading it off, and expected some part, at least, of the proceeds. The testimony authorized an inference that Nelson was acting for him and under his procurement. The conclusions of the jury on the dispute cannot be disturbed.

As the note was a mere nullity, the rule of damages which treated the money paid for it as paid without consideration, was correct. The mortgage was invalid without the note, and this note was not shown by any testimony to have been given with it.

We have not deemed it necessary to take up the assignments of error singly. What we have said disposes of all the material questions presented to us. The charges of the court were carefully guarded, and we find no error in the record.

The judgment must be affirmed with costs.

The other Justices concurred.

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PATRICK TREGENT v. ABRAM MAYBEE AND DANIEL HASLEY.

Fraudulent use of shipping receipt.

Assumpsit, to recover back the amount paid for a shipping receipt, lies against the persons who orginally issued the receipt, if the merchandise therein described was not actually shipped as agreed in the re-

ceipt and the defendants have by words or acts, authorized, consented to, connived at or sanctioned the act of the person selling the receipt in thereby obtaining from plaintiff money which he has turned over to defendants in payment of a debt due them from himself.

Error to Wayne. (Chambers, J.) June 14.—July 2.

ASSUMPSIT. Plaintiff brings error. Reversed.

S. E. Engle for appellant.

Jas. H. McDonald for appellees. Assumpsit will not lie for injury to security: *Randall v. Higbee* 37 Mich. 41; a bill of sale may be a pledge or mortgage and is so if the goods are merely security for repayment: *McMillan v. Larned* 41 Mich. 523; *Fuller v. Parrish* 3 Mich. 211.

SHERWOOD, J. This case was before this Court on error at the January term, 1882, but upon different pleadings. 47 Mich. 495. The case was then made to rest entirely upon the contract relations claimed to exist between the parties, and it was held they were not such as to entitle the plaintiff to recover.

The pleadings now present an action on the case against the defendants for fraudulently obtaining of the plaintiff $180 by the transfer to him of a certain shipping receipt, accompanied by the false statement and representation of one Baker (who, it is alleged, was acting for and in the interest of defendants) that the property mentioned in the receipt had then been shipped to Detroit. The receipt was endorsed by defendants in blank, and is as follows:

"MAYBEE STATION, Oct. 18, 1878.

Received of M. and H., by the Canada Southern Railway Company, the following property, marked and described as per margin, to be forwarded to Detroit station:

MARKS AND DESTINATION.	ARTICLES.	WEIGHT.
Maybee and Halsey, Detroit, M. G.	60 bbls. flour	1200.

A. MAYBEE, Agent.
Per Yager."

The defendants were a firm doing a milling and other

business at Maybee station, on the Canada Southern Railway, and Maybee was the agent who issued the shipping receipt. The plaintiff lived in Detroit, and dealt in grain and flour.

The declaration contains a special count, charging the fraudulent issue and transfer of the receipt to plaintiff, and the common counts with bill of particulars. Plea, general issue.

It appears from the testimony that Baker owed defendants an old account of $52, and that they could not collect anything of him; and it was a part of the theory of the plaintiff that the defendants pretended to sell the flour mentioned in the railroad receipt to Baker, and that they let him take the receipt, endorsed by them in blank, to make sale of it to plaintiff, and thus realize their pay of the $52 from Baker out of the proceeds of the sale, and then retain the flour upon the pretense that the sale to Baker was for cash, and, he failing to pay defendants, they would refuse to ship the flour.

Under the pleadings of the case the plaintiff was permitted to give testimony, without objection, tending to prove these facts; and further, that Baker sold and delivered the receipt to plaintiff, stating to him that the flour had been shipped, and thereby obtained from plaintiff the $180—the amount sued for; that after receiving the money Baker immediately paid the defendants the $52, and they then refused to ship the flour according to the receipt.

Plaintiff also gave testimony tending to prove—and this was not controverted—that the plaintiff bought the receipt in good faith and in the usual course of business, relying upon the facts stated in it and the statements made by Baker in parting with his money; and further, that Maybee, in a conversation with one of plaintiff's witnesses a short time after the transfer of the receipt, stated that "defendants did not do right—that they ought to have shipped the flour."

The business was all transacted in Baker's office in Detroit. Mr. Maybee also, in giving his testimony, stated: "I wanted Baker to pay this old debt of $52; I brought the shipping

receipt to Detroit with me; I did not expect to get the money on it unless I sold the flour; Baker had ordered the flour, and I supposed he would pay for it; I knew he did not have the money right with him, but he was to get the money right away for me;" and further stated that when he indorsed the receipt and let Baker have it, he did not know what Baker was going to do with it; that Baker paid him $52; and then said: "I did not ask Where is the rest of the money. I took it and made no objections. I did not ask him what he had done with the shipping receipt, and he did not tell me. I don't think I ever asked him for the receipt back."

When the testimony was closed, the plaintiff asked the court to charge the jury, among other requests, the following, viz:

"If the flour was not actually shipped, and the receipt consequently fictitious, and the defendants by their words or acts authorized, consented to or connived at or sanctioned the obtaining the money by Baker for their benefit, and for the purpose of getting their pay from Baker on their old account, this was a fraud and a wrong, and they would be liable for the amount so obtained in this action of assumpsit."

The court refused to give this request, and directed a verdict for defendants.

It was in evidence, and not disputed, that the money to the amount of $180 was received of the plaintiff by Baker on the transfer of the receipt to plaintiff, and that the amount of the old account was paid to defendants by him therefrom. We think this request should have been given and the case submitted to the jury on the theory of the plaintiff. *Beebe v. Knapp* 28 Mich. 53; *Converse v. Blumrich* 14 Mich. 109.

There was testimony quite sufficient tending to show that fraud was practiced in obtaining the money from plaintiff by the use of the receipt by Baker, and that he was permitted to make the use of it he did by the defendants, whose subsequent conduct with reference to it, to say the least, was open to criticism; and the case, as it appears upon this

record, fairly presents questions of fact which should have been submitted to the jury.

It is unnecessary to consider the other errors assigned, as many of the questions raised will hardly recur upon another trial.

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

The other Justices concurred.

WALTER CRANE v. THE SECRETARY OF STATE.

University lands—Issue of patents.

Mandamus to the Secretary of State will not lie to compel him to issue patents to State lands; that is the duty of the Governor. Comp. L. § 3824

Mandamus. Submitted June 19. Denied July 2.

Henry A. Chaney for relator.

Attorney General *Jacob J. Van Riper* for respondent.

GRAVES, C. J. The relator in 1853 purchased certain University land, and received the usual certificate, and a few days since he obtained a further certificate from the Commissioner [of the Land-office] that he had paid the principal and interest, and was entitled to a patent. He then applied for a patent to the Secretary of State, who declined to issue it. And the sole object of this proceeding is to obtain a mandamus to compel that officer to do what he refused, namely, to issue the required patent.

We gather from the record that a controversy exists concerning back taxes. But there appears to be a question beyond it, which demands to be first considered. The respondent objects that the power to issue the patent does

not reside in the Secretary of State, but in the Governor; and, if this is true, a discussion of the other question would be mere dicta, and without any force in regard to relator's title to the writ. The application would have to be denied, whatever the conclusion about the taxes; and, on examination, the objection that the Secretary has not the power appears to be well taken. The matter is regulated by statute, and the language is clear. Comp. L. § 3824. The Governor is to sign the patents and cause them to be issued.

But admitting, says the counsel for relator, that the law has lodged the authority and duty with the Governor, and not with the Secretary, it is still matter of usage; or, in other words, a practice which the Governor has tolerated, for the Secretary to issue these patents. This view cannot aid the relator. It amounts to a concession that the Secretary neither holds the power nor is subject to the duty. He has voluntarily acted for the Governor, who has adopted his acts. Whether in any given case the same course shall be pursued must depend on their will. The law cannot compel it.

The writ is denied, but without costs.

The other Justices concurred.

The People v. Walter Lepper.

Examination as to plea of guilty—Act 99 of 1875.

A person accused of grand larceny pleaded guilty on arraignment. The judge told him that if his plea was entered he could have no trial and must be sentenced. The prisoner said he understood that. He was then remanded to the sheriff's custody for two days before sentence. Meanwhile the judge inquired of the under-sheriff, in whose charge the prisoner had been, as to what statement he had made to him and he also talked with the sheriff and with the prisoner's wife, and was satisfied that the plea was voluntary. When the prisoner was brought into court to be sentenced, the

judge asked him if he had any reason to urge why judgment should not be passed upon him, and the prisoner said he knew of none. He was accordingly sentenced. *Held*, that the statutory requirement that the judge satisfy himself that a plea of guilty is voluntary, was substantially fulfilled.

Where the action of a judge in investigating the character of a plea of guilty, is reviewed, his return should fully state the details of his inquiry.

Error to Mecosta. (Russell, J.) June 19.—July 2.

LARCENY. Respondent was convicted. Affirmed.

Blanchard & Cagwin for respondent appellant.

Attorney General *Jacob J. Van Riper* for the People.

SHERWOOD, J. The respondent was informed against for grand larceny, convicted on his own plea of guilty, and sentenced to imprisonment at Ionia for four years, on the fifteenth day of March, 1882. He now brings error, and alleges that the circuit judge, after his plea of guilty was made, and before giving judgment, did not make any investigation into the nature of the case, and the circumstances of the plea of guilty, to satisfy said judge that said plea was made freely, with full knowledge by the respondent of the nature of the accusation against him, and without undue influence, as required by the statute. This is the only error alleged.

The statute referred to says: "That whenever any person shall plead guilty to any information filed against him in any circuit court, it shall be the duty of the judge of such court, before pronouncing judgment or sentence upon such plea, to become satisfied, after such investigation as he may deem necessary for that purpose, respecting the nature of the case, and the circumstances of such plea, that said plea was made freely, with full knowledge of the nature of the accusation, and without undue influence. And whenever said judge shall have reason to doubt the truth of such plea of guilty, it shall be his duty to vacate the same, direct a plea of not guilty to be entered, and order a trial of the issue thus formed." Pub. Acts, 1875, p. 140.

It appears from the record that when the party was

arraigned he was in charge of the sheriff, and the information was distinctly read over to him in open court, and he was fully apprised of its contents, and of the charge therein contained, and when asked by the court whether he pleaded thereto guilty or not guilty, said that he pleaded guilty. After making this plea he was informed by the judge that in case his plea of guilty was entered to the information he would not be entitled to a trial, and in that case it would be the only duty of the court to sentence him to one of the State's prisons, without a trial, for such time as the court might see fit to fix within the law. The respondent then stated that he understood that, and he was then remanded into the custody of the sheriff to await sentence; that after this the court inquired of the under-sheriff as to what he knew of the alleged offense, and how it was committed, and what statement respondent had made to him, if any, while he was bringing him from the West, and was informed that respondent told the under-sheriff that he was guilty, and intended to plead guilty upon his return. The circuit judge also talked with the sheriff and respondent's wife about the matter, but does not recollect the conversations, but he was satisfied from the statements of the under-sheriff that the respondent voluntarily stated that he was guilty; that two days after he made his plea respondent was brought into court for sentence, and the court then asked the respondent his age; where he had lived; if he had ever been arrested before; if he had anything to say, or any reason to urge why the judgment of the law should not be passed upon him. Respondent replied, "he knew of no reason," and the court says: "I was of the opinion at the trial that his plea of guilty was freely made."

The statute invoked in behalf of this respondent is a beneficent one, and was designed alike for the protection of the prisoner and the public against the imposition and fraud of mercenary persons and unscrupulous officers in procuring prisoners to plead guilty through ignorance, fear or illusive promises, when a fair trial might show them not guilty; and courts whose duty it is to try persons charged with

crime and pronounce sentence upon them cannot be too vigilant in carrying out this statute according to its true spirit in every case where such plea is interposed; and this Court will not hesitate whenever in any case any reasonable doubt exists as to a full compliance with its requirements to set aside the sentence imposed. It is true, it may be said, that in such a case the prisoner has had his day in court; but a proceeding in legal form which fails to give protection and immunity to the liberty of the citizen when innocent, though charged with crime, is unworthy of judicial recognition in this country. The abuses sought to be remedied by this statute are very fully and clearly pointed out by Mr. Justice Campbell in *Edwards v. People* 39 Mich. 760; and we commend to the attention of all our circuit judges the views therein expressed.

In this case it would have been more satisfactory to us had the record furnished more of the particulars of the investigation made by the circuit judge before pronouncing sentence. Still, there appears to have been no undue haste in the matter, and the facts stated in the return, we think, bring the case clearly within the previous rulings of this Court. *Henning v. People* 40 Mich. 733; *Bayliss v. People* 46 Mich. 221; *Clark v. People* 44 Mich. 308; *People v. Ferguson* 48 Mich. 41.

The judgment of the circuit court must be affirmed.

The other Justices concurred.

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THE PEOPLE v. GEORGE W. BURT.

Constable acting outside of bailiwick—Arrests on suspicion—Homicide in resisting unlawful arrest—Outlawry of prosecution—Amicus curiæ.

A constable is not vested with official character when acting in a county to which he does not belong.

An arrest cannot be made without a warrant on causeless suspicion, and

in the absence of actual belief of guilt, based on actual facts that create probable cause.

One who kills an actual felon in trying to arrest him, without knowing or believing him to be guilty, commits murder, especially if the person attempting to make the arrest is not an officer.

A constable acting outside of his county and in company with a private citizen, sought to find out who had committed certain burglaries, by stationing themselves at a certain point and stopping passers-by. One man as to whom there was no probable cause for suspicion, would not be stopped; and in escaping he fired on them, killing the private citizen. *Held*, that in trying him as for murder proof of the burglaries was inadmissible. And the case should have been put to the jury on the hypothesis that it was one of justifiable homicide.

Voluntary homicide is no more than manslaughter if provoked by unlawful violence and by a display of deadly weapons, designed to compel submission to an unlawful arrest.

One who was guilty of manslaughter but convicted of murder should be discharged, on vacating the judgment against him, if the right to prosecute him for manslaughter was outlawed when the proceedings for murder were taken.

Where the Attorney General appears for the People in a criminal case, and confesses error, the Supreme Court can pay no attention to suggestions from others in respect to the case.

Error to Livingston. (Turner, J.) June 19.—July 2.

MURDER. Respondent was convicted. Reversed.

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

Attorney General *Jacob J. Van Riper*, for the People, confessed error.

CAMPBELL, J. Respondent, having been convicted of murder, was sentenced to twenty years' imprisonment, and brings error. The Attorney General, on careful consideration of the case, has concluded that he cannot uphold the conviction. We are of the same opinion. But inasmuch as we are to consider whether the prisoner should be retained for further trial or discharged, we are compelled to deal with it far enough to determine that question.

Respondent is charged with murdering one Martin Van

Etter on the 18th of October, 1867. The complaint and warrant for his arrest were made in January, 1879,—between eleven and twelve years afterwards. The testimony showed that he could have been reached at almost any time during this interval, and no good reason was shown for any delay. As his defense consisted partly of proof that he was at that time in a different part of the State, and his identification depended chiefly on testimony of a witness very strongly interested in clearing himself from a bad case of wrong-doing under color of zeal for the public service, the delay was at least unfortunate in rendering testimony of so stale a transaction unsafe.

Without going over all the facts an outline of the principal matters will be enough to explain our legal views. Some burglaries having been recently committed at Williamston, in Ingham county, where respondent had been doing business, one Carr, who was a constable of Ingham county, undertook, with Van Etter's co-operation, to see what they could discover on the subject. They had no indications or suspicions, well or ill-founded, pointing towards any person as the criminal. They procured revolvers and stationed themselves by a bridge near Fowlerville in Livingston county, with the purpose of compelling passers-by to submit to a search, expecting thereby to get at indications of guilt in somebody. The person who killed Van Etter, and who is claimed to have been respondent, having, while passing along the highway, reached the bridge, was stopped, against his remonstrances, by these parties, and they endeavored to compel him to accompany them to Fowlerville—as Carr claims—to be searched. He warned them off once or twice if not oftener, and charged them with designing to rob him. Carr claims to have informed him of the burglaries and to have also told him that he was showing guilt in the matter. Having kept a few paces in advance of them,—they following him with weapons, and Van Etter's pistol, if not Carr's, being cocked,—he attempted to evade them by running off southward across the ditch, and when about twenty feet off he whirled round and fired and shot Van Etter through the

bowels. Van Etter fired at him, the shots being nearly simultaneous. Carr fired several shots after him, and thought he hit him.

In order to make the act of the assailant murder, the prosecution undertook to show that he was resisting or evading a lawful arrest, and to do so they were allowed to prove the burglaries, and the subsequent action of Carr and his associate as based on probable cause. At least, no other reason can very well be suggested for allowing such proof.

Carr, when acting out of his own county, was not vested with official character. But no one, whether private person or officer, has any right to make an arrest without warrant in the absence of actual belief, based on actual facts creating probable cause of guilt. Suspicion without cause can never be an excuse for such action. The two must both exist, and be reasonably well founded. We need not now go further,—although we may perhaps say that no one can be justified in threatening or taking life in attempting an arrest on suspicion, without incurring serious responsibilities. And where the life of an actual felon is taken by one who does not know or believe his guilt, such slaying is murder. A private citizen has less immunity than an officer. But we need not discuss their respective rights or liabilities, because neither Carr nor Van Etter were proceeding on any honest belief or well-founded suspicion. Except in the lack of specific intention to rob they in no way differed from any highway wrong-doers, and their appearance would justify any one in believing them to be dangerous criminals. Any serious injury done by them could hardly fail to be a felony.

The proof of the Williamston burglaries was therefore improper, because defendant was not on trial for them, and because his attempted arrest was not warranted by any honest and well-founded supposition of his complicity in them.

From the facts as detailed by Carr himself we are strongly inclined to think he made out a case of justifiable homicide. But whether this was absolutely shown or not, the case should have been put to the jury on that hypothesis, and if they thought that Van Etter was killed by a person

who believed his own safety to be in peril from Carr and Van Etter's lawless violence, the respondent should have been acquitted on that ground.

This, however, is now immaterial, because even if the homicide was voluntary, there can be no doubt that, having been provoked by unlawful violence and the display of deadly weapons to compel submission to a wrongful arrest, the killing could not be more than manslaughter; and it should have been so held.

The conviction was erroneous, and the judgment must be vacated. And inasmuch as, if respondent had been indicted for manslaughter, the prosecution would have been outlawed, he should not be subjected to another trial but should be discharged. Inasmuch as the Attorney General has appeared in this case, we can pay no attention to suggestions from other parties, and as we have no doubt the papers before us are substantially correct, it would not be just to postpone the decision.

The other Justices concurred.

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THE PEOPLE v. FRANK WEITHOFF.

Keeping a pool-room—Gaming—Act 171 of 1877.

Keeping a pool-room for selling pools on horse-races and base-ball games is within the statute punishing the keeping or maintaining of a gaming-room or gaming-table or of any game of skill or chance. Comp. L. § 1998, amended by Act 171 of 1877.

Gaming exists wherever a stake is laid on the chances of a game; and base-ball and horse-racing are games and so is any pooling scheme in betting thereon.

Exceptions before judgment from the Recorder's Court of Detroit. (Swift, J.) June 19.—July 2.

KEEPING a gaming room. Respondent was convicted. Exceptions overruled.

John Atkinson and *Maybury, Conely & Lucking* for respondent appellant.

Attorney General *Jacob J. Van Riper*, Prosecuting Attorney *James Caplis* and *Fred A. Baker* for the People.

COOLEY, J. The defendant has been convicted in the Recorder's Court of the city of Detroit on an information which charges him and one Henry Price with an offence which in general language is sufficiently described as the unlawful keeping and maintaining of a gaming-room contrary to the provisions of the statute.

The information contains seven counts. The first count charges that Price, Weithoff and one Davis on May 15, 1883, at the city of Detroit, unlawfully, for hire, gain and reward, did keep and maintain a gaming-room against the form of the statute, etc.

The second count, with proper allegation of time and place, charges that they did unlawfully, for hire, gain and reward, keep and maintain a gaming-room, and in the said gaming-room, for hire, gain and reward, unlawfully did suffer and permit divers idle and evil-disposed persons to come together for the purpose of gaming, and to be and remain there engaged in gaming for divers large and excessive sums of money.

The third count charges that unlawfully, for hire, gain and reward, they did keep and maintain a gaming-room, and in the said gaming-room, for hire, gain and reward, unlawfully did suffer and permit divers idle and evil-disposed persons to come together for the purpose of gaming by betting divers large and excessive sums of money on the result of divers games of base-ball and divers horse-races, and in the said gaming-room unlawfully did permit and suffer the said idle and evil-disposed persons to be and remain engaged in gaming by betting divers large sums of money on the result of divers games of base-ball and divers horse-races.

The fourth count charges that they unlawfully, for hire, gain and reward, did keep and maintain a gaming-room known as "Harry Price & Co.'s Turf Exchange," and in

the said gaming-room did carry on and conduct a business commonly known as "pool-selling," and in the said gaming-room did sell pools on horse-races, commonly known as "auction pools," and also pools on games of base-ball played by the clubs belonging to the "National League," so called, which last-named pools are commonly known as "combination pools," and did also, in said gaming-room, sell pools on horse-races, commonly known as "combination pools," and also certain other pools on horse-races, commonly known as "Paris mutuals,"—all of said pools being a combination of bets or wagers upon the result of horse-races, or of games of base-ball.

The fifth count charges that, for hire, gain and reward, they did keep and maintain a gaming-room, and in the said gaming-room did carry on the business of pool-selling and did sell pools on horse-races, commonly known as "auction pools," and which said pools were sold and conducted in manner following: A horse-race being about to take place in some part of the United States, the person conducting the business of pool-selling would give the names of the horses which were to participate in the race, and an auctioneer would ask what was offered for first choice, and the first choice would be sold to the highest bidder and the person being the highest bidder would select his horse. Second choice would be sold in the same way; also third choice if there were any bidder for it; and all other horses in the race would be sold together as the field for one bid. The different purchasers would pay their money to the person carrying on the business, and would receive checks in return, on which would be marked the amount of the bid and the purchase made by him, and the total amount in the pool. Upon the result of the race being announced, all the money in the pool would be delivered to the person who had named or purchased the successful horse, less a commission of five per cent., which would be retained by the person or persons selling the pools. And on, etc., the persons named did sell a large number of auction pools upon horse-races which

took place during that time in different parts of the United States.

The sixth count charges that they did unlawfully, for hire, gain and reward, keep and maintain a gaming-room, and in said gaming-room did sell pools upon games of base-ball being played by the clubs belonging to the National League, so called; said pools being commonly known as "combination pools," and which said business of pool-selling was conducted in the manner following: There are eight base-ball clubs in the League, so called, who usually play on the same day in different parts of the country. In the said gaming-room was a blackboard headed "Combination of four clubs," with sixteen lines ruled off underneath. On each of said lines are written the names of said clubs in the different combinations, on which, immediately to the left of the names so written, are placed numbers, ranging from nine to twenty-four, both inclusive. Only four clubs can win. A person wishing to bet on a combination selects it by its number, for which he pays fifty cents, and receives in return a ticket or check bearing the name of the proprietor, and a number corresponding to the combination selected by him. As many persons as choose can bet on any particular combination, and purchase any number of tickets, all the money thus put in constituting a pool. The persons who bet on the four winning clubs, constituting one combination, are entitled to the pool less five per cent. commission; the remainder to be divided among the persons who purchased the winning combination, according to the number of their checks. And the persons named sold a large number of said combination pools.

The seventh count charges the unlawful keeping of a gaming-house for betting money and laying wagers in the form and manner commonly known as pool-selling, and need not be further described.

On the trial it was admitted on the part of the defendant that he was, at the time specified in the information, with the other persons named keeping a room in the city of Detroit for the sale of pools upon horse-races and games of

base-ball, as described in the information; but it was denied that the room so kept and used was a gaming-room within the meaning of the statute for the punishment of that offense. The Recorder however charged the jury that the selling of pools was a game, and the keeping of a room for that purpose was the keeping of a gaming-room, and the defendant was convicted. The case comes before us on exceptions before sentence.

The statute under which the information is filed is section 15 of chapter 43 of the Revised Statutes of 1846, as amended in 1877. It reads as follows:

"Any person who shall for hire, gain, or reward keep or maintain a gaming-room, or a gaming-table, or any game of skill or chance, or partly of skill and partly of chance, used for gaming, or who shall knowingly suffer a gaming-room, or gaming-table, or any such game to be kept, maintained or played on any premises occupied or controlled by him, shall be deemed guilty of a misdemeanor, and upon conviction thereof, be punished by fine not exceeding five hundred dollars, or imprisonment not exceeding six months, or both, in the discretion of the court; and any person aiding, assisting, or abetting in the keeping or maintaining of any such gaming-room, gaming-table, or game shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be punished by fine not exceeding five hundred dollars, or imprisonment not exceeding three months, or both, in the discretion of the court." Public Acts 1877, p. 168.

As the defendant does not contest the facts, but admits that he with others was actually engaged in the keeping of a room where pools were sold according to the various methods described, and was doing this for gain and reward, the sole question which the record presents is whether the use of the room for this purpose makes it a gaming-room within the meaning of the statute. If it does, the defendant is properly convicted; but if not, he is entitled to a discharge.

The defence contend that a room in which pools are sold is not for that reason a gaming-room. Gaming, it is said, implies games: to game is to play at any sport or diversion;

to play for a stake or prize; to use cards, dice, billiards or any other instruments according to certain rules with a view to win money or any other thing waged upon the issue of the contest; to practice playing for money or any other stake; to gamble. Playing at games may have an entirely innocent sense, or it may import what is looked upon as immoral. The language of the statute is broad enough to include all gaming-rooms kept for hire; but this could never have been intended, for many games are lawful. A reasonable conclusion is that only the gaming-room is intended in which unlawful games are carried on. Games become unlawful by being prohibited by statute; and it becomes necessary therefore to a conviction, that it should appear—*first*, that the room was kept or maintained for the purpose of games; and *second*, that the games for which it was kept or maintained have been made unlawful.

But pool-selling, it is further said, is no game. To buy the tickets may be in the nature of a bet or wager, but betting alone cannot be held to constitute gaming unless all distinctions are confounded. It is necessary not only that there be betting upon the determination of the event, but the course of action to bring about such event must have originated and commenced with a view to determine the bet. *Lynall v. Longbothom* 2 Wils. 36; *State v. Smith* Meigs 99. There is nothing of the sort in pool-selling; the persons concerned in bringing about the event—the men who play ball and who race horses—are strangers to it, and they do not play or race with a view to the stakes which may be ventured upon the result.

These are the positions taken on the part of the defence, and which the prosecution contest. The issue turns upon the meaning of the word "gaming-room" as used in the statute. Upon this issue the previous legislation of the State ought to cast some light, and some notice of it will, therefore, not be out of place.

The earliest statute we have on the subject is the territorial statute of October 12, 1818, (1 Terr. L. 412,) purporting to be adopted from the laws of Massachusetts and

New York, but having a more remote origin in statute 9 Anne. The title to this statute is "An act to prevent gaming." The preamble recited as the occasion for passing it that "the practice of gaming for money and other property is not only injurious in a high degree to the individuals concerned therein, but also in its tendency ruinous and destructive to the community." Looking into the act, however, we find that it is not restricted in its scope to the laying of wagers upon games, but that the winning or losing at any one time by play or by betting more than four dollars, or within twenty-four hours more than eight dollars, is made a criminal offence, and all securities and conveyances the consideration of which, in whole or in part, is money or other valuable thing won at betting or gaming, are made void. Other provisions are equally general.

The main provisions of this statute were re-enacted under the same title and preamble in the Code of 1827, p. 492, and were retained in the Compilation of 1833, p. 477, and continued in force until the adoption of the Revised Statutes of 1838. In that Revision we find similar provisions in a chapter entitled "Of the observance of the first day of the week and the prevention and punishment of immorality": but the subheading to the sections relating to this subject is entitled simply "Gaming," though "betting of every description" is carefully specified and made punishable. It is noticeable also, that though section ten of the chapter authorizes any one who shall have lost money by playing at games or by betting, to sue and recover the same back, the next section employs the word "gaming" to express the method of all such losses. Rev. St. 1838, pp. 210–213.

Substantially the same provisions appear again in the Revision of 1846, and the subheading "Gaming" is again employed for sections which contain the provisions against wagers, and in which money lost "by any betting whatever" is spoken of as lost by gaming. Rev. St. 1846, pp. 192, 193; Comp. L. 1857, pp. 501, 503. Some of these are still in force. Comp. L. 1871, pp. 651–653.

It cannot be said, in the light of this review, that in the

legislation of this State any sharp distinction has at any time been drawn between betting and gaming. On the contrary they seem to have been considered and treated at all times as varieties of the same mischief, whose characteristics were so nearly identical that it was not always important to distinguish them in providing for their punishment. Nevertheless both have commonly been mentioned, and the context has in most cases implied a distinction. Moreover in providing for the punishment of gaming there has commonly been such specification of games as would, under accepted rules of construction, restrict the criminal penalties to the games mentioned and to others which were similar.

In the common usage of the two terms "betting" and "gaming," they may sometimes be employed interchangeably but not always. If two persons play at cards for money, they are said to be gambling or gaming; but they are gaming because they lay a wager or make a bet on the result of the game, and therefore to say they are betting is equally appropriate. If two persons lay a wager upon the result of a pending election, it will be said that they are betting, but not that they are gaming. There is no gaming in which the element of the wager is wanting, but there is betting which the term "gaming" is not commonly made to embrace. But the mischievous element against which the statute is aimed is present in all betting when money or other valuable thing is staked, and no violence is done to language when all such betting is classed as gaming, as manifestly it sometimes has been in our legislation, and to some extent always. It would probably never occur to any one that the article of the State Constitution which precludes embracing in a single law more than one object, which should be expressed in the title, would be violated by a law which, with a title like that of the Act of 1818, should not only undertake to punish gaming but also betting of every description. Neither do we think it would be deemed an inaccurate or inappropriate use of language if all betting for money were to be spoken of and considered as gaming or gambling. It is so common for persons accustomed to speak with accuracy

and propriety to apply one or the other of these terms to any species of immoral betting, that we learn the application intended and the precise meaning in any particular case only from the connection. Often we find the terms "gaming" and "gambling" applied to transactions which are illegal in the sense only of being immoral, but which involve the element of wager, as in the case of option contracts. *Gregory v. Wendell* 39 Mich. 337; s. c. 40 Mich. 432; *Raymond v. Leavitt* 46 Mich. 447; *Shaw v. Clark* 49 Mich. 387. But while such contracts are probably not gaming in the sense of any criminal law now on the statute books, there could be nothing to prevent their being legislated against under that head, when they are of the nature of gaming and embody its evils.

But conceding, for the purposes of further discussion, that in order to constitute gaming there must not only be betting upon uncertain events, but that the uncertain events must be such as are to be determined by games, we may next direct attention to the argument for the defense that there is no gaming unless the course of action which is to bring about the event shall have been commenced and prosecuted with a view to determine the wager. The illustration given is a bet upon an election, in which case that which is to determine the wager, namely, the election, is not instituted for the purposes of the wager, but would take place irrespective of it. In the particular instance given, if a single wager only were laid, it would certainly not be called gaming in common speech; but that there is any such restricted meaning of the term "gaming" which can be applied generally and as a rule, we cannot agree. If two men play cards for money, they may be supposed to have begun and carried on the game with a view to the wager, and they will be said to be gaming. If two others sitting beside them also make a bet upon the result of the same game, their act has the same elements of immorality and mischief, and differs only in the unimportant circumstance that they do not participate in the manipulation of the cards. The first two play and bet; the last two bet on the hands of those

who are playing; but in common language as well as in the law, all would be said to be gambling or gaming. If on the other hand the players have only amusement in view, and have no connection or concern with what is done by the others, the game is not then originated or prosecuted with a view to determine the wager which is laid upon it; but notwithstanding this the parties betting would be said to be gambling in this case as much as in the others. The game itself is innocent in either case: it is the betting upon the game that constitutes gaming, and those game or gamble who thus bet.

That the pooling schemes contemplated putting money at stake upon the issue of games is not denied. They had in view base-ball games, which are games in the strictest sense, and also horse-races. These last have often been held games, within the meaning of the statute of Anne, when made for wagers. *Goodburn v. Marley* Strange 1159; *Blaxton v. Pye* 2 Wils. 309; *Grace v. M'Elroy* 1 Allen 563; *Tatman v. Strader* 23 Ill. 493; *Mosher v. Griffin* 51 Ill. 184; *Ellis v. Beale* 18 Me. 337; *Cheesum v. State* 8 Blackf. 332; *Wilkinson v. Tousley* 16 Minn. 299; *McLain v. Huffman* 30 Ark. 428. So have been dog-fights, *Eagerton v. Furzeman* 1 C. & P. 613; and foot-races, *Lynall v. Longbothom* 2 Wils. 36; and cock-fighting, *King v. Howel* 3 Keb. 465; *Squires v. Whisken* 3 Camp. 140; *Bagley v. State* 1 Humph. 486; *Johnson v. State* 4 Sneed 614; *Commonwealth v. Tilton* 8 Met. 232). All the pooling arrangements, therefore, had games in view. And while, in our opinion, it is of no importance that the races or games are not begun or carried on with a view to the stakes which are laid upon them, or that those who race or play are not the persons who hold tickets in the pools, it is proper to remark that it is pure assumption in this case to say that such is the fact, for the record does not establish it. The existence of pooling-rooms, and the fact that profit may be made by their use for the purpose intended, must have a natural tendency towards the getting up of games that pools may be formed. But if the games are planned without regard

to the pooling, the room which is kept for the purpose invites the parties concerned in the games to participate with others in the hazards of the pools; and if they refrain from doing so, it is not because the room does not offer them its accommodations, but because they fail to accept them. But the offense which the statute punishes consists in keeping the room and offering its temptations to the public; not in the acceptance of the offer by any particular persons or class of persons.

It being found, then, that the pooling schemes contemplate gaming, it remains to see whether the room which is kept for the purposes of the schemes, is to be held a gaming-room. In gaming, as the term is used in distinction to mere betting, some special evils are always expected and generally found to exist. There is more or less withdrawal of attention from business and from social and family duties, while the game or contest which is to determine the wager is going on; there is a consequent tendency to idleness and unthrift; there is likely to be more publicity than in mere betting, and a gathering of persons whose excitement and anxiety react upon each other and incite to further stakes and to other vicious indulgences and disorderly conduct. These evils are greatly multiplied when a house or room is specially set apart and devoted to the purposes of gaming; and it is upon a recognition of this fact that the State sometimes punishes the keeping of such rooms, when it would leave unnoticed the mere laying of wagers; as it might punish the public sale of intoxicants but not private drunkenness. The characteristics of such a room must be readily apprehended and understood. If the room is one whose use is intended to facilitate gaming operations, and where sporting characters are invited to congregate for purposes of illegal amusement and gain, and to stake money or other thing of value upon trials of chance, skill or endurance, we seem to have everything necessary to constitute a gaming-room. That some or all the games or trials are innocent is of no importance. *Clayton v. Jennings* 2 W. Bl. 706. If forbidden wagers are laid upon them, it is gaming;

and the room, if the use of it is calculated and intended to facilitate the wagers, and the proprietor derives his profits from them, is a gaming-room.

We do not overlook the fact that the games upon which the wagers are laid do not take place in the room but at a distance. It is not necessary that persons be present at the place of game or contest in order that they may participate in the mischiefs of gaming. Betting upon a game of billiards which is being played in New York can as readily be carried on in a distant city, in a room appropriated to the purpose, as in the very room where the playing is going on; and if the latter is a gaming-room, so must the other be. Nothing seems more unimportant than that the game —the part that in itself is innocent, and which only furnishes the occasion and gives opportunity for the criminality—is at a distance.

To hold this room a gaming-room it is not necessary to proceed upon any strained construction of the statute; it is only necessary to give it effect according to its obvious intent. The statute is aimed at the particular evils of keeping, for hire, gain or reward, a room to aid and facilitate gaming. This is the precise purpose, and so far as we are informed, the sole purpose, for which the defendant keeps the room in question.

So far we have assumed that it was necessary for the State to establish the proposition that the defendant's room is a gaming-room even though the recorder was mistaken in holding the pooling itself to be a game. But we are not satisfied that he erred in this. The word "game" is very comprehensive, and embraces every contrivance or institution which has for its object to furnish sport, recreation or amusement. Let a stake be laid upon the chances of the game, and we have gaming. Eminent judges have thought the pooling scheme was to be considered a game, *Tollett v. Thomas* L. R. 6 Q. B. 514; *Scollans v. Flynn* 120 Mass. 271, 273; and it was so decided in *Edwards v. State* 8 Lea 411. It does not furnish sport, recreation or amusement except so far as the excitement of the choice of

chances may furnish it; but this is true of many contrivances which are always called games and which the law aims to suppress. There is no good reason for a distinction between pooling and such games.

The exceptions are not sustained and the Recorder will be advised to proceed to judgment.

The other Justices concurred.

The People v. Sophie Lyons.

Impeachment and credibility of witness.

In seeking to impeach a witness whose reputation is well known all over the city where he lives, it is unnecessary to restrict the inquiry as to reputation to the immediate neighborhood of his dwelling-place.

A jury in a criminal case is not at liberty to convict on the testimony of one who has been conclusively shown, by impeaching evidence, to be unworthy of belief.

One cannot be examined on the assumption that he is an unfriendly witness before there is any showing to that effect or any evidence from him to warrant it.

Error to Washtenaw. (Joslin, J.) June 19:—July

Larceny. Respondent was convicted. Reversed.

John Atkinson for respondent appellant.

Attorney General *Jacob J. Van Riper* for the People.

Graves, C. J. Since our reversal of the first conviction in this cause—49 Mich. 78—a second trial has taken place, resulting in a second conviction, and again the defendant alleges error. The objections are very numerous, but most of them are destitute of force. Some relate to mere matters of discretion, and others derive no support from the record. It is scarcely necessary to refer to more than one or two

points. A few other questions might merit attention, if it were likely they would arise again.

A Mrs. Lewis was a material witness for the prosecution, and her credit with the jury was a consideration of importance. And as the credibility of a witness is always in issue, the defendant submitted general evidence to prove that she was not worthy of belief, and no supporting evidence was given or proposed. She was an inhabitant of Detroit, and had been for several years, and was, moreover, a person of much notoriety. Persons of more or less prominence in different parts of the city knew of her, and many, if not all, of the chief officials connected with the police were acquainted with her. As matter of fact, she was a paid agent of the police. Her life had not been in a corner, nor was her reputation confined to any huddle. It had a degree of publicity which carried it beyond ward boundaries, and caused it to receive a considerable measure of attention in different walks and in many companies. It was a moral odor which penetrated into many recesses without being misconceived. Under these circumstances the witnesses to credit were interrogated as to her reputation in the city of Detroit. No mention was made of any minute locality or fractional division, and it does not appear to have been necessary. Greater nicety concerning the theater of her reputation was not called for. The witnesses had no difficulty. They swore that they were acquainted with her reputation for truth and veracity in the city, and that it was so bad they would not believe her under oath.

When the circuit judge proceeded to instruct the jury on this portion of the case, he gave them to understand that this impeaching evidence was entirely irregular and unwarranted because the questions propounded did not restrict the inquiry to the narrow circle or vicinity of the place which she made her home. In view of the circumstances, this opinion was wrong and misleading. It supposes that no person belonging in the city of Detroit, however generally known, can have a city reputation for veracity, either good or bad,—a proposition which is contradicted by uni-

form observation. That the evidence of what her reputation was in the city was entirely legitimate, seems hardly questionable.

In a later portion of the charge addressed to this subject of impeachment, the jury were further told that, although a witness were "completely impeached," they might still believe him; or, in other words, that they were at liberty to convict the defendant on the testimony of one who was shown, by impeaching evidence, to be unworthy of belief. Of course, it was not the intention of the circuit judge to convey that idea to the jury, but unfortunately his language was so chosen as to carry that meaning. We also think that the examination of Mrs. Brew, upon an assumption that she was an unfriendly witness, before there was any showing to that effect or any evidence given by her to warrant it, was unauthorized by the rules of evidence.

The judgment must be reversed and a new trial granted, and the defendant will be surrendered to the sheriff of the county of Washtenaw for such further proceedings as shall be necessary.

The other Justices concurred.

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SLUMAN S. BAILEY v. GEORGE W. CADWELL ET AL.

Ne exeat.

The writ of ne exeat is not issuable in Michigan by a circuit court commissioner or injunction master as a matter of interlocutory chancery practice.

History of the practice in England and the United States as to the writ of ne exeat.

Error to Kent. (Montgomery, J.) June 19.—July 2.

DEBT on bond. Plaintiff brings error. Affirmed.

Thomas J. O'Brien for appellant. Execution for debt cannot issue on a decree until it is enrolled: *Brown v. Haff* 5 Paige 235; *Gleason v. Bisby* 1 Clarke Ch. 551; and alimony is not a debt: *Lyon v. Lyon* 21 Conn. 185; but the writ of ne exeat is issuable: Chancery Rule 17; *Cadwell v. Randall* 36 Mich. 251; and a proper occasion is an application for alimony: 2 Story's Eq. Jur. §§ 1469, 1871; 2 Bish. M. & D. 508; *Kirby v. Kirby* 1 Paige 261; *Yule v. Yule* 2 Stockt. 138; *Denton v. Denton* 1 Johns. Ch. 364; and if a circuit judge in chancery can grant it, a circuit court commissioner can: Const. art. vi. § 16; Comp. L. §§ 5570, 5582; Jennison's Ch. Pr. 327; and the sufficiency of the showing on which he acts cannot be questioned in a collateral suit on the bond: *Miller v. Brinkerhoff* 4 Den. 118; *Bassett v. Bratton* 86 Ill. 152; *Jesup v. Hill* 7 Paige 95; *Blue v. Sheppard* 28 Ga. 566.

Champlin & More for appellees. The writ of ne exeat is in the nature of an arrest: *Raynes v. Wyse* 2 Meriv. 472; and cannot issue unless a debt is due: *Rice v. Hale* 5 Cush. 244; and for alimony, only after decree: Dan. Ch. Pr. 1802, 1806; it will not issue in cases of fraud: id. 1803; the demand which supports it must be equitable, pecuniary and actually due: id. 1805; Story's Eq. Jur. § 1474; alimony is a debt within the meaning of Const. art. vi. § 33 prohibiting imprisonment for debt: *Steller v. Steller* 25 Mich. 159; the writ was discharged in *Peltier v. Peltier* Har. Ch. 29; *Cable v. Alvord* 27 Ohio St. 654; *Exp. Harker* 49 Cal. 465; *Adams v. Whitcomb* 46 Vt. 708; see *Aiken v. Richardson* 15 Vt. 500; where issuable it cannot be allowed by a circuit court commissioner: *Samuel v. Wiley* 50 N. H. 356; the ground on which the writ issues is stated in it, and if improperly issued it must be discharged: *Hyde v. Whitfield* 19 Ves. 345; the writ is in the nature of equitable bail, and in cases of alimony is allowed only for arrears actually due, and for costs: *Oldham v. Oldham* 7 Ves. 410; it lies for money demands only: *Cowdin v. Cram* 3 Edw. Ch. 231; and not unless defendant owes complainant a debt actually due or complain-

ant is entitled to an account: *Williams v. Williams* 2 Green. Ch. 130; *Rhodes v. Cousins* 6 Rand. 188; nor, ordinarily, in a suit for alimony: *Prather v. Prather* 4 Dessau. 33; see *Bylandt v. Bylandt* 2 Halst. Ch. 28.

CAMPBELL, J. This is a suit on a ne exeat bond. The writ was allowed in the preliminary stages of a divorce suit, by a circuit court commissioner acting as injunction master, in 1868.

The court below held that there was no cause of action.

We find no statutes in this State regulating the issue of these writs, and we have had nothing beyond a bare recognition of their possibility since 1838. But we have in the Chancery Act (Comp. L., § 5057) this general rule in regard to jurisdiction: "The powers and jurisdiction of the circuit courts in chancery in and for their respective counties shall be co-extensive with the powers and jurisdiction of the court of chancery in England, with the exceptions, additions, and limitations created and imposed by the Constitution and laws of this State."

In the absence of statutory regulations we must therefore look to the English chancery jurisdiction as the measure of authority. It may have been limited, but it has not been enlarged on this subject by our laws.

There is some reason to think that the practice, which at one time prevailed in some other states, of enlarging this power by a broad discretion, arose out of undefined notions of equitable authority, which in this State we are not at liberty to entertain. However this may be, we are not allowed to interfere with personal liberty without finding some legal warrant for it in statute, or precedents which have similar force with statutes by recognition.

From the organization of the State our legislation has been framed with a view of restraining as far as possible all needless arrests, and never allowing them without a responsible showing and positive authority. The course of the New York courts of equity in refusing to extend to equitable suits the analogies of the Non-imprisonment Act

has not been followed. Our Constitution has put all courts on the same footing in restraining imprisonment for debt, and the enforcement of decrees in equity by attachment has been superseded, as far as possible, by milder remedies.

1. In the English courts the jurisdiction has been jealously limited to cases where the default of the defendant is capable of direct measurement, and clearly made out, and where no other remedy is attainable. In *Boehm v. Wood* 1 Turn. & R. 332, several questions were discussed, and the rules were laid down with much clearness. The necessity of an accurate ascertainment of the measure of the defendant's obligation was recognized, and of its present force as due. No English case has been found decided in modern times, where the probability of a future indebtedness or a future default on an unmatured indebtedness, has been allowed to furnish ground for a writ. 3 Dan. Ch. Pr. 1802, and cases.

The one exception to the rule confining the writ to equitable debts arose in the case of alimony, and was allowed because the Ecclesiastical courts could not enforce its payment by any adequate means. 3 Dan. Ch. Pr. 1802 and cases cited. In *Denton v. Denton* 1 Johns. Ch. 441, Chancellor Kent allowed the writ in a suit pending before alimony granted, and this case has been followed in New York. But the authorities which he relied on do not support any such doctrine, but it is distinctly repudiated. It is well settled that the writ cannot be allowed except for arrears due and unpaid. *Shaftoe v. Shaftoe* 7 Ves. 171; *Dawson v. Dawson* 7 Ves. 173; *Haffey v. Haffey* 14 Ves. 261. In *Coglar v. Coglar* 1 Ves. 94, Lord Thurlow suggested that the impossibility of ascertaining the proper sum at which to fix security was in his judgment an insurmountable obstacle. In *Shaftoe v. Shaftoe*, Lord Eldon declared his reluctance, as a matter of principle, to allow the writ for alimony at all, even after judgment, and in denying it before judgment uses this language: "It is wrong, that, before that decree is made, this Court is to take it for granted, that there will be a decree for alimony and separation, and to shut up the husband

pending that suit for any sum it shall name, lest there should be such a decree. Suppose, the plaintiff should miscarry in her suit, after this writ has issued: what recompence can be made to him? If the suit has effect, the difficulty is, for what sum to mark the writ. The ground, that the plaintiff would be without remedy, will not do; for that would apply to a judgment at law, where the man cannot be taken in execution." In *Dawson v. Dawson*, referring to this case, he says: "In a late instance, search was made; and no case could be found authorizing me to mark the writ for more than the sums actually due."

The same eminent chancellor in other cases expressed himself strongly against the application of "this high prerogative writ" to any private cases, except "with great caution and jealousy, and that its application to these purposes can only be justified by usage and practice." *Tomlinson v. Harrison* 8 Ves. 32; *Etches v. Lance* 7 Ves. 417. For the same general view of the caution required in avoiding its extension, see *Howden v. Rogers* 1 Ves. & B. 132; *Dick v. Swinton* Id. 371; *Hannay v. M'Entire* 11 Ves. 53.

In chapter 40 of Daniell's Chancery Practice the whole subject is fully treated, and the same results ascertained.

In *Street v. Street*, 1 T. & R. 322, the question arose concerning the application of the writ to temporary alimony, and it was held that it could not be used at all for alimony pendente lite. This doctrine does not seem to have been departed from.

We think that our laws do not favor the granting of the writ in such a case as that before us, and that its allowance was void and illegal.

But we should not be justified in overlooking the excess of jurisdiction of the officer who issued it, even if otherwise correct. This writ was allowed by an injunction master, as a mere matter of practice. But the authority to issue this writ is properly regarded as an exercise of very high judicial discretion which cannot be vested except in those who exercise the ordinary judicial power of courts. It is very far removed from the domain of ordinary practice. In

Boehm v. Wood 1 T. & R. 332, there seems to have been a serious question raised concerning the authority of the Master of the Rolls to allow the writ. Lord Eldon recognized the power of that judge as co-extensive with his own in ordering the writ, but stated that the lord chancellor was the only one who could actually issue it, and said that he would not issue it without using his own judgment and referring it back to the Master of the Rolls for re-consideration, in case of serious doubt. He indicates throughout his understanding that the matter involves the most important exercise of judicial discretion. In this view the great English chancellors have agreed, and their zeal in discountenancing needless interferences with private liberty is worthy of great respect.

The United States Judiciary Acts have always proceeded on the same theory. The supreme and circuit judges are the only persons authorized to allow the writ when the court is not actually sitting. Rev. St. § 717. It was held very early that the district judges, although members of the circuit courts, could not issue this writ. *Gernon v. Boecaline* 2 Wash. C. C. 130.

With this view of the office and importance of the writ, and in the absence of any constitutional or statutory regulations changing it, we have no hesitation in saying that it cannot be allowed in any case except by the judge himself, and that the power is not one of those mere chamber powers which may be vested in a circuit court commissioner, as a matter of interlocutory practice.

We think the circuit judge who tried the case was correct in his conclusion that no recovery could be had on the bond.

The judgment must be affirmed with costs

The other Justices concurred.

FRANK L. CARPENTER v. ISRAEL V. HARRIS.

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Guardians and administrators—Possession of ward's land—Guardian's bond—Summary proceedings for possession—Form of complaint—Arrest—Procedure.

An administrator's forcible ouster of a guardian from the possession of the real estate of heirs who are his wards cannot be legalized by facts occurring after the proceedings were begun.

Proceedings to recover possession of land, when taken by a person claiming to be guardian by appointment of the probate court, are of no importance if the showing of authority as guardian gives no proof of the jurisdiction of the court to grant it.

Where a testator made his wife and another person executors and declared that the wife, and on her death, the other executor should be sole guardian, and farther provided that the executors "and the guardian" should not be required to give bond, it was *held* that this covered the guardianship of the other executor.

Act 7 of 1877 provides that where a wife survives her husband, his appointment, by will, of a guardian for minor children shall not be operative until approved by the judge of probate after giving opportunity to the mother to show cause in opposition to it. *Held*, that this provision is not meant to allow an appointment to be defeated by the death of the mother before probate unless some good reason exists. The objection to the appointment is to be made in the probate court when the will comes up for probate; and if the wife has not otherwise objected and if no affirmative objection is made, the appointment must stand with the rest of the will.

The failure to give bonds, by a person appointed guardian of minors, does not of itself vacate his appointment.

In summary proceedings by a guardian to recover possession of the lands of his wards, a complaint was *held* sufficient which stated that complainant was sole testamentary guardian of certain minors, who were named, being duly nominated as such in their father's last will which had been duly probated; that at a certain date he was in quiet and peaceable possession of certain described lands; that on that date defendant entered said premises and unlawfully holds them and holds complainant out of possession by force, contrary to statute; and that at the time of said entry complainant was and ever since has been and still is well entitled to the same, and that he prays to be restored to possession.

Complainant in summary proceedings to recover possession of land can

resort to a summons instead of a warrant, and his course in doing so, where safe and practicable, is approved.

The arrest of defendant in summary proceedings to recover possession is not approved where some other course is allowable and where the arrest is not essential to complainant's security.

Error to Ottawa. (Arnold, J.) June 21.—July 2.

FORCIBLE detainer. Defendant brings error. Affirmed.

Norris & Uhl for appellant. As to the insufficiency of the complaint for want of essential facts: *Bryan v. Smith* 10 Mich. 229; *Allen v. Carpenter* 15 Mich. 32.

Frank L. Carpenter, in person, for appellee.

CAMPBELL, J. This was a special proceeding to aid a guardian in resuming possession of real estate of his wards, from which he had been forcibly ousted by an administrator of their deceased mother. The case was tried below upon the supposition, on the part of defendant, that the Act of 1881, giving possession in certain cases to executors and administrators, was retroactive, and the removal to this Court seems to have been made in ignorance of the decision of *Van Fleet v. Van Fleet* 49 Mich. 610, which had not then been published. The court below properly held that in this case the possessory rights of the heirs were superior to those of the administrator.

The ouster, which was maintained, in legal contemplation, forcibly, cannot be legalized by matter arising after this proceeding was commenced. But as neither the showing of general nor of special guardianship in defendant contained any indication of proof of jurisdiction in the court which assumed to grant the authority, these proceedings are not of any importance.

The only really important question presented relates to the authority of complainant, for if that existed, all of the other matters cease to have force on the record as it stands.

Complainant was appointed guardian of the minors by their father's will. Myron Harris, the father of these in-

fants, made his will August 23d, 1880, and died on the 1st of September. His wife, Miriam, who owned the land in question, died soon after, on the 13th of September. The will contained this clause: "I hereby nominate and appoint said Miriam Harris, and upon her death said Frank L. Carpenter, sole guardian of said minor daughters." The will also declared that the executors (of whom Carpenter was one) and the guardian should not be required to give bond. We have no doubt this covered Carpenter's guardianship.

It is claimed that inasmuch as the mother survived the father, the appointment was not valid without the consent of the mother. The statute which gives the father full power to appoint, was so amended in 1877 as to contain this proviso: "That when the mother of such children shall survive the father, the appointment of guardian by such will shall not be operative until approved by the judge of probate, and after opportunity afforded to the mother to show cause in opposition thereto."

The object of this provision was undoubtedly to save the mother, who is entitled to the personal care of children, from being obliged to deal with an obnoxious person, to whom she can oppose any sufficient objection. But the statute contemplates that this objection shall be made in the probate court, and it cannot be made until the will comes up for probate. If the mother dies before probate, and has made no objection otherwise, the probate of the will, including the clause of appointment, must stand; at least, until some affirmative objection is made for the removal of the guardian. We do not think the statute was designed to produce the defeat of such a testamentary choice by the death of the wife before probate, or to allow the father's choice to be set aside without some good reason.

Whether the probate court should require bonds or not is not important now, because, as held in *Palmer v. Oakley* 2 Doug. (Mich.) 433, the failure to give bonds does not vacate the appointment of itself.

The technical objections to the proceedings are not main-

tainable. We think the complaint * fully conforms to the statute, and there was no objection made directly or intelligibly on the record to its sufficiency. The objection that a summons was issued instead of a warrant is not tenable, for the complainant has the right to resort to a summons, and is the only one who could be injured by its substitution for a warrant. And in our opinion it is commendable to abstain from an arrest where any other practice is allowable, and where an arrest is not essential to the complainant's security.

The judgment was correct, and must be affirmed with costs.

The other Justices concurred.

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*THE COMPLAINT.

COUNTY OF KENT.—ss.

Frank L. Carpenter, being duly sworn, makes complaint, and on his oath says: That he is the sole testamentary guardian, duly nominated as such in the last will of their father, which will has been duly admitted to probate, of Myra Harris, Lucy C. Harris, and I. Victoria Harris, minors, and only heirs of Myriam Harris, deceased; that heretofore, to-wit, on the 27th day of October, A. D. 1880, he was in the quiet and peaceable possession of the following described lands and premises situate in the township of Tallmadge, county of Ottawa, and State of Michigan, to-wit: The southeast quarter (¼) of section twenty-seven (27), in town seven (7) north, of range thirteen (13) west; and that on, to-wit: The day and year last aforesaid, Israel V. Harris entered into the said premises and unlawfully holds the same and holds this complainant out of the possession thereof by force contrary to the statute in such case made and provided, and to the great disturbance of the people of the State of Michigan; and that this complainant at the time of said entry was and ever since has been, and still is well entitled to the same; wherefore he prays that he may be restored to the possession of the said lands and premises.

FRANK L. CARPENTER.

Subscribed and sworn to before me this 17th day of May, A. D. 1881.

WESLEY W. HYDE,
Notary Public, Kent County, Mich.

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SARAH B. RICKABUS v. JOHN F. GOTT.

Unfair opening—Attacks on character.

A. devised part of his farm to B., an adopted daughter, and died leaving a widow who became administratrix, the will not being produced. The widow married again, and died without being discharged as administratrix. She left all her property to her second husband. B. married, had a son, lost her husband, and married again. *Held* that in proceedings by her to establish the missing will, contestant's counsel had no right, in opening to the jury, to relate dealings between the second husband of A.'s widow and the proponent's son, on one side, and the contestant on the other, in regard to the possession of the testator's farm, nor to narrate legal proceedings for its possession brought by proponent and the second husband, against contestant; these matters were foreign to the issue. And it was improper to suggest that B.'s son was born too soon after her marriage, and hearsay for a witness to state what he had heard Mrs. A. say on the subject. It was also improper to show by a physician how soon the birth happened, as this had no legal connection with the issue.

A trial judge must repress needless scandal and gratuitous attacks on the character of parties.

Error to Wayne. (Chambers, J.) June 21.—July 2.

APPEAL from probate order disallowing will. Proponent brings error. Reversed.

Chas. B. Howell and *Wm. F. Atkinson* for appellant.

Browse T. Prentis and *Geo. H. Prentis* for appellee.

GRAVES, C. J. This proceeding was brought by Mrs. Rickabus, in the court of probate, to prove and establish a missing will which she alleges was made and left by William Buck, who died at Grosse Pointe, November 30th, 1874. Her demand for probate was contested by John F. Gott, who is described as being Buck's nephew and heir at law, and the court decided adversely to her. She then appealed to the circuit court, where a trial was had before a jury with a like result, and she now complains of rulings there made.

At the time of his death the decedent Buck was sixty-four or sixty-five years of age. He owned a large farm at Grosse Pointe and some other property. For many years this farm had constituted the place of residence of himself and his wife Elizabeth, and it remained their home to the time of his decease. If any children were born to them they must have died a long time since. When about eight years of age the proponent was taken into the family as a member, and she continued in that situation until her marriage with one Cordy in February, 1858, and possibly until a later period. She claims that she was received, treated and considered by decedent as his adopted child, and that he left a will by which he gave her forty acres of the farm referred to. Several years since her husband Cordy died, and she afterwards intermarried with one Rickabus whose name she now bears. During her marriage with Cordy a son was born to her. On the death of Buck no will was produced, and his widow Elizabeth was appointed administratrix. She subsequently intermarried with Charles Turner, and died without being discharged as administratrix. She left all her property by will to Turner, and no one has been appointed in her place to represent the estate of Buck. This sketch is perhaps redundant, but the fault is not very material.

First. When contestant's counsel proceeded to make his statement preparatory to the introduction of testimony, he was allowed, against proponent's objections, to relate transactions between Turner and Charles Cordy, proponent's son, on the one hand, and the contestant on the other, in regard to the possession of the Buck farm, and to relate legal proceedings for such possession had between the contestant and the proponent and Turner. These matters were foreign to the issue before the jury, and their introduction, under cover of an opening statement, was a plain impropriety which the court should have corrected.

Second. On cross-examining one of proponent's witnesses contestant's counsel was suffered to suggest that proponent's son Charles was born very soon after her marriage,

and was allowed to follow the suggestion up by requiring the witness to state what he had heard Mrs. Buck say on the subject. There was no color of excuse for this practice. It was equally a violation of propriety and the rules of evidence. It was not only hearsay but irrelevant, and could have had no other object than to wound and disparage the proponent. But this line of proceeding was not permitted to stop here. Contestant's counsel subsequently called the physician who attended on proponent at her son's birth, and was allowed to have him testify that it occurred within two weeks after her marriage. This testimony had no legal connection with the question that was being tried, and the end to which it was obviously directed is utterly indefensible. The duty of the trial judge to repress needless scandal and gratuitous attacks on character is a very plain one, and good care should be taken to discharge it fully and faithfully.

It is useless to pursue this record further. Whatever may be the abstract justice of proponent's case,—a point we are not dealing with,—the fact is patent that the trial was unfair.

The order of the court must be set aside, with costs to proponent, and a new trial granted.

The other Justices concurred.

ISRAEL P. HUTTON, ADM'R FOR RUSSELL COOK v. SUSAN E. CUTHBERT AND DAVID CUTHBERT.

Assignment of securities—Parties—Reasons for decree.

A man executed an assignment of a mortgage security held by him in order that he might use it, if necessary, to secure himself and personal creditors, in case of the failure of a manufacturing concern in which he was interested; but he never did use it and he continued to collect money on it as his own and used the money for his own purposes. *Held*, that this did not show that any effective assignment was intended or made out.

Defendants to a bill in equity cannot object to the omission to implead parties whose names they themselves will not disclose.

A decree in equity will not be set aside for containing superfluous reasons for the conclusion reached, if the result is correct, and the decree does not prejudice defendants. So *held* where a bill to obtain the release of a security was sustained not only on the ground that the alleged assignment of the security was never operative, but that it was void as against creditors. But in affirming the decree on the first ground it might properly be amended by striking out what related to insolvency.

Appeal from Cass. (A. J. Smith, J.) June 22.—July 2.

BILL to cancel assignment of mortgage and compel its transfer to complainant. Defendants appeal. Affirmed.

F. J. Atwell for complainant. A gift of a mortgage is void as against creditors. *Fellows v. Smith* 40 Mich. 689; a gift of personal property generally requires delivery, and when perfected is irrevocable except as against creditors: *Green v. Langdon* 28 Mich. 225; *Wilson v. Carpenter* 17 Wis. 512; *Byars v. Spencer* 101 Ill. 429: 40 Am. 212; but the mere execution of a deed or gift, if not delivered, will not transfer title: *Martin v. Ramsey* 5 Humph. 349; *Payne v. Powell* 5 Bush 248; unless the donor's intention to transfer it is established: *Ellis v. Secor* 31 Mich. 185.

E. M. Plimpton, H. H. Coolidge and *O. W. Coolidge* for defendants. Manual delivery of a note to a donee of it is unnecessary to the transfer of title: *Whitcomb v. Whitney* 24 Mich. 490; *Grangiac v. Arden* 10 Johns. 293; *Martin v. Frost* 75 N. Y. 134; Perry on Trusts § 98.

CAMPBELL, J. Complainant filed the bill in this cause to obtain the release and transfer to himself, as administrator, of a mortgage security formerly belonging to his intestate, which defendants claim was assigned to Susan E. Cuthbert (who is Russell Cook's daughter) by her father some years before his death, and by her to her husband, the co-defendant, David Cuthbert. He died in December, 1879. This assignment, which is regular and absolute in form, was

made in October, 1875. The bill assails the assignment — *first*, as never operative; and *second*, as voluntary and invalid as against creditors.

The court below decreed in complainant's favor on both grounds. In our opinion the first is the more important.

The defendants do not claim under the assignment as a donation in view of death. There is no evidence tending in that direction. They claim it to have been a present grant, intended to have immediate effect, and assert it to have been recognized and acted on as such.

Leaving out the hearsay testimony, of which there is a good deal in the record, we find the only explanation of the origin of the assignment given by the widow of the intestate, (who is not unfriendly to defendants, and seems disposed to favor them as far as she can,) who states that this, with a similar instrument in the name of a son, was executed at a time when Mr. Cook was interested in a furniture factory in Niles, which had become involved, and Mr. Cook executed them in order that he might use them if it became necessary to save himself and his personal creditors; but that it never became necessary, and he never used them. The testimony is satisfactory that he continued to treat the mortgage and collect money on it as his own, and used the money for his own purposes. There is some testimony of conversations with Mr. Cook, which, if admissible,—as some of them are not,—do not go far enough to establish any parting with the title to the mortgage. We do not think any effective assignment was intended or is made out.

Some objections are made that parties are left out who have become interested in the premises under a foreclosure sale which defendant David procured to be made pending these proceedings. Defendants, however, seem to have been especially careful in their answers to conceal the names of any such persons. There is no documentary evidence of any claim or interest in any one but the defendants, and no proof whatever that is tangible that the property is not in their names or under their control. We think it altogether likely it so remains; but at all events they

can take no objection concerning parties without disclosing who they are.

We should have some hesitation in declaring the assignment void as against creditors, if it actually became operative. But as it cannot prejudice defendants that the decree is so drawn, so long as the assignment is held null, the decree cannot be avoided merely because it contains some superfluous reasons. It may be proper to amend it by striking out the paragraph referring to insolvency as a reason for granting the decree, which is affirmed with costs.

The other Justices concurred.

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HENRY STANLEY v. HARVEY D. NYE.

Action on agreement to lend—Option dealings.

Assumpsit for the amount of a promised loan will not lie after the expiration of the time within which it was to have been paid back. The only right of action, if any, is for damages for not making the loan as agreed.

The parties to an arrangement for speculating in options have the right as between themselves to settle their mutual dealings as they please; and a loan from one to the other, agreed upon by them in making such settlement, would not be affected by the nature of their previous operations.

Error to Genesee. (Newton, J.) June 22.—July 2.

ASSUMPSIT. Defendant brings error. Reversed.

Geo. H. & Chas. A. Durand and *Isaac Marston* for appellant. Promissory notes are valid though made to raise money to carry on illegal business: *Bottomley v. Goldsmith* 36 Mich. 28; *Webber v. Donnelly* 33 Mich. 471; *Smith v. Barstow* 2 Doug. (Mich.) 156.

Howard & Thayer for appellee. Parties to an illegal transaction cannot hold each other liable for moneys ad-

vanced or paid therefor: *Raymond v. Leavitt* 46 Mich. 447; *Gregory v. Wendell* 39 Mich. 337: 40 Mich. 432; *Arnot v. Pittston & Elmira Coal Co.* 68 N. Y. 558; *Sampson v. Shaw* 101 Mass. 145; *Doolin v. Ward* 6 Johns. 194; *Story v. Salomon* 71 N. Y. 420; an agreement of partnership an object of which is the contemplated illegal sale of lottery tickets is void: *Williams v. Woodman* 8 Pick. 78; money lent to enable a person to gamble cannot be recovered: *White v. Buss* 3 Cush. 448; *Staples v. Gould* 5 Seld. 520; an agent cannot recover compensation from his principal for services in making a contract which is illegal, nor can he recover for money paid on account of his principal in execution of it: *Stebbins v. Leowolf* 3 Cush. 137; where a contract is illegal, either under a statute or at common law, the illegality will extend to all antecedent contracts made in aid of or to effectuate the illegal purpose: *Mosher v. Griffin* 51 Ill. 184; *Collins v. Merrell* 2 Metc. (Ky.) 163; *Tatum v. Kelley* 25 Ark. 209; *Watson v. Fletcher* 7 Gratt. 1; a note given for option deals is a gambling contract, and without consideration; but may be good if it has passed into the hands of a bona fide holder: *Shaw v. Clark* 49 Mich. 384; where a debt is extinguished by the deed, or the money paid is not advanced by way of loan, or where it is optional with the grantor to refund or to keep the money, the transaction is a conditional sale and not a mortgage: *Swetland v. Swetland* 3 Mich. 482; *Robinson v. Cropsey* 2 Edw. Ch. 138: 6 Paige 480; 1 Hilliard on Mortgages (2d ed.) 86; *Holmes v. Grant* 8 Paige 250; *Glover v. Payn* 19 Wend. 520; *Goodman v. Grierson* 2 B. &. B. 274; *Brown v. Dewey* 2 Barb. 28; *Baker v. Thrasher* 4 Den. 493.

Cooley, J. Assumpsit to recover the sum of two thousand dollars, which is claimed as part of the purchase price of a city lot in Flint.

The plaintiff's case is that in December, 1879, the parties entered into an arrangement for joint speculations in pork and grain in Chicago, and that in pursuance of such arrangement they bought options until in April, 1880, when they were found to have lost several thousand dollars. The par-

ties then had a meeting to adjust matters between themselves, the result of which was that plaintiff deeded to defendant the city lot in question, which was worth four thousand dollars, and defendant was to apply two thousand dollars in full settlement of the dealings between them, and pay plaintiff the further sum of two thousand dollars within a few days. It is this latter sum that plaintiff claims to recover in this suit. The transaction would thus appear to be a sale of the lot for four thousand dollars, with short credit for half the purchase price.

The defendant sought by the cross-examination of the plaintiff to show that he did not buy the lot, but received a deed of it by way of security of an agreed balance due him on their settlement. This balance the plaintiff stated was four thousand dollars; and he also said that at the time of the adjustment he was willing to pay defendant all that was due him, and had no desire to cheat him out of any thing. He also admitted that, when the deed was delivered, defendant gave him back a writing agreeing to reconvey the property in one year or two years.

The following questions and answers then appear in the record:

"*Q.* This property, now—this conveyance was really given with that object in view—to secure him—was it not, in part at least?

A. Yes sir; two thousand dollars of it.

Q. The object was security, and upon your being able to repay him you should have it back again?

A. Yes sir.

Q. That was the object of the transaction?

A. Yes sir.

Q. That was the object of putting the agreement in writing, that he should convey back and discharge the obligation on your paying the amount?

A. Yes sir."

The plaintiff did not put the agreement in evidence, but he called as a witness the notary who drew the deed and agreement, and he gave evidence on cross-examination that the arrangement between the parties was that the lot was to be reconveyed to the plaintiff on his paying within either one year or two years—the witness was not certain

which—the sum of four thousand dollars with ten per centum interest. No evidence was given on the part of the plaintiff which tended to make out any different case.

On the testimony of the notary it is very clear the plaintiff could not recover. He was bringing suit for two thousand dollars which was to be loaned to him for repayment within one or two years. More than two years had elapsed before the suit was instituted, and therefore, if he were to recover the money, defendant would be entitled to sue and recover it back again immediately. It is idle to contend that this may be done. If the plaintiff has a right of action, it can only be for damages for not making the loan as agreed.

The plaintiff admits that defendant holds the land as security, but he claims that the sum secured is only two thousand dollars. There are some difficulties in understanding this, but the most favorable view for him that can be taken of his evidence is this: that by the arrangement he allowed defendant two thousand dollars in settlement of their deals, and was to have a loan of two thousand dollars for two years upon a pledge of the lot. It would not do to say that the arrangement was one of sale of the lot, with the privilege of repurchase on payment of two thousand dollars when the plaintiff himself says it was worth twice that sum. But if the transaction was one of loan, it is immaterial for the purposes of this suit whether the sum to be repaid was two thousand dollars or four thousand, for in neither case is any sum owing to the plaintiff.

Argument was made in the case respecting the legality of the Chicago transactions; but whether they were legal or illegal seems to be of no moment. If they were illegal, the parties had a right to settle them up as they pleased, and they had full legal authority at the same time to agree upon a loan one to the other if they pleased. The previous transactions would not affect this agreement, even though they may have furnished the occasion for entering into it.

The judge should have instructed the jury that there was no evidence entitling the plaintiff to recover.

The cause will be remanded for a new trial and the defendant will recover the costs of this court.

The other Justices concurred.

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ELIZABETH MITCHELL v. THE CHICAGO & GRAND TRUNK RAILWAY COMPANY.

Railway travel—Presumption of negligence—Responsibility of passengers—Accidental injuries.

The negligence of a railway company will not be presumed in an action against it for personal injury, but must be shown; and there can be no recovery unless it appears to be the efficient cause of the injury without contributory fault in the plaintiff.

Negligence cannot be presumed against a defendant corporation in an action for personal injury if it did nothing outside of the usual course of its business, unless that course of business was itself improper, or special circumstances required particular caution.

Railway passengers are presumed to know the every-day incidents of railway travel, and it cannot be expected that they will be treated, or put under restraint, as if they were children.

There is no legal liability for purely accidental injuries.

A train approaching a station where there was a crossing of railway tracks, stopped, as required by law, several hundred feet from the crossing before proceeding to cross the track. The name of the station had just been called, and a woman passenger hurried to the door to alight. The train was not at the proper point for landing passengers, and as she climbed down it started to go on to the depot platform, and she fell and broke her ankle. The conductor and brakemen did not know she had left her place in the car, and it did not appear that anything was done that was out of the usual course. The accident happened by daylight. *Held*, that the injury to the passenger was purely accidental, unless the passenger was herself negligent, and that the company was not liable.

Error to Ingham. (Gridley, J.) June 22.—July 2.

CASE. Defendant brings error. Reversed.

M. V. & R. A. Montgomery for appellant. A trainman's announcement of a station does not amount to an invitation to alight from the train: *Bridges v. N. L. R. W. Co.* L. R. 6 Q. B. 377: 7 H. L. 213; *Weller v. R. W. Co.* L. R. 9 C. P. 126; *Cockle v. L. & S. E. R. W. Co.* L. R. 5 C. P. 457; *Lewis v. L. C. & D. R. W. Co.* L. R. 9 Q. B. 66; it is only a notice that a train is approaching a station, and to the passengers to be getting themselves ready to alight when the station is reached: *Weller v. L. B. & S. C. Ry. Co.* L. R. 9 C. P. 126; one who has, by his own negligence, so far contributed to the injury done him, that he might, by the use of ordinary diligence or care have avoided it, has no right of action: *Michigan Central R. R. v. Leahey* 10 Mich. 198; *Det. & Mil. R. R. v. Van Steinburg* 17 Mich. 127; *Lake Shore & Mich. Southern Rd. v. Miller* 25 Mich. 279; *Mich. Cent. R. R. v. Coleman* 28 Mich. 452; *Mich. Cent. R. R. v. Campau* 35 Mich. 471; *Swoboda v. Ward* 40 Mich. 424; *Downey v. Hendrie* 46 Mich. 501; *Hassenyer v. Mich. Cent. R. R.* 48 Mich. 209.

J. C. Shields and *H. P. Henderson* for appellee. A railway passenger is justified in trying to leave a car as soon as it stops after the station is called: *Wood v. Lake Shore & Michigan Southern Ry.* 49 Mich. 370; *Bridges v. Railway Co.* L. R. 6 Q. B. 377; *Taber v. D. L. & W. R. R.* 71 N. Y. 489.

CAMPBELL, J. Plaintiff sued for a personal injury which befell her on leaving a train at the Chicago junction of defendant with the Detroit, Lansing & Northern Railroad, three miles east of Lansing. She had been traveling on defendant's road with a ticket which went to Lansing from Chicago, and had a coupon attached to take her on the other road from Lansing to Fowlerville. As the ordinary stoppage at the depot of defendant's road in Lansing would make it necessary for her to cross over a considerable distance to the other station in Lansing, the conductor offered to take her to the junction where the two roads met, so that there need be no difficulty in the transfer.

Just before arriving at the junction and when the train was some 300 or 400 feet from it, the name of the station was called out by the proper person, and the cars came to a full stop as required by law before reaching crossings. Plaintiff at once left her seat and hurried to leave the car. It does not appear that any person employed on the train noticed her. She went down the steps where there was no platform or other convenience for landing, and just as she stepped off, the cars were suddenly started again to go forward to the depot, and she fell and broke her ankle. When the depot was reached the conductor came in to help her out, and finding she was not in the car backed down and picked her up and took her to Lansing, where she was treated by a surgeon, and went home that evening, and was confined to her bed and house some weeks while recovering. The accident happened early in the morning, during daylight.

The defense asked the court to take the case from the jury, which was refused, and a verdict was found in plaintiff's favor.

Upon the argument in this Court the defense was rested on the absence of proof of negligence. While there was some evidence tending to prove contributory negligence in plaintiff, it was not urged that on that point there was not evidence for the jury.

It has been held in some states that in cases of injury on railroads there is always a presumption of negligence against the defendant. That, however, is not the common law, and is not the law of this State. According to the doctrine which we follow, negligence must be shown in all such cases, and it must appear to have been the efficient cause of the injury without contributory fault in the plaintiff. *Chicago & N. W. Ry. Co. v. Smith* 46 Mich. 504; *Brown v. Congress & Baker St. Railway* 49 Mich. 153; *Henry v. Lake Shore & Michigan Southern Rw.* 49 Mich. 495. These cases refer to a line of earlier cases in our own Court and elsewhere.

It is also well settled that negligence cannot be presumed where nothing is done out of the usual course of business, unless that course itself is improper. There must be some

special circumstances calling for more particular care or caution, in order to make a liability. *Stephenson v. G. T. R. Co.* 34 Mich. 323; *G. R. & Indiana R. R. v. Judson* 34 Mich. 506; *Flint & P. M. Rw. v. Stark* 38 Mich. 714; *Downey v. Hendrie* 46 Mich. 498; *Mich. Cent. R. R. v. Coleman* 28 Mich. 440; *Haas v. G. R. & Ind. R. R.* 47 Mich. 401; *Chicago & N. W. Ry. Co. v. Smith* 46 Mich. 504; *Brown v. Congress & Baker St. Rw.* 49 Mich. 153; *Henry v. Lake Shore & M. S. Rw.* 49 Mich. 495.

The only cause of the mischief, leaving defendant's carefulness or negligence out of view, was her mistaken supposition that the cars had stopped for the station, and that she should therefore get out. There was nothing at the spot to indicate a landing place, and there was, at the proper place, a short distance further on, a building and platform appropriate and used for that purpose. The stoppage of the cars was required by statute, as well as by usage, as a precaution against collisions. The calling of the station was not shown to have been out of the usual course, and from the distance mentioned we can hardly conceive it should have been delayed. No one representing the company, whether conductor or brakeman, is shown to have known or suspected that plaintiff had put herself in peril or left her place. Nothing is shown which put them in fault for not knowing this.

We cannot discover anything in the record to indicate that there was any act or any omission not incident to the constant usage of the road, or indicating fault. The starting of the train after such a stoppage is an incident plainly contemplated by law. The company, as held in some of the cases above cited, cannot be expected to treat its passengers as children, or to put them under restraint. Passengers must take the responsibility of informing themselves concerning the every-day incidents of railway traveling, and the company could not do business on any other basis. This case does not differ in principle from those in 28 and 38 Michigan, and it resembles some of the others very closely. The law does not affix any responsibility for injuries purely accidental, and that is in our judgment the utmost that can be

asserted on the facts presented, if plaintiff was not herself negligent.

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

The other Justices concurred.

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ANNIE KILGANNON v. JOHN JENKINSON.

Bill to quiet title—Possession—Jurisdiction.

One who is not in possession cannot maintain a bill to quiet title, and an averment in the bill that defendant has entered upon the premises, and by personal force and violence has prevented complainant from occupying or using them, has the effect of negativing a fact that is necessary to the theory of the bill.

Equity cannot take cognizance of a dispute as to the true location of the boundary between the premises of parties, if the settlement of such dispute leaves no question as to the title to the property on either side; the remedy is at law.

The comparative means of the parties to a boundary dispute are immaterial to the question whether the case should fall within the jurisdiction of law or of equity.

Appeal from St. Clair. (Stevens, J.) June 22.—July 2.

BILL to quiet title. Defendant appeals. Reversed.

Chadwick & Cline for complainant.

B. C. Farrand and *Wm. T. Mitchell* for defendant. A court of chancery will not try titles to land: *Devaux v. Detroit* Har. Ch. 98; *Moran v. Palmer* 13 Mich. 367; *Barry v. Shelby* 4 Hayw. 229; unless there is an equity against the adverse claimant: *Lange v. Jones* 5 Leigh 192; *Wake v. Conyers* 1 Eden 331; and some objection to a suit at law: *Payne v. Riley* 4 Dana 38; as that the boundary cannot be found: *Miller v. Warmington* 1 J. & W. 464; a bill to quiet title cannot be maintained if it shows that com-

plainant is in possession: *Barron v. Robbins* 22 Mich. 35; naked pretence of title will not support it: *Torrent v. Muskegon Booming Co.* 22 Mich. 354.

GRAVES, C. J. This bill was filed on the supposition that it contained a case for the jurisdiction to quiet title, and the circuit judge conceded to it that character and granted relief. Was the decree authorized?

A brief reference to the pleadings is proper. Complainant substantially alleges that she owns in fee, and for more than ten years has occupied, lot 3 in block 7 of the plat of the subdivision of the Fort Gratiot Military Reservation in the city of Port Huron, and caused it to be fenced in; that defendant owns adjoining lot 7, on what is known as "Cemetery Grant;" that in May, 1882, he asserted a claim to the west ten feet of her lot, and under such claim forcibly tore down the fence and entered upon said ten feet and by "actual personal force and violence has prevented her from occupying or using the same or rebuilding her fence." Defendant admits being owner of lot 7 and that complainant is owner of lot 3 and that the east line of "Cemetery Grant" corresponds to the west line of lot 3 and the east line of lot 7. But he denies that the ten feet claimed by complainant belongs to lot 3, and avers that it is a part of lot 7. He admits tearing down the fence, and that he means to repeat the act in case a fence is again put up on his land; but he denies having committed any trespass.

The statement just cited from the bill is such as to warrant special notice. It amounts to an allegation, and almost in terms, that defendant expelled complainant from the ten feet of land in question and is keeping her out of the occupation; which is the same as saying that she is not in possession, but is kept out by the defendant.

The effect of this allegation is to negative a fact which is necessary for the theory of the bill. *Barron v. Robbins* 22 Mich. 35; *Blackwood v. Van Vet* 11 Mich. 252; *Methodist Church of Newark v. Clark* 41 Mich. 730.

But this is not all. The showing by evidence fails to

make out a possession in complainant at the time she began the suit. The only inference admissible is either that the defendant was then in possession or that the locus in quo was vacant.

Passing this ground of objection, another difficulty is noticeable. A full review of the proceedings makes it entirely clear that the fundamental dispute is about the correct position of the line between lots 3 and 7. The case is not one where a complainant in possession of a specific piece of land, and a defendant out of possession, but claiming some right or title, are contending as to which one has the better right to that same parcel; but it is a case where the titles are not opposed, and the basis and existence of all right and claim depend simply upon where the original line runs. When that is once settled there can remain no semblance of claim or cloud to be passed on, and the issue on that particular question is one regularly triable at law.

The distinction in these cases between the jurisdiction of law and equity depends in no manner on the comparative means of the parties, and the suggestions in the bill respecting the ability of defendant and the inability of complainant have no pertinence on this point.

The result is that the case in the record is not one of which a court of equity is authorized to take cognizance. The grievance implies legal remedies, and there are no elements to divest the jurisdiction at law and entitle equity to deal with the controversy. *Wykes v. Ringleberg* 49 Mich. 567.

The decree should be reversed and the bill dismissed with costs.

The other Justices concurred.

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JOHN BAKER v. THE CITIZENS' MUTUAL FIRE INSURANCE COMPANY OF KALAMAZOO COUNTY.

Insurance—Cancellation of policy—Assessments.

The cancellation of an insurance policy has no effect, in itself, upon a right of action which has previously accrued under the policy.

The charter and by-laws of a mutual fire insurance company provided that when the board of directors ordered an assessment the secretary should prepare it and it should be signed by him and by a majority of the board. *Held* that an unsigned and uncertified paper containing no headings to explain the figures set down in it, could not be treated as an official assessment for the purpose of forfeiting the policy of one who had not paid the amount of his assessment until after the expiration of the period fixed by notice to him.

Error to Kalamazoo. (Mills, J.) June 22.—July 2.

ASSUMPSIT. Defendant brings error. Affirmed.

E. M. Irish for appellant.

Dallas Boudeman for appellee.

CAMPBELL, J. Baker sued defendant on a policy of insurance and recovered judgment. The defense set up was —*first*, the cancellation of the policy; and *second*, the forfeiture of the insurance by non-payment of assessment.

Upon the first point no legitimate question arises, as the policy was not canceled until after the loss and right of action accrued, and there was nothing in the mere act of cancellation to operate retroactively so as to cut off the claim for damages already existing.

The controversy all turns upon the second point; for the other questions raised on the trial do not appear to have any materiality.

The defendant, which is a mutual company organized under the laws of Michigan, appears to have divided its risks into various classes at different rates. Plaintiff held what was known as one first-class risk for $400, which is the one

in question. He also held two fourth-class policies for $700. On January 11, 1882, the board of directors passed a resolution ordering all policies issued previous to October, 1881, to be assessed, at the rate of two mills on the dollar for first-class policies, and additional rates at 10, 20 and 30 per cent. respectively on the second, third and fourth classes, and directing an assessment to be levied accordingly, payable on the first of March and for thirty days thereafter, and that the secretary give notice on the 1st of March. The resolution directed that all policies not paid within the 30 days should be suspended till paid. The by-laws directed a total forfeiture, retaining nevertheless personal liability for future assessments. The charter directed that the mode of assessing should be fixed by the by-laws. The by-laws provided that when the board ordered an assessment, the secretary should prepare it, and it should be signed by a majority of the board and by the secretary, and placed on file.

The secretary prepared a paper which was not signed by himself or by any one else, which contained no headings showing what was meant by the various columns in which entries were made, and in which the only reference to plaintiff was as follows:

"168	Baker, John	27	Kal	1	4.00 7.00	2.48	May 13	2.48"

The notice sent by the secretary was dated March 1, 1882, and after setting out the resolution of January, informed plaintiff that the grade and amount of his insurance was "No. 1 and 4 grade, $1100; assessment, $2.48." It required him to pay the assessment to the treasurer within 30 days from date.

The plaintiff did not pay until May 13, the day after the fire, when he paid the entire amount specified in the notice, and informed the secretary of the fire. On May 16 he presented his claim, which the board refused to allow. No objection was made on any formal grounds.

The record shows conclusively that no such assessment was made as was required by the charter and by-laws, and without this there could be no forfeiture. The charter and

by-laws both treat the assessment as an act to be done subsequent to the resolution of the directors. Until the assessment is put in shape there is nothing to found a notice on, and nothing to create a liability. The purpose of the by-law is to secure the personal attention and oversight of the officers to the preparation of the assessment, so as to secure accuracy, and to prevent omissions or mistakes in regard to the persons responsible and the amounts of their dues. Every member is interested in having assessments correct, and in having others properly charged for their share of the common burden.

We need not consider whether the omission of certain policies would have been fatal had the directors and secretary acted in preparing the assessment. The directors paid no attention to it whatever, and there was no assessment properly so called made at all, for it is impossible under the charter to regard a mere unsigned and uncertified paper to be treated as an official act of persons who never had anything to do with it and probably never saw it.

Without referring to other difficulties, we think the court below correctly decided that this was no valid assessment, and created no forfeiture.

The judgment must be affirmed with costs.

The other Justices concurred.

Augustus Gay v. The Farmers' Mutual Insurance Company of Kalamazoo County.

Mutual insurance—Unwritten contract—Pleadings.

A declaration in a suit against a mutual fire insurance company set forth that plaintiff, being a member of the company and having bought insured property from another member, applied to the secretary for insurance on it in his own name, tendering the proper amount; that the secretary had authority and actually contracted, but informed him that the property would be regarded as insured and asked him

to keep the money until a formal policy could be prepared; and that before he could get him to make out the policy the property was burned. The declaration gave the charter and by-laws of the company in full, and set out an absolute contract in positive terms. *Held*, that under Circuit Court Rule 104, which dispenses with prolix declarations on policies of insurance, the declaration made out a good cause of action, and that unless the charter and by-laws made such contracts as it alleged, illegal, plaintiff should have been allowed to show that they had been recognized by the company as within the secretary's powers.

The charter of a mutual fire insurance company made it the absolute right of farm owners in the county to become members on subscribing the articles and applying for insurance on prescribed terms. *Held*, that the secretary could not cut off this right by refusing an actual tender of the proper amount from one who was already a member and had duly applied for insurance.

Objections to the sufficiency of a declaration should be raised early in the proceedings, so that parties may be saved the expense and delay of preparation for trial.

Error to Kalamazoo. (Mills, J.) June 22.—July 2.

ASSUMPSIT. Plaintiff brings error. Reversed.

Edwards & Stewart for appellant. A parol agreement as to the terms on which an insurance policy shall be entered, made by the president, secretary or other general agent of the company, binds the company: *Constant v. Insurance Co.* 1 Am. Law Reg. (N. S.) 116; *Perkins v. Washington Insurance Company* 4 Cow. 645; insurance companies can make binding parol contracts to insure, even though the charter of the company or a general law requires policies or other contracts of insurance to be under seal and signed by particular officers: *Commercial Mutual Marine Ins. Co. v. Union Mutual Ins. Co.* 19 How. 318; *New England Mutual Ins. Co. v. De Wolf* 8 Pick. 63; *Trustees &c. v. Brooklyn Fire Ins. Co.* 19 N. Y. 305; *Audubon v. Excelsior Ins. Co.* 27 N. Y. 216; *M'Culloch v. Eagle Ins. Co.* 1 Pick. 280; *Hamilton v. Lycoming Ins. Co.* 5 Penn St. 342; *Delaware Ins. Co. v. Hogan* 2 Wash. C. C. 4; *Tayloe v. Merchants' Fire Ins. Co.* 9 How. 405; *Westchester Fire Ins. Co. v. Earle* 33 Mich. 143.

E. M. Irish for appellee. Generally officers of a mutual insurance company cannot waive any of the conditions by which all the members of the company are mutually bound: *Van Buren v. St. Jo. Co. Village Fire Ins. Co.* 28 Mich. 398; *Barrett v. Union Mutual* 7 Cush. 175; *Forbes v. Agawam Mutual* 6 Cush. 471; *Hale v. Mechanics' Mutual* 6 Gray 173; *Stark Co. Mutual Ins. Co. v. Hurd* 19 Ohio 149; *Westchester Fire Ins. Co. v. Earle* 33 Mich. 150.

CAMPBELL, J. In this case plaintiff sued for a loss by fire, and the defense set up and allowed on the trial was that the policy was not actually issued in writing, and the premium was not actually paid.

The declaration averred in substance that plaintiff, being already a member of the company, did, on the purchase from another member of insured property, apply to the secretary for insurance of that property in his own name, tendering the proper sum for insurance charges and other dues. That the secretary informed him the property would be regarded as insured, and requested him to retain the money until he could find it convenient to prepare a formal policy, and that plaintiff did not succeed in getting him to make out a policy before the property was burned. The declaration averred fully the secretary's authority, and that he actually contracted. On the trial he offered to show that such contracts had been recognized by the company, as within the secretary's powers, but was not permitted to do so, and the case was disposed of on the insufficiency of the declaration, which set out in full the charter and by-laws.

Unless there is something in the charter and by-laws absolutely preventing such a contract as is set out from being legal, there can be no doubt of the incorrectness of the action below. An absolute contract was set out in the most positive terms. From the record in this and in other cases which have been brought before us, we infer that the court and counsel for defendant overlooked Rule 104* of the

* RULE 104. In order to avoid needless prolixity, inasmuch as policies of insurance are generally issued upon printed forms, of the contents of

Circuit Court rules, which was designed to save plaintiffs from the trouble of the prolix recitals which formerly cumbered up the pleadings in insurance cases and made them difficult to construe, and also made it quite easy to create faults by trifling omissions. The declaration, if faulty at all in regard to the fullness of its recitals, is faulty for redundancy. But perhaps the particular questions of the necessity of a written policy and of actual payment are sufficiently raised.

We find nothing in the charter and by-laws rendering a written policy necessary. Section 12 of the charter makes it the absolute right of farm-owners in Kalamazoo county to become members of the company. The conditions imposed are, subscribing the articles, and applying for insurance, on the terms and conditions of the charter and by-laws.

As the declaration sets out that plaintiff was already a member, nothing further was required than making such application. And if made in the manner required, these articles give the secretary no option on the subject. He could not, by his caprice, cut off such right.

The only defect pointed out which we can find any notice of in the papers is that, by section 20 of the charter, it is declared that "no insurance policy shall be binding until the actual payment of premium."

Whatever force this might have where the officer dealt with has power to reject applications, it cannot apply where the right to insurance is absolute, and an actual tender is made of the full sum necessary. When the money is within the reach of the secretary he cannot cut off the applicant's rights by refusing to accept it.

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which the companies issuing them are fully advised, it shall not be necessary hereafter in declaring upon such policies to set forth specifically any more than the date and amount of the policy, the premium paid or to be paid, the property or risk insured, and the loss; and upon the trial, proofs may be made in the same way as if the declaration had set forth the policy in full. And in case the company or person issuing such policy shall rely, in whole or in part, upon the failure of the plaintiff to perform or make good any promise, representation or warranty, not contained in such policy, but set forth in any other paper or instrument in the hands of said insurer, the notice under the general issue shall declare the same and indicate the breach relied on.

We think the declaration made out a good cause of action, and that plaintiff showed himself, by its allegations, possessed of a good cause of action, and should have been allowed, if disputed, to prove it.

We think it proper to suggest that where defendants suppose the declaration to be insufficient, they ought to take early occasion to raise the question without putting parties to the expense and delay of preparation for trial. Objections which are needlessly postponed should receive no favor.

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

GRAVES, C. J. and COOLEY, J. concurred. SHERWOOD, J., having been of counsel, did not sit in this case.

GEORGE D. WALCOTT v. THE MAYOR, RECORDER, AND ALDERMEN OF THE CITY OF JACKSON.

Mandamus—Laches.

Mandamus was not allowed to enforce the payment of a claim for salary where the relator first elected to sue in assumpsit but left the action undetermined and, after ten years had passed from the date of his claim, sought his remedy by mandamus from the appellate court.

Mandamus. Submitted June 22. Denied July 2.

Melville McGee for relator.

City Attorney *Chas. A. Blair* for respondent.

GRAVES, C. J. At the last April term the relator made this application for a mandamus against the city, and the case has been heard on the usual order to show cause. An outline of the leading facts is indispensable.

On the 11th of September, 1871, the relator accepted the appointment of Superintendent of the Water-works then

owned by the city, and continued to hold the position until the first day of July, 1872, at which time he resigned. On the occasion of his appointment the common council fixed his salary at $1000; but he gave notice that he would not accept it. No change was made, however, until the 27th of the following November, at which time, on the recommendation of the board of public works, the common council increased it to $2000. A few days later he sent in his charge for his services prior to the change of salary, and it was regularly allowed and paid. It was at the rate of $1000 per year. He drew his pay monthly under the allowance of $2000, and was paid at that rate from the date of the increase to the first of June. But on the 3d of that month the common council assumed to cut the salary down to $50, and when he resigned the first of July, the city tendered him for his June service an amount computed for the first five days at the rate of $2000 per year, and for the other twenty-five days at the rate of $50 per year, and he refused to accept it. He insisted on being paid at the rate of $2000 per year for the entire month. This item of service has never been paid.

The relator and the common council were evidently at variance, and the former had some kind of charge against the city besides the demand for salary. But the circumstances are not explained.

We are informed by the petition that in December, 1872, the relator sued the city in the circuit court, and among other claims which are not described, alleged one for his salary during June, 1872, at $2000 per year, and a second for the difference between what he actually charged against the city for the period prior to the change, and the amount which would figure up for that time on the new basis; that one trial was had on the merits, before a jury, which terminated in a disagreement; that after many postponements the cause was again brought to trial last winter, but without a jury; that relator then proceeded to give evidence of these claims, but the circuit judge excluded it on the ground that

the remedy was by mandamus. These facts are all admitted.

No further reference is made to the action in the circuit court. The explanation leaves the action pending and the trial in progress, and stops with the offer of evidence to prove these claims, and the adverse ruling. Now, it is these same demands of which this Court is asked to take cognizance by this proceeding. It is for their enforcement that the relator prays a mandamus at our hands. Is the case a proper one for such intervention at this late day? It is the opinion of the Court that it is not. If the claims in question were ever tenable on mandamus, they arose more than ten years before the application, and the relator was then as well informed of their existence as he is now. His election to sue in the circuit court was his own affair, and it is not a matter he can set up to excuse his delay in coming here. As respects this remedy, the demands have become stale, and public policy is against extending it to such cases.

In a case in the state of New York, where the delay was only for a year, the Supreme Court refused the writ. They said: "Here has been a delay of a year since the happening of the errors complained of, and the fact of the party's having been advised that his remedy was by writ of error, furnishes no excuse. This court will not by mandamus disturb proceedings in which parties have so long acquiesced." *People v. Seneca Com. Pleas*, 2 Wend. 264.

Were it necessary we should be obliged to consider several other questions before reaching the subject of validity of the claims, and we notice these among others. We should have to inquire whether, for the purpose of mandamus to compel payment, the city is the proper party to be proceeded against; and, again, we should have to see whether demands which are actual causes of action in a pending suit in assumpsit, and in regard to which demands there have been rulings which are liable to be brought hither by writ of error, are in a condition to be singled out by the plaintiff, and made triable here against the defendant on mandamus.

But it so happens there is no occasion to go further than the objection arising on the delay.

The writ is denied with costs.

The other Justices concurred.

OCTOBER TERM 1883.

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56	627
59	260
60	504
51	253
67	66
67	77
67	638
51	253
76	404
51	253
93	159
51	253
97	275

WILLIAM H. HATHAWAY v. MICHIGAN CENTRAL R. R. Co.

Injury to brakeman in coupling cars.

The omission of a railroad company to warn an inexperienced brakeman of the specific danger of coupling cars that are furnished with double dead-woods does not make the company liable for an injury received by him in so doing, if the risk is such as to be manifest to any person, and if, on being employed, he was warned in general terms of the perils of coupling cars of different construction, and was told not to take any chances.

Error to Jackson. (Gridley, J.) June 5.—Oct. 3.

CASE. Defendant brings error. Reversed.

Gibson, Parkinson & Ashley, Henry Russel and *Ashley Pond* for appellant.

Conely, Maybury & Lucking for appellee. Employers are bound to explain to servants the dangers of using machinery which they do not understand: *Strahlendorf v. Rosenthal* 30 Wis. 675; *McGowan v. La Plata Mining Co.* 9 Fed. Rep. 861; *Grizzle v. Frost* 3 F. & F. 622; *St. Louis & S. E. Ry. Co. v. Valirius* 56 Ind. 511; *Dowling v. Girard D. Allen Co.* 14 Cent. L. J. 92; *Coombs v. New Bedford Co.* 102 Mass. 597; *O'Connor v. Adams* 120 Mass. 427; Cooley on Torts 553; Wood's M. & S. § 349; *Parkhurst v. Johnson* 50 Mich. 70; the construction of the machinery is not sufficient to notify a workman of the risk: *Hill v. Gust* 55 Ind. 47.

SHERWOOD, J. The plaintiff brings his suit against the Michigan Central Railroad Company for damages sustained by him while in the company's employment as a brakeman, alleging that while making a coupling of cars at Niles, as directed by the company's agent, his arm was caught between the bumpers and crushed in such manner as to render amputation necessary; and that the injury was caused by the negligence of the company in not informing the plaintiff of the dangerous position he was called upon to occupy, and the nature, character and action of the machinery used for the coupling, and the particular dangers to be encountered in making the connection. The plaintiff obtained a judgment at the circuit for $9000 damages, and the defendant brings error.

The record contains the substance of all the testimony and proceedings had at the circuit, and all the exceptions relate to the charge of the court as given, and to the refusals to charge.

The plaintiff was reared in Jackson county, and was twenty-four years of age when he entered the service of the defendant. It is not questioned but that he is a man of ordinary understanding and of full average intelligence. He had traveled some, but had no experience in railroading, except that he worked a few weeks in 1871 distributing spikes on the Davenport & St. Paul Railroad, and in 1877 a few months in track-repairing on the M., K. & I. Railroad, and this experience, he says, did not bring him in contact with the construction of freight cars.

He was received into the defendant's service as a brakeman, and entered upon the discharge of his duties on a freight train, his run being between Jackson and Michigan City. Plaintiff made his first two trips with Conductor Hulitt, who told him, when he came on his train, of the dangers incident to the business; to be careful in coupling, and to take no chances. He cautioned him in regard to the cars; told him defendant had cars of all makes and descriptions; and some had dead-woods and some had not; and he allowed him to make couplings on the second trip. Mr.

Sullivan, the brakeman who was with him when he made his first trip, told him that braking was a dangerous business, and that coupling was a dangerous part of braking; to be careful in making couplings, and if the cars did not come back right to step out; that the cars were of different heights; and they sometimes used a crooked link in coupling; and watched him when he made his first couplings. The engineer, on his first trip, also cautioned the plaintiff, and told him there was much danger; to be careful in running over the cars, and look out for himself. Conductor Day also told plaintiff, on the trip he made with him, that all couplings were dangerous; to be careful; to look out for flat cars loaded with lumber or iron, as it projected over; that he must take care of himself in every way. The company also, after he had made his first trip, presented him with a time-table which contained the rules or instructions of the company to its employees on trains, and directed them where they might find all information necessary in discharging their duties, and containing warnings as to special dangers; and these instructions plaintiff says he read before making his second trip. The plaintiff, aside from his own experience, learning and observation, the evidence tended to show, was thus forewarned before the injury complained of occurred; indeed, to this extent the defendant's testimony is not denied. He had also made three round trips on the defendant's freight trains and made several couplings of the Michigan Central cars, and when injured was making his fourth trip, having been to Michigan City, and was on his return as far back as the city of Niles.

The plaintiff claims, and his testimony tended to show, that while at this place he was called upon by Conductor Sykes to make a coupling between two cars known as the New York, Lake Erie & Western cars, which were being taken with others over the defendant's road, and that double dead-woods were used on said cars instead of single dead-woods, like those on defendant's cars; that he was entirely unacquainted with that kind of dead-woods used

about the couplings; that he had never seen any of the kind before; that it was more dangerous making the coupling when the double dead-woods were used; that he had not been specially forewarned of this fact by the company; that he was called upon to make the coupling in the night; and that the omission of defendant to forewarn him of such increased danger was such negligence on the part of the defendant as to create a liability to the plaintiff in this action.

It is conceded by the parties that the cars were of the same make and pattern as to dead-woods as the cars mentioned in the case of Smithson against defendant before the Court in 45 Mich. 212. The cars he was coupling were cars belonging to and received from the New York, Lake Erie & Western Railway. At the ends were what are known as double dead-woods. A car of this construction has a horizontal timber at the end, with projecting blocks bolted to the timber, one on each side of the draw-bar which extends a little beyond the faces of these blocks. In coupling, the blocks come together and receive the blow of the cars. The coupling-pin is usually dropped through the draw-bar between the blocks from above. The defendant's cars are furnished with single dead-woods, and those of three or four other roads, outside of the State, which pass over defendant's road have double dead-woods.

At the time the injury complained of occurred, it was not only the right and privilege of the defendant to transport the cars of the New York, Lake Erie & Western Railroad Company over its road across our State, but it was its duty to do so. By the General Laws of 1873, p. 99, "every corporation owning a road in use shall, at reasonable times and for a reasonable compensation, draw over the same the merchandise and cars of any other corporation."

The evidence in this case shows that cars with the double dead-woods had for a long time passed over the defendant's road, and that about one-sixth of the freight cars passing west had double dead-woods; that in three of the trains the plaintiff made his trips on, before he was hurt, there were some

of this kind of cars; and that one-twentieth of all the double dead-woods that passed over the road were New York, Lake Erie & Western cars.

It is not claimed or pretended by the plaintiff that the cars attempted to be coupled by him or the dead-woods thereon or any part of the same were defective in their construction, unsound or out of repair, or that they were not a part of the rolling stock then largely used by defendant in transporting property over its road; or that they were not proper cars for that purpose; or that any of the usual and customary means were not adopted and used by the defendant to guard against accidents to its employees in transporting said cars over its road, except the want of proper notice to him of the dangers which overtook him in making the coupling when he was injured. It is not claimed by plaintiff that with proper care said cars could not be coupled with safety, but that it was more dangerous coupling these cars than those belonging to the defendant, and of this fact plaintiff was not advised; that defendant should have instructed him and given him notice to that effect, and, failing so to do, it must be held accountable for the injury complained of.

The general rule that "when a person enters the service of a railroad company he assumes the risks and dangers incident thereto, and cannot demand compensation from his employer for accidental injury," is well settled in this State, and has frequently been applied in cases in this Court. *Davis v. Detroit & Milwaukee Railway Co.* 20 Mich. 105; *Quincy Mining Co. v. Kitts* 42 Mich. 34; *Mich. Cent. R. R. Co. v. Smithson* 45 Mich. 212; *Swoboda v. Ward* 40 Mich. 423.

It is also equally well settled by several decisions of this Court that "the employer is charged with the duty of care to those in his service and must not subject them to risks by his own negligence." *Mich. Cent. R. R. Co. v. Smithson* 45 Mich. 212; *Chicago & Northwestern Ry. Co. v. Bayfield* 37 Mich. 205; *Swoboda v. Ward* 40 Mich. 420. In the last case Mr. Justice Marston states the rule to be: "When the servant is to be sent into dangerous places or

put to dangerous tasks, of the risks of which he is ignorant, due care on the part of the master requires that he shall give the servant notice and put him on his guard." The rule there stated is approved by Mr. Justice Cooley in the *Smithson Case*, and I fully endorse the views of my learned brethren expressed in these two cases, but the rule must not be carried to the extent of making the company insurers of the safety of its servants, or be used by them as an excuse for their not exercising that care and caution in avoiding dangers which must be expected of all men of ordinary intelligence.

In the case in 40 Mich. 420, as also in the case of *Huizega v. Cutler & Savidge Lumber Co.*, post, p. 272 (decided at the present term of this Court), the plaintiff was employee in the defendants' saw-mills, in which the defendants had neglected to cause a dangerous piece of machinery to be covered, which was unobserved by plaintiff (though had he looked carefully he might have seen it), and in passing, in the one case, and by slipping upon a piece of bark, in the other, the plaintiff was caught in the machinery and badly injured; and in each of these cases the rule was correctly applied and the plaintiff was allowed to recover. There was negligence in the defendant's failing to cover the dangerous machinery. It should have been done to escape injury in case of accidents, which were liable to occur; and the machinery being stationary, with little labor and expense all danger could have been avoided. In all cases where the danger can be readily guarded against the employer is in duty bound to protect his employees; and if he does not, his failure is at his peril. The same is true as to the duty of a railroad company towards its employees. The general rules are the same in all these cases. But it is not always possible for a railroad company to so guard its machinery as to secure the safety of its employees in all cases, and therefore each case must necessarily, to a great extent, be governed by its own peculiar circumstances. Much must depend upon the employee's own prudence, caution and judgment; and it is the duty of every person in the employ

of the railroad company to exercise due and reasonable care in avoiding danger; and the degree of care required must be in proportion to the nature of the danger to be encountered and the extent of the risks; or, in the language of Mr. Justice Campbell in *Mich. Cent. R. R. Co. v. Coleman* 28 Mich. 448: "The rule of care and caution to be applied in any case must properly be one required by the nature of the case, and such as the circumstances call for." Reasonable care in such cases requires one to be diligent in the use of any or all his faculties necessary in ascertaining and avoiding the danger. Anything less than this must be regarded as negligence; and whenever such negligence contributes to produce the injury complained of, it will be a good defense to an action brought to recover for such injury.

In the present case the real ground of defendant's alleged liability stated in the declaration is that the plaintiff was not sufficiently instructed in what was required of him by the company to enable him to discover and appreciate the danger which caused his injury; that some notice thereof should have been given him by the company other than the general one which he received.

The defendant had advised him that railroading was a dangerous business; that braking was very dangerous; and that coupling cars was the most difficult and dangerous part of braking. The plaintiff entered the defendant's service as a learner, choosing for himself the position he desired and occupied, and it was his duty to improve every opportunity furnished him by the defendant to learn of his duties and their accompanying dangers. If he failed to do this he was guilty of neglect, and if such neglect contributed to the injury complained of he cannot recover. 2 Thomp. Neg. 1052; *Mad River etc. R. Co. v. Barber* 5 Ohio St. 541; *Davis v. Det. & M. Ry. Co.* 20 Mich. 105.

This Court decided in the *Smithson Case* that it was not negligence in the defendant to take over its road the double dead-wood cars by which the plaintiff was injured; that the business of the road itself is the best notification; that many differences requiring attention in coupling are to be

encountered by brakemen; "that every man of ordinary intelligence in the employment of the company knows that the Michigan Central Railroad is a great common way for all the railroad companies in the country, and that the cars of the several railroads and transportation companies differ, and that all their differences may appear at some time in the cars he may be called upon to couple or uncouple; that every train is likely to have several kinds of cars in it; and he cannot assume, as he passes from one car to another, that the two will be alike,—much less that the whole train will be."

The dangers surrounding the brakeman, when he makes his coupling, are constantly changing, and therefore no previous warning can be given of the particular dangers to be avoided in making any particular coupling. The cars and coupling machinery and the protection surrounding the draw-bar must be seen by the coupler to be of any service to him in avoiding the impending danger, and I think we must all agree with Mr. Justice Cooley, when he says in the *Smithson Case*: "The best notice is that which a man must necessarily see, and which cannot confuse or mislead him. He needs no printed placard to announce a precipice when he stands before it."

In that case the plaintiff claimed the same kind of negligence on the part of the defendant as a ground of recovery as in this; and the plaintiff's own view of the cars, deadwoods and couplings at the time of the injury was held to be all the notice that was necessary to be given by the company, and that the plaintiff could not recover. The correctness of that decision is not questioned but admitted by the plaintiff's counsel in this case, and the only difference claimed between the two cases is that in the *Smithson Case* the coupler injured had long experience in coupling, and in the present case he had little or none at all.

This fact, if admitted, cannot make this case an exception to the rule. If the character of any particular danger is so simple that it can as well be ascertained at a single view as at many, it is difficult to see how additional observation

could be of any benefit to the party whose duty it is to encounter it. 2 Thomp. Neg. 976. In this case the danger consisted in the brakeman being caught between the two dead-woods as they came together. The dead-woods were in plain sight; they were really the most prominent objects on the end of the cars. The plaintiff had full opportunity of examining the one by which he stood some moments before the cars came together. Its size, shape and the location of the draw-bar were before him. He had only to look at it to be informed of any peril surrounding it. The moving car at a distance of twenty feet, with its dead-wood and draw-bar in plain view, slowly approached the one where the plaintiff was standing. It does not appear there was any hurry about the business. How could the plaintiff have been better warned? Certainly he knew the car was coming, and could see the dead-woods and draw-bar thereon as well as if he had made the coupling a thousand times before. He could not fail to see if he looked at all. It was no special risk to which he was subjected, but it was common to all that class of cars going daily over defendant's road, and of which the plaintiff had had, for nearly a week, at least, the opportunity of knowing, whether he availed himself of it or not. The risk in making that coupling was incident to the service the plaintiff had voluntarily engaged in,—one, of which, from the very nature of the business, he must, under the circumstances, have been cognizant; and no other or better notice of which could be possibly given than that which the plaintiff had as he stood there and saw the two cars, with the dead-woods approaching each other; and no amount of experience could further or better warn the plaintiff of the dangers then before him in making the unfortunate coupling;—the chances were his. Wait on Actions & Defences 417, and cases there cited; *I. B. & W. R. R. Co. v. Flanigan* 77 Ill. 365; *Baldwin v. C. R. I. & P. R. Co.* 50 Iowa 680; *Way v. Ill. Cent. R. R. Co.* 40 Iowa 341; *Chicago & N. W. R. R. Co. v. Ward* 61 Ill. 131.

I think the plaintiff's case falls clearly within the decision

of the *Smithson Case* and others in this Court, and must be ruled by the same. *Fort Wayne etc. R. Co. v. Gildersleeve* 33 Mich. 133; *Davis v. Det. & Mil. Ry. Co.* 20 Mich. 105; *Botsford v. Mich. Cent. R. R. Co.* 33 Mich. 256.

The company is under no greater obligation to care for the safety of its employees than rests upon the employees to care for their own safety. 2 Thompson on Negligence 1009. The plaintiff had full opportunity to see and examine the cars from which he received his injury, and all the peculiarities of the double dead-woods, if there were any, and the differences between them and the dead-woods upon the Michigan Central cars, had he looked at them; they were in the very train in which he was injured. He might have seen that the draw-bars of the cars he was injured by, projected little, if any, beyond the faces of the dead-woods; that to place his arm between the approaching blocks would inevitably result in injury; and that the way to make the coupling safely was to keep his arm above or below the dead-woods. All these things were before him, and it was the simplest of all his duties to look at them. No youthful inexperience can be offered as an excuse for his failing so to do; and his failure to use his lantern and make such observations, under the undisputed facts and circumstances disclosed in this record, shows unmistakably a degree of negligence on the part of the plaintiff which very largely contributed, if not wholly, to the injury complained of; and the defendant's first request should have been given to the jury.*

It is unnecessary to consider the other assignments of error.

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

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

COOLEY and CAMPBELL, JJ. concurred with the Chief Justice.

*The request was that the jury be instructed that their verdict should be for the defendant.

MARK S. HITCHCOCK ET AL. v. CAVALLO S. PRATT ET AL.

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Forcible detainer—Treble damages—Loss of profits—Sufficiency of counts—Dismissal of writ of error.

Comp. L. § 6717 allows one who has obtained restitution in forcible entry proceedings to sue the defendant in trespass and recover treble damages. *Held* that he is not deprived of this remedy by defendant's voluntary surrender of the premises and dismissal of a writ of error sued out by him on the judgment of restitution.

Dismissal of a writ of error leaves the judgment on which it was sued out operative and conclusive.

The statutory action of trespass which one who has obtained restitution in forcible entry proceedings is entitled to bring against the defendant therein, and in which he is allowed to recover treble damages, is not the same as the common-law action of trespass for mesne profits, though in pari materia.

Damages for a forcible entry cannot be based on any specific effect of the act that is not near enough to the injury done to make it just and reasonable that defendants answer for it to the plaintiffs; nor on any particular effect, however natural, if it is not a necessary result, unless it is specially charged as a ground of recovery.

Loss of profits is a proper element of the damages recoverable in an action of trespass for forcible entry and detainer.

Whether the damages allowed by Comp. L. § 6717 in addition to the treble damages for forcible entry and detainer, are not such as may have accrued before the act complained of—Q.

The sufficiency of the counts of a declaration cannot be considered on review if there is no assignment of error thereon.

Comp. L. § 6717, in allowing the recovery of treble damages by one who has recovered judgment of restitution in forcible entry proceedings, contemplates that single and treble damages may be recovered under the same count.

Treble damages are recoverable in a statutory action therefor if the declaration sufficiently states the cause of action and specifically refers, for authority, to the statute allowing the court to treble the damages.

Error to Jackson. (Hooker, J.) June 6.—Oct. 3.

TRESPASS. Defendants bring error. Affirmed.

A. & C. A. Blair for appellants. The action for mesne profits is discussed in 1 Chit. Pl. (7th Am. ed.) 222–5 : 2 id. 870, n. *h;* Wood's L. & T. 982; and the damages recoverable therein are confined to (1) compensation for use and occupation; (2) waste or special damage to the premises; (3) costs of the action for re-possession: 1 Sedgwick on Damages 249, 254: 2 id. 591; *Bartholomew v. Chapin* 10 Met. 1; *Braman v. Perry* 12 Pick. 118; the measure of damages is the same as in assumpsit for use and occupation: *Holmes v. Davis* 19 N. Y. 488; damages for withholding real estate are distinct from claims for rents and profits: *Larned v. Hudson* 57 N. Y. 151; *Livingston v. Tanner* 12 Barb. 481; a claim for treble damages in the words, "That this plaintiff, upon the whole, on account of the unlawful detention of said premises, has sustained damage to the amount of two thousand dollars, and claims treble damages in the premises, as prescribed for in said statute, and therefore she brings this suit;" was held not to be counting upon the statute in the strict language of pleading: 1 Chit. Pl. 405; *Chipman v. Emeric* 5 Cal. 239; *McKeon v. Caherty* 1 Hall 300; *Benton v. Dale* 1 Cow. 160.

Gibson, Parkinson & Ashley for appellees.

Graves, C. J. For the purpose of understanding this controversy it will be necessary to mention four several store buildings in the city of Jackson, but it will save words to identify them by numbers. The *first* is a building on the north side of Main street, and formerly owned by Douglass Gibson; and the *second*, a building nearly opposite, and belonging to George I. and Jacob K. Smalley; the *third*, a store contained in the block put up by Allen Bennett in 1881; and the *fourth*, a double store on the corner of Jackson and Pearl streets.

Prior to December, 1880, the defendants occupied No. *one* as tenants of Mr. Gibson; the lease was to expire March 14, 1881. The plaintiffs occupied No. *two*, nearly opposite, under a lease which was soon to expire. Each concern carried on hardware business.

The plaintiffs offered to buy No. *one* of Gibson, and he informed defendants of his opportunity and proposed to re-let to them for a fixed term at an increased rent, and they refused to rent for any period beyond their term, which was limited, as already stated, to the 14th of March. The plaintiffs were desirous to secure a place to which they could remove their business at the expiration of their lease of No. *two*, and they proceeded with their negotiations for the purchase of No. *one*, and since the defendants had decided that they would hire no longer than March 14th, Mr. Gibson closed with the plaintiffs' offer and entered into a written agreement with them for a sale of the property. They were to have possession March 15th, the day following the expiration of defendant's term, and they relied on the arrangement and considered that the defendants would remove at the end of their term on the 14th of March, and enable them to transfer their stock on the 15th.

In the winter of 1881 Allen Bennett commenced putting up his block, and represented that he would have it ready for occupation by the 15th of March, and the defendants engaged the store in it mentioned as No. *three*. The defendants expected it would be ready in time for them to transfer their stock to it at or about the close of their term at No. *one*. But the construction of the block lagged, and the store No. 3 was not made ready for occupation until the 28th of September. Early in the spring of 1881 the right of the plaintiffs to remain in No. 2 ceased, and their landlords, the Smalleys, insisted on possession. The defendants, not being able to use No. 3, still continued in No. 1, and so prevented the plaintiffs from getting in under their purchase. The Smalleys commenced summary proceedings against the plaintiffs to expel them from No. 2, and in April obtained judgment, and on the 30th the plaintiffs were compelled to quit. In these circumstances, and whilst the plaintiffs were threatened with expulsion from No. 2, the defendants requested permission to remain in No. 1 until No. 3 should be ready for them; but this was declined. The defendants' term coming to a close, the plaintiffs received a deed from

Mr. Gibson and called for possession, which was refused. They immediately commenced summary proceedings before a circuit court commissioner, who gave judgment in their favor on the 9th of April; but the defendants appealed. The plaintiffs being unable to hold No. 2, and being kept out of No. 1, removed to No. *four*, which was the best situation they could obtain.

In June the circuit court rendered judgment on the appeal against the defendants and issued a writ of restitution. But the defendants sued out a writ of error, and secured a stay of the process for possession.

At length the store No. 3 was finished and the defendants removed to it, and on the 28th of September abandoned their writ of error and submitted to the judgment of the circuit court and allowed the plaintiffs to enter.

The refusal of defendants to give possession at the end of their term, and their subsequent resistance to the plaintiffs' proceedings to obtain it, were acts purely dilatory and devoid of merit. If they were in straits it was their own fault or misfortune. The course they took was merely a resort to legal formalities to gain time and keep the plaintiffs out of a possession to which, in law, they were entitled, and which the defendants well knew was not open to legitimate dispute. This is admitted.

In November, 1881, the plaintiffs brought this action for damages and relied on the following statute:

"The complainant obtaining restitution of any premises under the provisions of this chapter, shall be entitled to an action of trespass, or trespass on the case against the defendant, and may recover treble damages from the time of the forcible entry, or forcible detainer, or of the notice to quit or demand of possession, as the case may be, and all other damages to which he may be entitled." Comp. L. ch. 211, "General Provisions," (6717,) Sec. 24.

The jury before whom the cause was tried found in favor of the plaintiffs, and assessed their damages at $1655, and having been requested to state in what way they found in regard to certain given items, they answered as follows: (1st) $200 for labor, etc., in removing to No. 4, and thence to

No. 1, beyond what would have been necessary in case of a direct removal to the latter; (2d) $50 for injury to stock by such circuitous removal beyond what would have been necessary in going direct to No. 1; (3d) $57.50 for injury to stock caused by the unfitness of No. 4 as a place of storage; (4th) $35 for necessary expenditures in the proceedings to get possession, above taxable costs; (5th) $500 for loss of profits caused by defendants' keeping possession during the time they unlawfully held it; (6th) $812.50 for the rental value of No. 1, from March 15 to September 28. The court proceeded to treble the last item, and then added the other items to the product, and awarded judgment for the entire amount.

First. It is objected that the plaintiffs had no cause of action on the statute because they did not obtain restitution "under the provisions of" the "chapter." The position is that the store was voluntarily surrendered by the defendants and accepted by the plaintiffs during the pendency of the proceedings.

This is not a satisfactory construction of the facts. The writ of error being dismissed, the judgment of the circuit court was operative and conclusive, and the means for executing it were ready. In the eye of the law the defendants had no choice, and their going out was not a discretionary surrender, but an act which supreme authority enjoined and would immediately compel. They recognized the futility of resistance, and yielded to legal necessity. See *Calvart v. Horsfall* 4 Esp. 167; Stearns, Real Act. ch. 8, and particularly p. 406.

Second. It is next contended that the action given by the statute is merely the common-law action of trespass for mesne profits, where nothing is recoverable except the damage caused by waste or some sort of special injury to the premises, the use or rental value and the costs incurred in the case to recover possession; and that the allowance by the court below of other heads of damage was, therefore, error.

It is futile to examine the propriety of the conclusion

unless the premises are legitimate, and it is not admitted that this action is analogous to the ancient action of trespass for mesne profits. That remedy could hardly be deemed fit and suitable in a case of forcible dispossession or forcible detention where the interference would usually be brief and the use or rental be little more than nominal, and the action under review is given just the same, whether the case be one in which the plaintiff has been driven out or kept out by force, or one in which the element of force has not existed. If we recur to the language, we at once see that it does not suggest any such intent. Had it been the purpose to allow recovery for only the same matters as in an action for mesne profits, it would have been natural to mark it by characteristic language, and the large and general expressions which now appear would scarcely have been chosen. When a recovery of mesne profits was to be provided for, the Legislature, instead of making use of the broad phraseology which enters into § 6717, were careful to employ words which would expressly confine the damage to rents and profits, except in the case of dower; and the fact of the exception, as well as its character, only tend to strengthen the construction. § 6245. It will not be denied that the regulations are in pari materia, and since the Legislature when dealing with the subject of mesne profits in the statute concerning ejectment have used words which expressly restrict the damage to rents and profits, and have seen fit to apply different and much larger terms in the statute under review, the conclusion is very strong that a different scope and meaning were intended, and that the criterion of damage in the one case was not to be the criterion in the other. There is no occasion to speculate on possibilities and attempt an enumeration of all the heads of damage the statute would admit of.

Having reached the result that the limitation settled in suits for mesne profits does not apply, it remains to see whether any of the items specified in the verdict are dehors the remedy. The only thing which the defendants point out as unauthorized is the item for loss of profits in the way of trade. And the ground of objection alleged here is that

such damage is not recoverable in cases for mesne profits. But, since we have concluded that this is not an action of that sort, nor governed by the same principles, the reason for the objection fails. But it may be well to go further.

The statute gives an action of trespass, or trespass on the case, and gives treble damages. Had nothing been said about trebling damages the elements of damage must certainly have been referred to the principles which govern such actions. And it is not perceived that the provision for multiplying the single damages was designed to produce any change in that regard. It may be that this regulation was intended to exclude the kind of damages which are generally known as punitory, and on the principle of attaining the same end by trebling such other of the damages as are allowed to be trebled. But on this subject no decision is called for. The Supreme Court of Connecticut, in a case of the same nature, observed as follows: "The party is to be indemnified for what he has actually suffered; and then all those circumstances which give character to the transaction are to be weighed and considered. *Braceyirdle v. Orford* 2 M. & S. 77; *Churchill v. Watson* 5 Day 140. Thus, whether the entry was violent or quiet, whether through malice or mistake, whether under color of right or without any pretense of title, are all proper subjects of consideration. And if a person, acting without pretense of right, would be subject to greater damages than one acting under a bona fide claim of title, surely such claim, accompanied by proof of actual title, should be submitted to the triers. For instance, if a tenant at sufferance was holding over, and the lessor ejected him by force, under an execution, which was technically defective, ought that man to recover the same damages as if he had been dispossessed, in the night season, by an armed ruffian, whose object was plunder?" *Bateman v. Goodyear* 12 Conn. 575. There is much in these observations which is pertinent to the case before the Court. The statement of the general principle is quite applicable. The plaintiffs were to be indemnified for what they had actually suffered. But, of course, the principles relating to

the injury and pertaining to the remedy must finally decide what is required to constitute indemnity. No specific effect of the injury can be admitted as an element of damage unless it is near enough to the injury to make it just and reasonable that the defendants should answer for it to the plaintiffs. Nor can any particular effect, however natural, which is not a necessary result, be allowed as a ground of recovery, unless it is specially charged.

It was recently held in California, where damages were demanded for a forcible entry and detainer, that no recovery could be had for bodily or mental pain or injury to credit, (*Anderson v. Taylor* 56 Cal. 131;) and the courts of New York regard the value of the use and occupation as something recoverable distinct from damages. But this view is founded on the express language of the Code. *Cagger v. Lansing* 64 N. Y. 417. It was intimated in *Howser v. Melcher* 40 Mich. 185, that there was room for question whether any damage for loss of profits could be recovered in this kind of action. On full consideration the ground of this doubt is entirely removed. We think the adoption of the loss of profits as an increment of the damages was fully warranted by the decisions. *Allison v. Chandler* 11 Mich. 542; *Tracy v. Butters* 40 Mich. 406; *Grand Rapids etc. R. R. Co. v. Heisel* 47 Mich. 393; *Gilbert v. Kennedy* 22 Mich. 129; *Shaw v. Hoffman* 21 Mich. 151: 25 Mich. 167; *Welch v. Ware* 32 Mich. 80; *Heiser v. Loomis* 47 Mich. 19. And we are not satisfied that any error was committed in letting in either of the other items.

In *Howser v. Melcher*, before referred to, there was a special verdict, and a question arose on the effect of it. It found a given small amount expressly as damages, and further set forth what the jury had ascertained to be the amount of certain other claims, but without finding them as damages either specifically or by any general statement or designation. And it was decided that amounts not found as DAMAGES by the jury could not be trebled by the court under this statute. The present case raises no such question. The verdict is for damages in toto. The only special feature

is that the jury, pursuant to the instructions of the court, have analyzed their general finding of damages, and reported the various heads and their respective amounts. It will not be forgotten that after giving to the party treble damages the statute goes on to say, "and all other damages to which he may be entitled." This double provision seems to have caused some confusion, but no question is made to depend upon it. Without assuming to offer an authoritative opinion I venture to suggest whether, as the treble damages are confined to such matters of damage as obtain "from the time of the forcible entry, or forcible detainer, or of the notice to quit, or demand of possession, as the case may be," the "other damages" mentioned are not intended to be such, if any, as obtain outside of that time.

Third. The defendants now make the point that neither count in the declaration is valid for the purpose of getting treble damages under the statute, and *Howser v. Melcher* supra, and other authorities are cited.

It is a sufficient answer to observe that there is no charge of error to warrant the objection. The only assignment that relates to the matter is one which asserts that it was error to treble the rental value of the premises, as found by the jury. No intimation is given of any fault in the declaration, and the issue which results from the charge of error presents no question of that kind. But the Court is of opinion that if the point were duly assigned as error it could not be sustained. The reference to the statute is looked on as sufficient.

The objection that single and treble damages are not recoverable under one and the same count cannot be supported. The statute on which the action is based contemplates that they may. The recovery is regarded as single, and the mode of reaching the amount does not imply a necessity for more than one count. *Osburn v. Lovell* 36 Mich. 246, and *Mooers v. Allen* 2 Wend. 247, which are cited on this point, have no application; they refer to the impropriety of a general finding where a count at common law giving single damages is joined with a count upon the statute giving

treble damages. There everything depends on an application of the finding to the right count, and yet the verdict gives no means by which the court can so apply it.

The charge to the jury was very fair and perspicuous, and if the result is exposed to any criticism, which we do not decide or intend to intimate, it is because the process of trebling was not more comprehensive. All the points of error insisted on have been examined, and no fault is discovered of which the defendants are entitled to complain.

The judgment must be affirmed with costs.

The other Justices concurred.

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MARTIN HUIZEGA v. CUTLER & SAVIDGE LUMBER CO.

Personal injuries—Damages—Evidence.

Evidence from competent persons as to the dangerous character of machinery, and the consequences of coming in contact with it, is admissible in an action for injuries caused thereby.

In an action by a laborer for personal injuries from machinery, testimony as to his consequent inability to work, the amount of time he lost through sickness, what that time was worth to him, and his reasonable expenses for medical attendance, is admissible as bearing on the amount of damages to which he may be entitled.

Damages for personal injury include everything of which the person recovering them has been deprived as a direct and natural consequence of the injury.

A youth employed in a saw-mill was injured by the machinery before he had been there long. He had once before been employed in the same mill. *Held*, that in an action for the injury he could show the changes made in the arrangements of the mill in the interval between his terms of employment as bearing upon his want of familiarity with them when hurt.

In an action for a personal injury from mill machinery, the question whether a witness had ever heard of such injuries to other persons is improper as calling for hearsay testimony.

The age and intelligence of a laborer injured by machinery, and his experience in the use of such machinery, may be considered by the jury in an action by him for the injury.

Error to Ottawa. (Mills, J.) June 6.—Oct. 3.

CASE. Defendant brings error. Affirmed.

Geo. A. Farr for appellant.

Geo. C. Stewart and *H. M. Campbell* for appellee.

SHERWOOD, J. The plaintiff in this case, while in the employ of the defendant, was seriously injured by accidentally coming in contact with some of the machinery in the defendant's saw-mill, when he was at work under the direction of the head sawyer in the mill. At the time the injury occurred he was, under the direction of the sawyer, removing a slab from some gearing that extended up through the floor two or three feet, and a portion of his pants caught in some cogs that were uncovered, and his leg was drawn thereby between the wheels and severely lacerated. From this injury he underwent great suffering and was laid up many months, but finally, after much care bestowed by physicians and nurses, which cost him five or six hundred dollars, he recovered, and the injury proved not to be permanent.

When the injury occurred the plaintiff was sixteen years old, and had been in the employ of the defendant about twelve days, at a compensation of twelve shillings per day. It further appears that the plaintiff had once before been in the employ of defendant in the same mill, but at different work, and that the mill, after he left it, had undergone many changes and repairs, somewhat changing the machinery therein. It was claimed upon the trial that the plaintiff was not familiar with that portion of the machinery which injured him; that it was the duty of defendants to cover it, and that the same had negligently been allowed by defendants to remain uncovered, exposed, and in a dangerous condition; that he had never noticed or been warned of such

danger by defendants, and had no knowledge of the same; and that said machinery might have been covered or boxed, without any detriment or impairment of its usefulness.

The defendants did not deny that the injury complained of was received in the mill and while plaintiff was in their employ and under the direction of the head sawyer; but claimed that he was fully acquainted with the condition and situation of the machinery by which he was injured; that the cogs were in plain sight, and the injury was the result of plaintiff's own carelessness and neglect, and that the machinery was sufficiently guarded, and to the extent that is usual in mills of that kind in that part of the country; and that they exercised all the care and diligence, in that regard, of prudent men.

Upon these several theories the case was tried and submitted to the jury under a well-considered charge by the court, and the plaintiff had judgment for $950. The defendants bring error, and the questions raised for our consideration are upon exceptions to the testimony and the charge of the court.

The third, fourth, fifth, ninth and twelfth assignments of error are to the admissibility of the testimony relating to the dangerous character of the machinery which did the injury, and what would be the natural effect of a personal contact with it. The questions were substantially as follows: "State whether, in your opinion, the gearing that turns the slab-rollers, in an uncovered condition would be dangerous." "What would be the effect of a person's coming in contact, or his clothing's coming in contact, with that gearing—those cog-wheels?" The ground of the objection was immateriality. We can see no objection to those questions. Certainly the dangerous character of the machinery was one of the questions involved in the case, and the opinion of competent witnesses was admissible to show it, as well as what consequences might be expected if a person were to come in contact with it.

The first, second, eleventh and seventeenth assignments

of error relate to the admission of testimony and the charge of the court concerning the plaintiff's inability to labor while sick; the amount of time he lost, and what that time was worth to him. It is objected that this testimony is incompetent and immaterial. If the plaintiff was entitled to recover anything, he was entitled to recover that of which he had been deprived as the direct and natural consequence of the injury complained of, and his inability to labor was one of the first of those consequences. There was no error in these rulings. This testimony was necessary to ascertain the plaintiff's damage. 3 Sutherland on Damages 261; *Kinney v. Crocker* 18 Wis. 74; *Grant v. Brooklyn* 41 Barb. 381; *New Jersey Exp. Co. v. Nichols* 32 N. J. 166; *Lincoln v. Saratoga & Schenectady R. R. Co.* 23 Wend. 425; *Penn. R. R. Co. v. Books* 57 Penn. St. 339: *Cox v. Vanderkleed* 21 Ind. 164; *Morris v. C. B. & Q. R. Co.* 45 Iowa 29; 2 Thompson on Negligence 1256.

The same is true of the objection to the testimony showing the value of the physician's services in caring for him during his sickness, and the charges for nursing and medicines. There is no pretense that any of these things were unnecessary, or that the charges were exorbitant. These also were a natural, if not necessary, consequence of what the jury found to be the negligence of the defendants; and if the plaintiff was entitled to recover, these were proper items in that recovery, as this Court has frequently heretofore ruled. 2 Thompson on Negligence 1257, and cases cited.

The evidence of John Hamilton, showing the changes in the mill made after the plaintiff first worked in it, was entirely proper. Its tendency was to show a condition of the machinery with which the plaintiff was unacquainted at the time of the accident, and different from what it was when he was first in the employ of the defendants, and that his former acquaintance with the mill was of no service to him in designating the location or dangerous character of the part producing the injury. This familiarity with the mill during his first employment by defendants was urged upon

the attention of the jury at the trial as a strong point against the plaintiff. The question put to witness Wilson as to his ever having heard of injuries occurring in mills to other persons, called for hearsay testimony, which was properly rejected upon that ground.

The remaining exceptions are to the charge of the court. The following is the first clause objected to: "An employer is not guilty of negligence if he uses those instruments and appliances, or safeguards, common in like employments in his locality. If you find that the gearings in the mill where the injury occurred were of a similar kind and similarly guarded as compared with other mills in this locality, and that these appliances and safeguards were the usual and common appliances and safeguards of like mills in this locality, then that would be a strong presumption of ordinary care on the part of the defendants. It would be a strong presumption of it, but it would not be conclusive. If you find, from the evidence in this case, that the defendant furnished such machinery and exercised such care, then, of course, the plaintiff cannot recover." We fail to find anything in this charge that is prejudicial to the defendant. *Swoboda v. Ward* 40 Mich. 423.

The court charged the jury that in considering the case they were at liberty to "take into consideration the age, intelligence, or want of intelligence, experience, or lack of experience, in such mills, and the use of such machinery, and the risks incident thereto." This clause of the charge is excepted to. It is within the former rulings of this Court, and not erroneous. *Hassenyer v. Mich. Cent. R. R.* 48 Mich. 208, 209, and cases cited; *Swoboda v. Ward* 40 Mich. 425.

In this case the duty of the defendants to give notice to the plaintiff of the dangerous machinery where the injury occurred, and the duty of the defendants to keep the same properly covered to prevent contact, was carefully and fairly submitted to the jury, and, taking the charge as a whole, we find it quite as favorable to the defendants as the law will permit.

We find no error in the record prejudicial to the defendants, and the judgment must be affirmed with costs.

COOLEY, J. This case in its facts so closely resembles *Swoboda v. Ward* 40 Mich. 420, as to be ruled by it, and I concur in the affirmance; and see *Parkhurst v. Johnson* 50 Mich. 70.

GRAVES, C. J. and CAMPBELL, J. concurred.

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GEORGE N. FLETCHER AND ROBERT P. TOMS v. THE THUNDER BAY RIVER BOOM COMPANY.

Riparian rights—Agreements fraudulent against grantee.

Riparian rights, unless expressly limited, extend to the middle of the navigable channel, and cover any shallows or middle ground not shown in the government surveys, but lying between such channel and the shore; and it makes no difference that the deed conveying the premises to which the rights attach describes them according to a city plat instead of the government survey.

Private agreements between joint riparian owners, whereby they apportion among themselves the submarine rights in front of their premises, cannot diminish the riparian rights of their grantees, if the latter have no notice of these agreements.

Agreements between joint riparian owners, after making conveyance, cannot affect the grantee's rights; and deeds made in pursuance of such agreements would be in fraud of those rights if not made to the grantee, or to those claiming under him.

Error to Alpena. (Hart, J.) June 13.—October 3.

EJECTMENT. Plaintiffs bring error. Affirmed.

R. J. Kelley and *J. B. Clayberg* for appellants.

Norris & Uhl for appellee.

SHERWOOD, J. Ejectment to recover "a certain piece or

parcel of land lying and being in Thunder Bay river, in front of lots 14 to 23, inclusive, in block 8, in the city of Alpena, covered by waters of said Thunder Bay river, being known as that part of the middle ground in Thunder Bay river in front of said lots." Plea, general issue.

The cause was tried at the Alpena circuit before a jury, and the circuit judge directed a verdict for the defendant, which was duly rendered and judgment entered thereon. The case now comes before us on bill of exceptions. At the close of the trial three requests to charge were made by counsel for plaintiff and refused by the court, and exceptions taken. The errors complained of are the refusal of the court to severally give these requests in his charge, and the direction of the court to the jury to return their verdict for the defendant. The view we take of the case renders it unnecessary for us to discuss the matter contained in the requests further than will appear in what we have to say upon the direction given by the court to the jury.

It appears from the record before us, in this case, that Thunder Bay river runs through the city of Alpena, and on the east side of the river lies, according to the original United States survey, government lot 3, and on the west side, and directly opposite, government lots 4 and 5 according to the same survey, which includes the premises in controversy. It is claimed by the plaintiffs that in the river, and between these two parcels of land, there is "middle ground" or an island; that the same lies in front of all the city lots on the west side, from lot 14 to lot 34, both inclusive; that there are two channels in the river at this point, one on each side of the island, and that the city lots on the west side only extend to the center of the westerly channel; and that this action is brought to recover that portion of said "middle ground" or island, lying in front of city lot 14 and to and including city lot 23, according to the plat of said city,—it being the lower or southerly part of the claimed "middle ground" or island.

It very clearly appears that the easterly channel is the main channel of the river, and that that on the westerly side

was never used for navigation but principally for floatage and giving access to a mill a little up the stream, and later by the defendants for shore purposes and as booming water in common with others who have had occasion to pass and repass with floatables. It is not disputed but that the defendant is the owner of all said city lots from 14 to 23 inclusive, and defendant claims to be the owner of all the frontage on the east side thereof, extending to the center of the easterly or main channel, and that the plaintiffs' proofs establish this fact. The plaintiffs' testimony shows that what they claim to be the "middle ground" in said river commences several hundred feet north of lot 35, where the water is five feet deep, and extends south down the river to a point near lot 14, where the water is the same depth, and that that part of the claimed middle ground between 14 and 23 inclusive is nearly or quite under water all the time from two to five feet deep; that government lots 3, 4 and 5, which includes all of the said middle ground, were entered by the defendant's grantors on the fifteenth day of March, 1851, and continued to be used by them (the plaintiff Fletcher being one) until April 8, 1865.

The owners of government lots 3, 4 and 5 platted the same June 28, 1857, and the owners of government lots 4 and 5, so far as the evidence shows, have always claimed, in connection therewith, the ownership of said "middle ground;" have built, or permitted to be built, mills and docks thereon, and have used the waters in the westerly channel for floatage and booming purposes, and portions of the time exclusively so. Two government surveys of the sections and of the river through the same within which the premises are claimed to be located were offered in evidence,—one dated February 12, 1841, and the other June 19, 1858,—neither of which shows any middle ground or island at the place claimed; and the same is true of the township survey and city plat, and so far as relates to that channel between city lots 14 and 23, the testimony of the plaintiff shows substantially the same thing. Mr. Fletcher in his testimony says, upon his direct examination, when asked where

the two channels joined below the "middle ground" with reference to lot 14: "The two channels of perhaps six feet of water must have been very nearly opposite lot 14; they probably got into deep water somewhere in front of lot 14,—at least eight feet anyway;" and when recalled upon his cross-examination, further testified: "This particular parcel of land that I am seeking to recover is land that is all under water to-day; it has not always been so." *Question.* "Has any portion of the 'middle ground' fronting these ten lots ever been out of water?" *Answer.* "Yes, sir; according to my best knowledge the first or second lots up there—meaning 22 or 23—had been dry land at times, depending upon the rise and fall of the river's fluctuating; how long I could not say or how much; some portions of it dependent upon the rise and fall of the lake."

We think, in view of all that is disclosed in the record in this case, if the decision had to depend upon the fact whether or not there was "middle ground" in front of the 10 lots referred to, the surveys and plattings, and the plaintiff Fletcher's testimony, might well be considered by the court as settling the question in the negative. But it appears conclusively, we think, that the title to the premises claimed, whatever may be their character, is shown by the record to be in the defendant. Plaintiff Fletcher, James K. Lockwood and John Oldfield owned government lots 3, 4 and 5 on the fourteenth day of June, 1859, Fletcher owning an undivided half and each of the others an undivided quarter, and on the twenty-eighth day of the same month platted the village of Alpena on said government lots 3, 4 and 5, said village lots in said plat all being numbered and extending to the bank of the river.

On May 25, 1862, Lockwood sold to Mason his interest in the property, and it is conceded by counsel for both parties that on the twenty-fifth day of September, 1862, plaintiff Fletcher owned an undivided half of the premises in question, and Oldfield and Mason each an undivided quarter. On the eighth day of April, 1865, Henry D. Bassett obtained by warranty deed without exception or reservation

village lots from 10 to 23 inclusive, and both parties admit title in him at that time to said lots. It is through this deed the defendant makes its title.

What is to be the construction of this deed? Does it not carry with it the premises in question? If the same property had been conveyed to Bassett by the government description, instead of by description according to the village plat, there could be no question upon the subject at the common law or under the decisions of this Court. Angell on Water-courses §§ 10 and 54, and cases there cited; *Norris v. Hill* 1 Mich. 202; *Gas-light Co. v. Industrial Works* 28 Mich. 182; *Atty. Gen. v. Sup'rs of Bay County* 34 Mich. 46; *Maxwell v. Bay City Bridge Co.* 41 Mich. 453; *Twogood v. Hoyt* 42 Mich. 609; *Pere Marquette Boom Co. v. Adams* 44 Mich. 403; *Richardson v. Prentiss* 48 Mich. 88; *Cole v. Wells* 49 Mich. 450.

The decisions upon this point are so full and exhaustive and so recent in this Court that we do not consider a review of them or further discussion of the point here profitable; such description clearly establishes the defendant's claim to the premises to the center of the main channel of the river.

In the case of *Watson v. Peters* 26 Mich. 508, it was fully decided by this Court that, when a lot is conveyed as designated in a city plat bounded on a navigable stream, with the water as a boundary, such conveyance carries with it the land under the water to the center of the stream. Mr. Justice Cooley in that case says: "The owner of city lots bounded on navigable streams, like the owner of any other lands thus bounded, may limit his conveyance thereof within specific limits, if he shall so choose, but when he conveys with the water as a boundary, it will never be presumed that he reserves to himself proprietary rights in front of the land conveyed, which he may grant to others for private occupation, or so occupy himself as to cut off his grantee from the privileges and conveniences which appertain to the shore of navigable water. Such privileges and conveniences constitute a part, and in many cases the principal part, of the

value of the grant; and it is precisely in these cases of city lots that they are of most value, and generally constitute the chief inducement to the purchase; and the chief, or at least a very important element, in determining the price. These cases, therefore, of all others, are those in which the reason of the rule which infers an intent to convey the land under the water, is most apparent and forcible. And the rule itself is too valuable, and too important, to be varied by so immaterial a circumstance as that the boundary on the water is defined by a line, instead of by making use of words which to the common understanding would convey the same meaning. And what we have said of navigable waters, is equally applicable to all natural water-courses." *Yates v. Milwaukee* 10 Wall. 497; *Trustees of Illinois & Michigan Canal v. Haven* 11 Ill. 554.

The record shows that after Bassett purchased he went immediately into possession of these ten lots, the most important, valuable and useful part of which seems to have been the water right upon their river frontage. While thus the owner and in possession, he gave two mortgages upon the property he purchased to John K. Hathaway,—the first dated April 13, 1865, for six thousand three hundred and fifty dollars, and describing the property as "all those lots, messuages and parcels of land usually known and described as lots Number 14, 15, 16, 17, 18, 19, 20, 21, 22 and 23, in block 8, in the village of Alpena, Alpena county, Michigan, as per the survey and plat of said village now on record in said county, together with the steam saw-mill, engine, boiler, shafting, saws, pulleys, belting and all machinery, and all else now in or hereafter put in, the new mill and engine-house and other buildings now on and to be put on the aforesaid ten lots or part of them, or built extending into the river from said ten lots of land, and with all property anywise used with any of the aforesaid, with the hereditaments and appurtenances thereunto belonging or in anywise appertaining." This description is herein given as tending to show, as we think, what Bassett understood was included

in his deed. The second of said mortgages was dated November 16, 1865, and given for three thousand dollars.

These two mortgages were foreclosed, and the property sold under the above description, and bid off for the sum of ten thousand dollars, June 22, 1878, by James S. Hathaway, who sold the same by warranty deed to the defendant, March 22, 1880.

There is no question made, as we understand the record, but that defendant has all the rights and interest, under the master's deed, in the property in question which Bassett obtained under his deed; and if the latter owned to the center of the main channel of the river, then the defendant's title is complete to the premises claimed by the plaintiffs, and which, as we have shown, certainly must be the case, unless there is something in the record which necessarily changes the construction which the law, by a long course of decisions, both in England and in this country, has given to the effect of deeds conveying lands bordering on rivers, like the Bassett conveyance.

It is claimed by the plaintiff that the middle ground is an island, a separate and distinct parcel of land, and as such would not pass under the Bassett deed, as appurtenant to the shore lots.

Suppose the condition of the claimed "middle ground" to be as stated by counsel for plaintiff; still, under the evidence, the point would be untenable. The island, as claimed, is nearer to the west shore than the east. The government never recognized or meandered any such ground out in its survey, and under such circumstances it would be appurtenant to the west shore, and pass to the grantee of the ten lots bordering on that shore. 2 Bl. Comm. 261; 3 Kent's Comm. 412, 428; 1 Swift's Digest 111; Schultes on Aquatic Rights 117–138; *Ingraham v. Wilkinson* 4 Pick. 268; *Giraud v. Hughes* 1 Gill & J. 249; *People ex rel. Tibbits v. Canal Appraisers* 13 Wend. 355; *Lunt v. Holland* 14 Mass. 152; 1 Cooley's Bl. 501, note 3; *Canal Com'rs v. Tibbits* 5 Wend. 423; *Browne v. Kennedy* 5 Har. & J. 195; *Adams v. Pease* 2 Conn. 481; *Palmer v. Mulligan* 3 Caines 307;

Jackson v. Louw 12 Johns. 252; *People v. Platt* 17 Johns. 201; *Hooker v. Cummings* 20 Johns. 91; *Carter v. Murcot* 4 Burr. 2162; *Rex v. Wharton* 12 Mod. 510; Angell on Water-courses (7th ed.) §§ 44–52; *Handly's Lessee v. Anthony* 5 Wheat. 375.

The riparian rights of the defendant in this case, under his deed, extended to the thread of the stream, to the center of the main channel of the river, and entitled it to every beneficial use thereof, subject to the public easement in the same. *Clark v. Campau* 19 Mich. 325; *Lorman v. Benson* 8 Mich. 18; *Rice v. Ruddiman* 10 Mich. 126; *Ryan v. Brown* 18 Mich. 196.

The agreement of June 8, 1868,* between Fletcher, Lockwood and Oldfield, and the indorsed agreement thereon, were both immaterial, as was also the agreement of January 22, 1868,† between Mason, Minor and Lockwood. They

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*It is hereby stipulated and agreed by and between George N. Fletcher, John Oldfield and I, James K. Lockwood, as follows, to-wit: To divide up the middle ground, or shore, in the Thunder Bay river, in section 22, township 31 north, of range 8 east, as follows: Commencing at the upper end, at a point where five feet of water is reached, going up stream, ending at a point where five feet of water is reached, going down stream, dividing the space between the same points into four equal parts,—that is to say, of the same length up and down the river,—and conveying the same by partition deeds at the earliest possible date, to-wit, two parts to George N. Fletcher and others, one part to John Oldfield, and one part to J. K. Lockwood. And whereas, the said Lockwood, being desirous to build or erect a steam saw-mill upon said middle ground, shall have the first choice of a site confined within the limits aforesaid, and may also use, occupy and possess, keep and defend the whole from all other persons, until wanted by the said Fletcher and Oldfield; provided that nothing herein shall prejudice any existing rights of the said Fletcher and Oldfield.

Alpena, June 8, 1860.

GEORGE N. FLETCHER.
J. K. LOCKWOOD.
J. OLDFIELD.

Witness: S. M. NOXON.

[REVERSE SIDE.]

It is hereby agreed and stipulated between the parties hereto that the within described premises shall be divided by a proper survey, so that J. K. Lockwood shall have the north or upper quarter, John Oldfield his quarter next adjoining, and George N. Fletcher the lower or south half of the same, measuring in distance from point to point, as described within.

GEORGE N. FLETCHER.
JOHN OLDFIELD.
L. M. MASON & CO.,
Per J. K. LOCKWOOD.

Witness: S. M. NOXON.

†This indenture, made and entered into at the city of Detroit, in the

were made long after Bassett received his deed and went into the possession of the property thereunder and actually occupied a portion of the premises contended for; and any deed given in pursuance of such agreement was in fraud of Bassett's right and those claiming under him, unless they

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county of Wayne, and state of Michigan, on the twenty-second day of January, in the year of our Lord one thousand eight hundred and sixty-eight, by and between Lorenzo M. Mason, of the said city of Detroit, and John S. Minor, of the same place, and James K. Lockwood, of the county of Alpena, all in the state aforesaid, witnesseth: that whereas, the said Mason, Minor and Lockwood have heretofore and do now own jointly certain real estate, consisting of village lots with buildings and mills thereon, as hereinafter described; and whereas, the interests of the parties in the said property is in the following proportions, namely: Lorenzo M. Mason one-half, John S. Minor one-fourth, and James K. Lockwood one-fourth, and is to be divided and set apart in such proportions; and whereas, it is now agreed and determined by all the above-named parties to divide the same among the several owners above named: Now, therefore, this indenture witnesseth, that to L. M. Mason there is hereby set apart and conveyed all the right, title and interest of John S. Minor and James K. Lockwood aforesaid, and they do hereby forever quitclaim to the said Mason the following described property, namely: The water-mill, so called, described as water-power number one; also a parcel of land lying between block number twenty-six and the river, being south part of block 44, north of Tenth street; also lots number 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13 and 14, with the boomage in front, and the undivided one-fourth of the water-power dam, situated on said property, excepting so much from the south end of said water-power number one as will be south of a line drawn or run from the south-east corner of lot number 10, in block number 19, and the easterly end of the water mill dock in the Thunder Bay river; also lots number one and two, in block number 21; also lots 13 and 14, in block number one; also lots 1 and 2, in block number 2; also the Lester mill, so called, situate on lots number 8, 9, 10, 11, 12 and 13, in block number 8, which said lots belong to George N. Fletcher; and also lot number 5, in block number 6, according to the recorded plat of the village of Alpena, in the county of Alpena, and state of Michigan, with all and singular the hereditaments and appurtenances thereunto belonging, to have and to hold the same to his own proper use and benefit, forever. And to John S. Minor there is hereby set apart and conveyed all the right, title and interest of Lorenzo M. Mason and James K. Lockwood aforesaid, and they do hereby forever quitclaim to the said Minor, the following described property, namely: Island mill, so called, with all the middle ground north of the north line of lot number 28, extended across the middle ground; also lots number 1, 2, 3, 9, 10, 11, 12 and 13, in block 15, extended across the river to the channel bank of the west side of Thunder Bay river; and lots numbers 7 and 8, in block number 15, and that part of water-power number 1 lying south of a line running from the south-east corner of lot number 10, in block number 19, to the easterly end of the water mill dock, reserving James K. Lockwood a passage-way from the main river to the head of the Home mill boom, at the west end under the bridge, of a suitable width for running logs, say 25 feet; also the east half of lot number 34, in block number 8; and also the Ox Bow, so called, being lot number 6, old survey, or the north part of lot number 9, new survey, containing six acres, more or less; also lots number 2, 3, 4, 9 and 10, in block

were given to him or to his grantees, and any title resting upon such conveyance, of course, would be worthless, and such appears to be the character of the title through which the plaintiff claims, and it cannot be sustained. The description of the premises claimed, contained in the declaration, is very imperfect; but whether sufficient or not to entitle the plaintiffs to maintain their action it is not now necessary to determine.

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

GRAVES, C. J. and COOLEY, J. concurred.

CAMPBELL, J. I concur in the result.

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number 13, all according to the recorded plat of the village of Alpena, in the state and county aforesaid, with all and singular the hereditaments and appurtenances thereunto belonging, to have and to hold the same to his own proper use and benefit, forever. And to James K. Lockwood there is hereby set apart and conveyed all the right, title and interest of Lorenzo M. Mason and John S. Minor aforesaid, and they do hereby forever quitclaim to the said Lockwood the following described property, namely: The Home mill, so called, with site, consisting of lots number 24, 25, 26, 27 and 28, to extend from River street across the south channel and middle ground, so called, to the channel bank of the south channel of Thunder Bay river; also lots number 29, 30, 31, 32 and 33, to extend across the south channel to the said middle ground, containing the boomage of the south channel to the lower side of the Island mill bridge; also the west half of lot number 34, all in block number 8; also a passage-way to be kept open and free for the passage of logs, under and from the west end of the Island mill bridge, to the east end of the water mill dock, and thence to the main channel of the river, of a suitable width for running logs, not exceeding 25 feet; also lots number 3, 4, 5, 6, 7, 8, 9 and 10, in block number 11, and lot number one, in block 13, according to the recorded plat of the village of Alpena, in the county and state aforesaid, with all and singular the hereditaments and appurtenances thereunto belonging, to have and to hold the same to his own proper use and benefit, forever.

All the said property herein described being in the county of Alpena and state of Michigan. And it is hereby further stipulated and agreed, by and between all the above-named parties, that each of the several parties to whom the several lots and parcels of land are herein set off, divided and conveyed, shall have and hold the said lands and tenements to the said parties, their heirs and assigns forever.

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

L. M. MASON. [L. S.]
J. S. MINOR. [L. S.]
J. K. LOCKWOOD. [L. S.]

Signed and delivered in presence of
F. E. DRIGGS,
J. P. WHITTEMORE.

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FRANCIS G. RUSSELL, RECEIVER OF THE MERCHANTS' MUTUAL FIRE INSURANCE COMPANY v. THOMAS BERRY.

Mutual insurance companies—Assessments to pay debts.

The liability of persons insured in mutual insurance companies organized under Acts 82 of 1873 and 66 and 142 of 1877, to pay their proportion of such assessments as shall be sufficient to meet all of the company's losses and liabilities, cannot be avoided by any arrangements entered into with the company whereby the insured seeks to limit such liability; nor can it be lessened by any provisions in the articles of association.

Error to Wayne. (Speed, J.) June 13.—October 3.

ASSUMPSIT. Defendant brings error. Affirmed.

Ervin Palmer and *George Gartner* for appellant.

Wilkinson, Post & Wilkinson for appellee. Provisions in articles of association are invalid if not warranted by the statute under which the company is organized: *Stewart v. Father Matthew Society* 41 Mich. 67; see *Upton v. Tribilcock* 91 U. S. 45; *Wilbur v. Stockholders* 18 N. B. R. 179; *Greenwood's case* 3 De G., M. & G. 459.

GRAVES, C. J. The circuit court gave judgment in favor of the plaintiff on special findings, and the defendant alleges error.

The insurance company mentioned in the title of the cause was established in 1880, under the general law of 1873 as modified in 1877, the defendant being one of the original corporators. Pub. Acts 1873, p. 107, and amending Acts Nos. 66 and 142 of 1877. In December, 1880, the defendant took out three policies, for three years each, and executed three several "undertakings" to pay future assessments. The amounts specified in these "undertakings" and the reductions by payments were as follows: One ran for $30 and was credited with $22.50; another was for

$6 and had a credit of $4.50; and the third was for $3 and was credited with $2.25.

In the fall of 1881 the Commissioner of Insurance entered proceedings in accordance with section seventeen of the organic act to wind up the company by insolvency, and the Court found that the proceedings were well based, and appointed the plaintiff receiver. The company was indebted in little sums to various persons, the whole amounting to $300. It was also indebted to I. Blitz & Son in the sum of $4586.50 for a loss by fire in September, 1881. The policies and "undertakings" of this firm were in the same form as those of defendant. The assets of the company, including $1088.42, consisting of acknowledged balances on standing "undertakings," was $1601.33. The total insurance represented by existing policies was $400,766.66, and the total of "undertakings" on that insurance was $4843.87.

For the purpose of paying I. Blitz & Son and the other creditors, and in order to defray the expenses of the receiver and pay him for his services, he proceeded to levy a pro rata assessment against the members on the amount of insurance held by each for the required sum, and of this the portion of defendant was $91, and this is the demand for which he was adjudged liable by the court below in this action.

The material objection urged against the recovery is that, under his contract with the company for insurance, he was not to be liable for assessments beyond a sum then given, and that the assessment sought to be enforced, being above that limit, it is not valid.

In support of this proposition he refers to his promise in the application and undertaking to pay whatever assessments the directors should, from time to time, declare to be required, but not exceeding in the whole the sum there mentioned; and then quotes a provision in the articles of association as being a sufficient warrant for the limitation; and next cites a paragraph in section five of the organic act,

which, he contends, amounts to a grant of full authority for the provision in the articles.

The passage in the articles is found in section 18, and it reads as follows: "The extent of the liability of the members of the company shall not exceed the amount of undertaking given for premium on their risk;" and the clause in the organic act is the last paragraph of section five. The object of that section is to declare what matters shall be set out in the articles, and, after enumerating several, it closes up by saying, they "may prescribe the liabilities of the members to be assessed towards defraying the losses and expenses of the company, and the mode and manner of collecting such assessments," and this is the clause relied upon.

Does it justify the defendant's claim? Does it furnish authority for the paragraph in the articles? It is a vague provision, and the purpose of its enactment is open to speculation. But this is plain; it does not say that liability to be assessed may be fixed *below* the point necessary to raise sufficient to pay losses and expenses, and there is no room for implying that meaning. The clause professes to be remedial and not obstructive, and it should be interpreted in that light; it requires to be expounded in harmony with the scheme to which it belongs, and not in derogation of it, and the language offers no obstacle.

The defendant is only able to accommodate it to his case by imputing a sense beyond the tenor of the words, and one which directly antagonizes the principle of the statute and the theory of the corporations it provides for. As he reads it, it operates to enable companies, and those insuring in them, to cut short the only source of revenue and preclude the accumulation necessary to pay losses and even such expenses as the statute has itself compelled to be incurred. This is not a reasonable construction.

The supremacy of the organic act will not be questioned. No one will contend that the organizers of the company, or the corporation, when organized, had any power to contravene the principle of that act, or to adopt any rule or pro-

vision or make any contract not authorized by it. Whatever capacity the company possessed to contract or be contracted with was derived from it. It prescribed the conditions on which corporate rights and privileges might be enjoyed, and on which individuals might become insurers and insured. When the company organized, it necessarily accepted all the conditions, because on no other terms was organization possible; and when the defendant became an insured member, he necessarily submitted to all the obligations, because the relation could not arise or exist on any other terms. The legal consequences were inevitable. No words in the articles or in the insurance papers could overrule the imperative regulations and requirements of the statute.

Without further reference to the ambiguous provision in section 5, and without enlarging on the controlling operation of other portions, I pass to section 17. It was under this section that the defendant was assessed, and the authority appears conclusive. The language is explicit. It declares that the receiver "shall at once proceed to assess upon all the members and persons insured in such company, such sums of money as will in the aggregate be sufficient to pay all the losses and liabilities of said company, together with the services and expenses of such receiver, according and in proportion to the amount of their insurance or interest in such company;" and power is given to enforce collection by action in the circuit court, and also to re-assess as often as necessary. No reference is made to "undertakings," nor to the state of account in regard to prior assessments or former payments. No exception is made nor qualification expressed. Nor is any discretion given. The terms are imperative.

The law is now dealing with the company when it has become insolvent and is being wound up in chancery. There is no capital stock. The means to pay losses and expenses, and also for services, must be obtained, if at all, by the levy of contributions in accordance with the vital principle of all such organizations. There can be no other re-

sort. And were this to be considered as denied it would be equsvalent to saying the Legislature required a specified end, and in the very act of requiring it conferred a right to withhold the indispensable means. It is surely not admissible to contend that the law means to recognize, and much less sanction, repudiation, or that it purposes to exact services and expenses in winding up the affairs, and at the same time empower those from whom contributions could alone come to avoid contributing therefor and leave the receiver to go unprotected and unpaid.

The obligation of the insured party is fundamental. It does not depend upon the form which may be given to his promissory "undertaking." It is a positive result of his connection with the company, and the principle which underlies it somewhat resembles that which underlies the liability to taxation. Responsibility is inseparable from the status of an insured member. The organic act makes it so, and no kind of stipulation between the agents of the company and the person who becomes insured can supersede or impair it. It would be just as practicable for a person entering into marriage to provide by covenant against its necessary and imperative duties and obligations.

So far as the other points in the brief merit attention they are disposed of by what has been said.

The judgment should be affirmed with costs.

The other Justices concurred.

JOHN A. WIDNER v. WESTERN UNION TELEGRAPH CO.

[See 47 Mich. 612.]

Payment "in settlement of account."

A debtor enclosed a check in a letter of transmittal which was merely a printed form with the blanks filled out in writing and containing the printed words "in settlement of account." The letter also enclosed a receipt in similar form and with the same printed words.

The creditor refused to sign this receipt but gave an ordinary receipt in place of it without objection from the debtor. Farther payments were made before the completion of the contract and the creditor frequently demanded full payment after the check was received and at such times the debtor made no claim of a settlement. *Held* that the words "in settlement of account" meant no more than "applied on the account."

It is the intention of the parties to an account that has not been paid in full which determines whether an alleged settlement was meant to dispose of the entire account.

Error to Bay. (Green, J.) June 13.—October 3.

ASSUMPSIT. Defendants bring error. Affirmed.

Hatch & Cooley for appellant. A creditor who receives a payment enclosed in a letter which refers to it as "in settlement of account" cannot afterward sue for a balance: *McDaniels v. Lapham* 21 Vt. 222; *McGlynn v. Billings* 16 Vt. 329; *Towslee v. Healey* 39 Vt. 523; *Cole v. Transportation Co.* 26 Vt. 87; *McDaniels v. Bank of Rutland* 29 Vt. 230; *Preston v. Grant* 34 Vt. 201; *Potter v. Douglass* 44 Conn. 541; *Palmerton v. Huxford* 4 Den. 166; *Tuttle v. Tuttle* 12 Met. 551; *Stockton v. Frey* 4 Gill 406; *Foersch v. Blackwell* 14 Barb. 607; *Pierce v. Pierce* 25 Barb. 243; *Green v. Rochester Iron Co.* T. & C. (1 N. Y. Sup. Ct.) 5; *Wilmot v. Richardson* 2 Keyes 519, 528; *Cool v. Stone* 4 Ia. 219; *Jennings v. Major* 8 C. & P. 61; *Gordon v. Cox* 7 id. 172; *Sutton v. Hawkins* 8 id. 259; *Hastings v. Thorley* id. 573; *Wilkinson v. Byers* 1 Ad. & El. 106.

Frank L. Westover and *Shepard, Lyon & Clark* for appellee.

SHERWOOD, J. The plaintiff brought this action against the defendant in the Bay circuit to recover a balance claimed to be due him from the defendants for poles sold and delivered under a written contract dated February 3d, 1880; and for disbursements made in and about the delivery of said poles—in all to the amount of $475. Declaration was on common counts; plea, general issue, with notice there-

under of set-off and of the contract under which poles were delivered and its terms, and alleging breach on part of plaintiff and claiming damages by recoupment. The jury rendered a verdict, under the instructions given them by the circuit court, for plaintiff for $434.49 damages, and defendant brings error. The exceptions all relate to the charge as given by the court and to his refusals to charge as requested.

The plaintiff's claim was for the value of one hundred and fifty-two poles and for disbursements to the amount of $220. The delivery of the poles was denied by defendant, and whether or not he was chargeable with the disbursements depended upon the construction to be given to the contract of the parties. These questions were both settled in favor of the plaintiff by the jury under the charge of the court.

It is claimed by defendant's counsel that Leman L. Culver was authorized to receive the money sent to him in the letter of July 29, 1880, in full settlement of accounts of plaintiff against defendant to June 30, 1880. The circuit judge charged that there was no evidence in the case tending to show such authority to make settlement. We have carefully examined the record, and if it were necessary to pass upon the question thus presented, we should be inclined to sustain the charge of the court. In the dealings and treaties had by plaintiff with the witness Culver only one thing was sought to be accomplished by the plaintiff, and that was the payment to Culver of the money borrowed of him; and the authority given to Culver was only to receive the money sent by defendant, and apply it to the liquidation of his claim: we can see no other intention or purpose in the testimony upon this point. There does not appear to have ever been a word said by Widner to Culver in regard to the settlement of this account between the parties; but on the contrary the record tends to show, as we think, that Culver knew that Widner had claims under the contract for property delivered, which would require his further attention before settlement could be had.

We now come to the consideration of the main question in the case, viz.: Upon the facts appearing in the record tending to show a settlement of the accounts between these parties, were the proper instructions given by the circuit judge to the jury?

The important testimony tending to show a settlement, is contained in the letters transmitting the two checks of the defendant. These letters are as follows:

"NEW YORK, [July 29, 1880.]

To [Leman L. Culver,]
[Bay City, Mich.:]

Enclosed find check to your order on the [Commerce Bank, N. Y., for $2141.25,] in settlement of account to [June 30, 1880, bill of L. H. Widner.] Please date and sign the annexed acknowledgment and return with this. Return to number [222.]

Yours respectfully,
R. H. ROCHESTER, Treasurer."

"NEW YORK, August 30th, 1880.

To [J. A. Widner, Bay City, Mich.:]

Enclosed find my check to your order on the [Commerce Bank, N. Y., for $1867.30,] in settlement of acct. to [July 31st, 1880.] Please date and sign the annexed acknowledgment and return, with this advice, to

Yours respectfully,
R. H. ROCHESTER, Treasurer."

Accompanying each of these letters was a blank receipt, both alike except as to the amount of money inserted, reading as follows: "Received [here stating amount] dollars in settlement of account as above stated." The letters were wholly printed except those portions included in brackets. Many other letters were introduced in evidence, but these two, with the enclosures, and the fact that they were received by the plaintiff or his agent, and the drafts collected and appropriated by plaintiff, are the principal facts relied upon to show that these amounts were intended and considered to be in full for the plaintiff's claim. At the close of the trial counsel for defendant asked the court to charge the jury upon this subject as follows:

"First. If the jury find that the defendant, after the delivery of the poles in June, 1880, gave to the plaintiff the check of its treasurer for $2141.25, in settlement of the account of the plaintiff against the defendant to June 30, 1880, and if the jury also find that after the delivery of the poles in July, 1880, the defendant gave to the plaintiff the check of its treasurer for the sum of $1867.30, in settlement of the account of the plaintiff against the defendant to July 31, 1880, and if the plaintiff retained such checks, and drew the money thereon, and if he has made no offer to return such checks or the money received thereon, he is now estopped from disputing the settlement.

Second. When money is paid by a debtor to a creditor in full satisfaction of a debt, and the money is received by the creditor, and retained by him, the creditor cannot thereafter dispute the settlement, and will not be permitted to show that really the debt was in excess of the amount paid."

The circuit judge did not charge the jury in the language of these requests, but did charge:

"There is a proposition on behalf of the defendant, which, if sustained, will preclude any recovery in this case whatever. Where the parties have a controversy and there is a dispute about the amount claimed and the extent of it or the facts and circumstances relating to it, and each party knowing all about the facts, as these parties are supposed to have done after this discrepancy appeared, and these negotiations took place and this correspondence about a recount,—I say, if after all this the parties, understanding the facts, agreed upon an amount which would be accepted in settlement of the whole,—that agreement would be binding on both parties as settling the controversy. It would be an accord and compromise between the parties which the law would favor; and if these parties understandingly entered into a settlement embracing this controversy, and the plaintiff accepted what he was offered in full settlement of his claim, he is bound by it and cannot escape from it."

Referring to the last letter sent, the court further charged, after reading the check:

"Now this certainly imports on the face of it that this is tendered as so much in settlement of the account up to that time. It does not say in full, but in settlement of account. It does not specify what account, but there does not appear to

be any other account between the parties, so far as the testimony shows. Now, I say, if you are satisfied Mr. Widner accepted this in settlement and as a settlement, and as full payment of what was due to him, he is bound by it, although he may have had a good and legal cause of action against this defendant for a considerable amount more. If he did it, understanding the facts in the case, he is bound by it."

We think the charge of the court in this case very fair to the parties, and upon the point we are now considering covers the whole ground upon the testimony offered, and is quite as favorable to the defendant as his case would permit. It covers all the points contained in the defendant's requests above given, and states and applies the law correctly.

It is very clear from the testimony that the time limited in the contract for its performance, and the forfeiture for failure to perform, were both waived by agreement of the parties; and when the several payments were made by defendant there was no completion of the contract, but its future completion was by both parties contemplated and expected. There had been no consultation or agreement between the parties as to any amount the defendant was to pay for the property forwarded, other than that mentioned in the contract; neither did either of the letters accompanying the checks state any terms of settlement or compromise, except what was contained in the printed blank in common use by the firm and the receipt accompanying, which plaintiff refused to give. There is nothing except this to indicate that anything more was intended by defendant by the words "settlement of account" than is included in the words "applied on the account." Full payment was frequently, after these checks were received, demanded by plaintiff, but nowhere do we find defendant claiming a settlement of the balance when such requests were made.

The checks only contained the amount that defendant admitted was plaintiff's due. The letter contained no condition upon which plaintiff was to accept the money or any

direction what to do with it, if he refused to accept it; and we fail to find any testimony showing defendant found any fault with the ordinary receipt given by plaintiff for the money; or that he ever made a second request to have the receipts, sent with the checks, signed and returned by plaintiff; but defendant immediately went to making arrangements for the fulfillment of the contract. And it was months after the payment of these checks that defendant made claims against the plaintiff for damages arising under said contract, and which existed, if at all, at the time said payments were made. These were all facts and circumstances submitted to the jury upon the trial to enable them to ascertain the intention of the parties.

It was the intention of the parties—the one in sending, the other in receiving these checks—which was to govern the jurors, as they might find it, in deciding this question. If the defendant did not intend or expect that the payment and receipt of the amounts stated in the checks were to be a settlement of accounts between the parties to those dates,—or if the plaintiff, in receiving the check, did not intend by so doing to treat the account as settled,—then settlement could not be urged as a defense to the plaintiff's claim. 1 Pars. Cont. (4th ed.) 399; *Hazard v. New Eng. Marine Ins. Co.* 1 Sumn. 218; *Bruce v. Pearson* 3 Johns. 534; *Sheldon v. Capron* 3 R. I. 171; *Tuttle v. Love* 7 Johns. 470; *Hutchison v. Bowker* 5 M. & W. 538; *Eliason v. Henshaw* 4 Wheat. 225; Chit. Cont. 9, 10, 11; *Hubbard v. Coolidge* 1 Met. 93; *Continental Ins. Co. v. Horton* 28 Mich. 173. The jury passed upon this question under proper instructions as to the law, and decided in favor of the plaintiff; and we cannot disturb their verdict.

We find no error in the record, and the judgment must be affirmed with costs.

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

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JULIAN F. DE WITT v. CHAS. H. PRESCOTT AND GEO. H. BARNARD.

Proof of documents—Notice to produce papers—Agency—Breach of warranty by judgment lien.

Documents cannot be treated as proven by the testimony of a witness to their identity unless the adverse party has had an opportunity to inspect them and cross-examine the witness.

Notice to produce papers is insufficient if it barely allows time to procure them by telegraphic communication with clients, unless longer notice is impracticable.

Defendants to an action on a contract are entitled, without notice, to the production of all papers which formed any part of the contract.

In an action against joint defendants upon an implied warranty it is admissible to allow one of the defendants to testify as to his authority to bind the other, though he must state facts and not conclusions.

A judgment lien does not operate as a breach of warranty of title unless the judgment was had in a proceeding which the guarantors undertook to be concerned in or had proper notice to defend.

One who sells goods with warranty of title to a purchaser in another jurisdiction cannot claim that his liability thereon is released by any reasonable arrangements which the buyer finds himself compelled to make with the holder of an existing lien to enable him to remove the goods to his own domicil; and the fact that such a removal changes the venue of any consequent action does not necessarily support an inference of fraudulent combination by the buyer and the lien-holder against the seller.

Where replevin is brought against a purchaser, and the seller assumes the defence, the purchaser cannot be required to watch and defend the action without at least adequate notice and adequate reason.

Where one of several joint-vendors is manager of the business and makes all the bargains, he must be presumed to act for all where there is a joint interest and joint duty; and notice to him in proceedings arising out of a breach of warranty caused by the existence of a lien upon the property sold, is notice to the rest unless in cases where the original lien has been extinguished and the existing lien springs from a contract with the buyer.

Error to Bay. (Green, J.) June 13–14.—October 3.

ASSUMPSIT. Plaintiff brings error. Reversed.

Holmes, Collins & Stoddard for appellant. Copies are not admissible in evidence unless proper notice to produce the originals is seasonably given: 1 Green's Pr. 250; Graham's Pr. 528; *Furguson v. Hemingway* 38 Mich. 159; *Gorham v. Gale* 7 Cow. 739: 17 Am. Dec. 549; a notice cannot be said to be in writing unless properly signed: Wade on Notice § 1229; notice to produce must be served a reasonable time before the trial, unless the party giving the notice shows that the papers called for are in court: 1 Graham's Pr. 529; 1 Burrell's Pr. 449; 1 Greenl. on Ev. 562; *Story v. Patten* 3 Wend. 486; *Utica Ins. Co. v. Cadwell* id. 296; *McPherson v. Rathbone* 7 Wend. 216; *Hammond v. Hopping* 13 Wend. 505; *Barton v. Kane* 17 Wis. 37; *Moulton v. Mason* 21 Mich. 364; whether a joint party had authority to undertake the defense of a suit is for the jury to decide: *Amer. Trans. Co. v. Moore* 5 Mich. 368; he cannot testify to the fact: *Ward's Central Pacific Lake Co. v. Elkins* 34 Mich. 439; *First National Bank of Sturgis v. Reed* 36 Mich. 263; *Lake Superior Iron Co. v. Erickson* 39 Mich. 492; express notice to defend is not necessary to render a party liable over for the amount of a judgment: *Chicago v. Robbins* 2 Black 418: 4 Wall. 657; *Brewster v. Countryman* 12 Wend. 446; but persons who are given an opportunity to defend are bound to protect their rights: *Hazen v. Reed* 30 Mich. 331; *Adams v. Cameron* 40 Mich. 506; *Ryerson v. Eldred* 23 Mich. 537; *Taylor v. Boardman* 25 Mich. 527; *Stilwell v. Carpenter* 59 N. Y. 415; and are, in effect, parties: *Mason v. Kellogg* 38 Mich. 139; *Bachelder v. Brown* 47 Mich. 370; *Barney v. Dewey* 13 Johns. 224: 7 Am. Dec. 372; *Mayor v. Troy & Lansingburgh R. R.* 49 N. Y. 657; *Lovejoy v. Murray* 3 Wall. 1; *Green v. Van Buskirk* 7 Wall. 139; *Craig v. Ward* 36 Barb. 377 and 383; *Thurston v. Spratt* 52 Me. 202.

Shepard, Lyon & Clark and *H. H. Hatch* for appellees. Voluntary relinquishment of possession destroys a lien: *McMaster v. Merrick* 41 Mich. 505.

CAMPBELL, J. De Witt sued defendants on a claim arising out of a breach of implied warranty of title to certain lumber sold by defendants to D. C. Welch & Co., his assignors. Welch & Co. were lumber dealers, living in Buffalo, New York, and the firm was made up of D. C. Welch and J. H. Behn. The sale was made in July, 1879, at Bay City, and the lumber was then lying at Hale's dock, in Tawas, Iosco county, having been sawed by S. & C. D. Hale and their assignee, Edward W. Eames, who then held it in possession, and out of whose claim for a lien for sawing the present controversy arose.

Welch & Co. sent up a barge, named the Orontes, to bring the lumber down to Buffalo, and a load of about 537,000 feet was accordingly taken down, and after its arrival at Buffalo was replevied by Eames, who established a claim, for which judgment was given to the amount of $3477.89, and paid by De Witt. This is the basis of the present action, in which the defendants prevailed. De Witt brings error.

The defense on the facts was made to rest on a denial of the existence of the lien, and a claim that if it existed it was lost by the action of Welch & Co. There was also a claim by the defense that Barnard was not bound, whether Prescott was or not. Plaintiff claimed that the lien was established by the judgment, and that defendants were in such a position as to be bound by it. There were some interlocutory questions of evidence, and some rulings on the law, assigned as error. As there is not much probability that most of the questions about evidence will arise in similar shape on a new trial, no further time will be given to them than is necessary to avoid mistake.

While one of plaintiff's witnesses was on the stand, defendants, during cross-examination, undertook to prove by him the identity of certain documents, which counsel for plaintiff was not allowed to see, but which were afterwards read as having been proved. This was, we think, erroneous. There may be no objection to proving documents at one time rather than another, if the opposite party consents. But there is no case where a witness proving an instrument

should not be subject to immediate cross-examination, which could never be effective without the view of the document itself,—not only to guard against forgery or substitution, but also to inform parties what issues were likely to arise concerning genuineness or any other fact which is material. Our rules in equity cases have done away with proof of instruments at the hearing, for the reason that there was always danger of surprise and imposition. But there was never any practice which deprived parties of the right to inspect and cross-examine in season.

Upon the questions of secondary evidence, we think that where parties reside at a distance from the place of trial, a notice to counsel to produce papers which will only allow time to communicate with clients by telegraph is insufficient. We need not pass upon exceptional cases where the necessity is not discovered early, and where an offer is made to bear such expenses and furnish such facilities as the exigency suggests. But, in the absence of peculiar exigencies, we think that there is no propriety in putting parties to the necessity of trusting their business to an agency which is not only uncertain, but open to difficulties of proof as well as extra expense for such full notices as are necessary for safety.

But it must also be remarked that the defendants in this case were entitled, without notice, to the production of all papers which formed any part of the contract under which the cause of action arose, and, as far as we can judge from the record, a considerable portion of the papers called for were of this character.

It does not appear to us that there was error in allowing Prescott to be asked concerning his authority to bind Barnard. That his opinion concerning his authority would not prevail over facts is no doubt true, and it may be that the questions put were not sufficiently confined to facts rather than conclusions. But the entire facts were open to inquiry, and the legal consequences should then have been made the subject of proper requests to charge.

A similar remark will apply to the questions touching his

employment of counsel and assumption of the defense in Buffalo. There was one aspect of the case in which this fact might be material. His answers should be strictly confined to facts, and not conclusions; but the facts themselves were pertinent. But upon this, as well as upon some other questions, there seems to have been some testimony given by persons who must have acted on hearsay. This, of course, is not admissible.

The chief questions of importance relate to the various rulings upon the merits, or bearing on them.

It therefore becomes important to know what the issue really was. The declaration rests practically upon a breach of warranty of title, and on the existence of an incumbrance in the shape of a possessory lien, which plaintiff had to pay. But the averments in the special count did not rest the cause of action on an original payment of this lien as one to be made out by ordinary testimony, but on the obligation arising out of an adjudication upon it, which precluded the necessity of any further investigation, and bound the parties. In order, therefore, to make out such an effect, it was necessary to show that the judgment was had in a proceeding which defendants either undertook to be concerned in, or, being otherwise concerned, had proper notice to defend. There was evidence before the jury which would bear upon both of these conditions, and there was also on the other side a claim that the testimony exonerated defendants from any duty or liability. Some facts are disputed, and some are not.

It is not disputed that defendants (or Prescott, in their name) sold the lumber in question as their own lumber, and unconditionally, in the first week of July, 1879, and that Welch & Co. were expected to send up a vessel to be loaded, and that on or before July 7, 1879, they sent up the Orontes, and gave notice to Prescott, by letter, which he received, stating how she was to be loaded, and that she was loaded accordingly. It also appears that Eames set up his claim to a lien on the lumber, but under what circumstances there seems to be some disagreement. It appears by Pres-

cott's testimony that subsequent shipments were made by him without Eames' consent and against his protest. It appears by the same witness that after the cargo in question was shipped, he agreed that the purchasers might withhold a portion of the price of this and of another cargo until he had settled with Eames; and that a few days subsequently, when the lumber had arrived in Buffalo, and Eames was about replevying, Prescott obtained paper for the full balance. All of these transactions involve some disputed circumstances.

When Eames replevied the lumber in Buffalo, he did so on the averment that his lien had been kept alive by the shipping agreement with Welch & Co. Immediately thereupon the testimony tends to show that counsel from Buffalo applied to Prescott, in Bay City, for indemnity, and he directed the witness to proceed and defend, and that he would indemnify and protect Welch & Co., who then went on and bonded the lumber. There was further testimony concerning the conduct of the various parties pending the replevin suit.

The more important allegations of error relate to the rulings of the court as to what circumstances would relieve defendants from responsibility for the result of the replevin suit, and discharge them from any lien which may have existed. And several of the charges and refusals complained of are connected with the alleged waiver of the lien, by allowing the lumber to be shipped to Welch & Co.

The court below held that any delivery of the lumber by Eames to Welch & Co. would discharge the lien, unless preserved by agreement, and that no such agreement would bind defendants or sustain the lien, so far as their responsibility to discharge or defend against it was concerned, unless made with their consent or ratification. This doctrine was laid down very broadly, and it was also intimated that an agreement to remove the lumber from this into another jurisdiction might be treated as fraudulent and injurious to defendants. And the court refused to charge that such an agreement, made without fraudulent intent and with no

design to injure defendants, would not be of itself a fraud on them.

We have not found authority for any such unqualified doctrine, and no cases were cited on the argument sustaining it. It is quite uniformly held that an unconditional surrender of possession, or conduct showing a design to discharge the lien, or plainly inconsistent with it, will usually put an end to it. But it seems equally clear that the holder of the lien may allow the owner of the property to take it into his possession and remove it without prejudice to the lien, if so agreed. *Wheeler v. M'Farland* 10 Wend. 318. And it is also undisputed that such a lien cannot be destroyed by a removal, without the consent of the lien-holder, from his possession. And in *Nash v. Mosher* 19 Wend. 431, Cowan, J., in reviewing the authorities, comes to the conclusion that the holder of a possessory lien can transfer the lien with the possession, as other valuable rights may be assigned.

There was testimony in this case on which the jury might lawfully have found that Welch & Co., as actual and complete purchasers of the lumber in question, and in direct accordance with the terms of their agreement of purchase, sent a vessel up from Buffalo to Tawas for the express and only purpose of getting this lumber, and that the defendants had bound themselves by that agreement that they might lawfully take it. There was, also, testimony indicating that it was understood the vessel should not be delayed in loading and departure. It is plain that Welch & Co. could not get the lumber from the hands of Eames, (whose original possession was unquestionably lawful, and whose continued possession would be lawful if any lien existed,) without either seizing it by replevin, and thereby incurring the risks of litigation, or paying the sum demanded, and running the risk of recovering it back as a lawful claim against defendants, or by taking it by permission, without prejudice to such lien as actually existed. They had already incurred the expense of employing the vessel, and the dilemma was not by their fault. We can see no reason why,

having already been put into a position where any other course would in all probability subject them to difficulty, they were not fully justified, if they acted in good faith, in adopting the course complained of. And we can see no reason why, under such circumstances, any inference of fraud or unfairness should arise because the controversy would be removed to Buffalo. If Welch & Co. had, as their purchase fully authorized them to do, so far as defendants are concerned, taken the lumber and removed it without the consent of Eames, he could certainly have sued them in Buffalo, and defendants would have been responsible for any lien he established. And in like manner, if Welch & Co. chose to set up in abatement or defense of payment their damages by reason of paying the claim, or other damages arising out of the facts, the litigation would be likely to arise in their domicile, and they had as good a right as defendants to prefer their own domicile, if attainable. If any lien actually existed, all the complications were primarily due to the default of defendants, who cannot complain of anything which Welch & Co. were reasonably compelled to for their own protection.

It also appears evident that if defendants assumed the defense, and had practical control of its management, Welch & Co. could not thereafter be required to watch it or to defend it without at least adequate notice and adequate reason for so doing. Whatever may be the abstract correctness of the doctrine claimed to apply in case of a fraudulent combination of Welch & Co. with Eames, it could have no force unless fraud should be proven, and it is not clear from the record that testimony of such fraud was put in.

So far as defendant Barnard is concerned, his responsibility depends chiefly on whether he was one of the vendors of the lumber, as the record seems to indicate that he was. If he was bound by the warranty as Prescott's associate in the sale, and if, as seems to be shown, Prescott was manager of the business and the party through whom all the bargains were made, notice to Prescott was notice to him, and the latter must be presumed to be acting for both when

there was a joint interest and joint duty. The only case in which the question of authority could apparently arise would be where the original lien was entirely extinguished, and the lien thereafter was one by contract with Welch & Co. The record does not indicate such a contingency, so far as the testimony is set out.

In the absence of other statements, we think that what we have said meets such questions as are likely to arise on a new trial, and it is not worth while to take up the charges and requests one by one, as they involve repetitions and unimportant shades of difference.

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

GRAVES, C. J. and SHERWOOD, J. concurred. COOLEY, J. did not sit in this case.

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CLARISSA S. RHOADES v. ALVIN C. DAVIS.

Release of dower—Construction of statute.

A married woman's release, to her husband, of her dower right, if made for a good consideration and without fraud or improper dealing, is binding, in view of the Married Woman's Act permitting wives to dispose of their interests as if single.

An empowering statute does not necessarily imply that the power given did not exist before.

Error to Kent. (Montgomery, J.) June 20.—Oct. 3.

EJECTMENT. Defendant brings error. Reversed.

Morse, Wilson & Trowbridge for appellant. A wife's agreement, on separating from her husband and on adequate consideration, to give up her dower, is valid: *Stephenson v. Osborne* 41 Miss. 119; *Hitner's Appeal* 54 Penn. St. 110; *Dillinger's Appeal* 35 Penn. St. 357; *Thomas v. Brown*

10 Ohio St. 247; *Osgood v. Norris* 21 N. H. 435; *Bullard v. Briggs* 7 Pick. 533; *Powell v. Powell* 9 Humph. 477; *Blake v. Blake* 7 Ia. 46; *Robertson v. Robertson* 25 Ia. 350; *McKee v. Reynolds* 26 Ia. 589.

Thos. J. O'Brien and *Edward V. Raynolds* for appellee. A wife's release of dower by separate deed, executed long after conveyance by her husband, does not bar her right of dower: *Powell v. Monson &c. Mfg. Co.* 3 Mas. 347; *Page v. Page* 6 Cush. 196; *Dodge v. Aycrigg* 12 N. J. Eq. 82; *Savage v. Crill* 19 Hun 4; 2 Scribn. Dower 271; *Graham v. Van Wyck* 14 Barb. 531; *Crain v. Cavana* 36 Barb. 410; a wife can release her dower only by joining in her husband's deed: *Ulp v. Campbell* 19 Penn. St. 361; an inchoate dower right is a mere contingent claim, which may be released but cannot be granted or assigned, and can be diverted by legislation: *Green v. Putnam* 1 Barb. 500; *Moore v. Mayor* 8 N. Y. 110; a covenant for good consideration to release dower, is void: *Rowe v. Hamilton* 3 Greenl. 63; *Carson v. Murray* 3 Paige 483.

Graves, C. J. Ejectment for dower. Findings by the court, and judgment for the plaintiff.

In 1865 the plaintiff intermarried with John Rhoades, and they lived together from that date until the 12th of September, 1870, at which time they separated, and never afterwards cohabited. At this time the husband was owner in fee of the premises in the declaration, but owned no other. On the day of the separation the plaintiff gave the husband a quitclaim deed of the premises, and he paid her $250, and gave her a mortgage on the same premises for $650 more. The deed was placed on record a few days later. About two and a half months afterwards, and on the 25th of November, they entered into written articles of separation, and she therein agreed that the $900 which had been in part paid and in part secured by the mortgage should be "in full satisfaction for her support and maintenance, and all alimony whatever." At the same time, and as part of the same transaction, they added to

the consideration clause of the deed this language: "The consideration of this deed being in lieu for the right of dower of said party of the first part in and to said described premises," and the deed as thus changed was again recorded in December, 1870. The $900 mentioned in the articles, and of which $650 was secured by mortgage, formed the consideration of the quitclaim.

January 23d, 1872, the husband conveyed to the defendant, subject to the mortgage, the plaintiff not joining. The defendant assumed what remained of the mortgage debt as part of the purchase price, and paid it to the plaintiff's assignee. July 3d, 1878, the husband died, and the plaintiff commenced this suit April 16, 1881. At the time the deed and mortgage were given, in September, 1870, the plaintiff had no right except her expectancy of dower as the wife of John Rhoades. The construction of the facts is not difficult. The husband held the premises subject to plaintiff's incipient dower right. For $900 which she has received in full, she agreed to waive her right and place the title in such shape that the property should be grantable by the husband as though she were not living. On this basis the husband paid and secured the consideration, and on this basis she deeded as before stated. The title being in this condition, the defendant purchased of the husband and accepted his sole deed, and assumed and paid what remained of the mortgage given on the premises to secure a portion of the very consideration for which she agreed to resign the right that she now endeavors to enforce.

The question is whether, on these facts, she may now repudiate her part of the arrangement, and not only hold the benefit of the consideration she obtained, but may also recover the very thing for which she solemnly accepted that consideration as the price. If she can, it must be because there are technical difficulties too stubborn to yield to the claims of natural justice. The moral dictates of the law are all against her. Her position is—*first*, that before the legislation of 1855 it was not possible for a married woman, by giving a deed to her husband, to relinquish to

him her incipient right of dower in his lands; *second*, that this right not being, as is well settled, a separate estate, its disposal has not been affected by that legislation. Consequently the deeding by the plaintiff made no change in her legal claims and interests. The view which the case offers will excuse examination of the first point. Whether the method of barring dower which the statute approves by joining in the husband's deed or with the guardian, or by her sole deed to a third person, who has obtained the husband's title, should be deemed exclusive where the case does not depend on an act of relinquishment directly to the husband, may be left for future inquiry.

The second proposition demands some attention; it seems to have the support of a dictum in *Ring v. Burt* 17 Mich. 465. It was there said that a married woman during the coverture could not affect this right except by joining in a deed or mortgage with her husband. This was not the point in judgment, and the remark was only a casual observation in the course of argument. However entitled to respect as the expression of an eminent judge, the Court cannot regard it as an adjudication.

The first consideration is, what, in the light of reason, is this "possibility of dower accruing to the wife after marriage, but before the death of the husband?" The authorities universally deny that it constitutes an estate; at the same time they admit, with equal unanimity, that it is a right concerning land, and one which possesses value. In *Greiner v. Klein* a majority of this Court were of opinion that it was of such worth that a sale in partition would not bar it, unless the wife were a party to the suit. 28 Mich. 12. Again, in *Farwell v. Johnston* 34 Mich. 342, and in *Bissell v. Taylor* 41 Mich. 702, it was ruled unanimously that the right was salable by the wife, and had sufficient purchasing power to supply a legal consideration for a conveyance to her. And in *Randall v. Randall* 37 Mich. 563, it was determined that the right was of such nature that the wife, by deeding directly to the husband, might work an equitable sale of it, whereby to furnish a consideration capable of

upholding a grant to herself. See also *Miller's Ex'r v. Miller* 16 Ohio St. 528; *Wilson v. Wilson* 1 H. L. Cas. 538.

Here, then, is something belonging to the wife which she may part with or retain. It possesses a money value, and may be the object of sale and release. It is capable of being dealt with as property. The statutes and the decisions recognize it as property. True, it cannot be shifted from one to another without reference to the repository of the general title. The nature of the thing forbids it. The only point here is whether the husband, who holds the land subject to this right, may not continue and at the same time receive directly from his wife a release by deed, provided the transaction is supported by a satisfactory consideration and is in all respects fair and reasonable. If the question were in equity and subject to be adjudged by the long-settled principles on which rights and titles are there founded and enjoyed, and by which their use and disposal are regulated, the result would neither be novel nor uncertain. The release would operate as a bar in equity. But the inquiry arises on the other side of the court. It is a question of law. And until the Act of 1855 it was the general doctrine of the courts of common law that the wife was not capable of enjoying and disposing of her own property at her own election, and moreover that the married pair could not contract directly with each other. The subject is quite fully explained in *Burdeno v. Amperse* 14 Mich. 91. But that statute made a great change. It provided that coverture should in nowise disable the wife from selling what was her own, nor in any manner interfere with her disposal of it. No distinction is made between kinds of property. The language takes in all without exception. Now, since the right in question is her property, and is a legitimate subject of sale, why may she not part with it in point of law to whomsoever holds the title to which it is germane? And since husband and wife may now by the rules of law, as well as those of equity, make mutual contracts with regard to property, and sell and deed to each other (*Burdeno v. Amperse* supra; *Ransom v. Ransom* 30

Mich. 328,) why may she not sell and release directly to her husband?

No reason is perceived that would not infringe the spirit of the legislation of 1855. By means of that enactment the faculty to transact, and the fact transacted, which were antecedently pure matters of equity, were legitimated at law and clothed with the attributes of law. The consequential effect of the act of release upon the future of the right can present no objection. That the act in which she parts with the right, and so disposes of it, does at the same time determine it, is not an obstacle. These consequences are the due expressions of opposite sides of the same fact. The object aimed at is to cause a cessation of the right, and not an existence of it in new hands. The sale being made fairly, and in accordance with the dictates of equity, and regularly carried out by deed on one side and exemplary performance on the other, the transaction operates by way of release of the right, in contemplation of law, and implies an obligation not to reassert it.

It is very naturally suggested that this view is not consistent with the opinion which the Legislature is presumed to have entertained when they passed the Act of 1877 providing that the wife might bar her dower by her separate deed to whomsoever was the holder of the husband's title. Act No. 65, Pub. Acts, 1877. If the wife, it is said, was already able to dispose of this right by her sole deed, it was needless to re-enact authority for her. This argument is not without force, but it is not controlling. The principles which underlie the case will not submit to it. It has happened here, as in some other instances in the history of legislation, that the Legislature has proceeded on an inaccurate opinion of the true meaning and proper scope of an existing law. *Talbot v. Seeman* 1 Cranch 1–35; *Postmaster General v. Early* 12 Wheat. 136–148; *Jackson v. Phelps* 3 Caines 62–68, 69, per Kent, C. J.; *Mersey Docks v. Cameron* 11 H. L. Cas. 443–518; *Van Norman v. Circuit Judge* 45 Mich. 204. According to these views the circuit court should have entered judgment for the defendant.

The judgment should be reversed, and one entered here for the defendant, with the costs of both courts, and the case should be remanded for such further proceedings respecting a new trial under the statue as may be lawful.

The other Justices concurred.

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THE MICHIGAN STATE INSURANCE CO. v. LINNIE S. SOULE AND EDWARD P. FERRY.
LINNIE S. SOULE v. THE MICHIGAN STATE INSURANCE CO. AND EDWARD P. FERRY.

Foreclosure—Perfection of title—Estoppel from foreclosing—Suretyship for mortgager.

If a purchaser at a sale under an invalid foreclosure afterwards acquires the equity of redemption, it operates to perfect his own previous conveyance of the land and to discharge him from liability on his covenants of warranty, if that be the purpose of the parties.

If a purchaser of a parcel of mortgaged land assumes the whole mortgage debt, his land becomes the first fund to be resorted to for its satisfaction, and the land retained by the mortgager becomes the secondary or security fund.

A creditor's neglect to enforce his demand against his debtor at the request of the latter's surety, does not, in Michigan, release the surety.

A creditor's mere statement to his debtor's surety that the debtor's responsibility was sufficient security for the debt and that the surety would not be called upon, did not estop the creditor from resorting to the security if the claim was not renounced and the surety was not misled by the assurance to his disadvantage. Whether even a promise to discharge the surety would estop him where no consideration is shown for such a promise—Q.

The discharge of a surety by an extension of time on his principal's debt results from the contract for extension and not merely from forbearance to collect the debt or from a promise to forbear collection.

A notice of foreclosure by advertisement, purporting to be signed by the party foreclosing, is not fatally defective for being signed in the

wrong name if the true name is specified in the body of the notice; the party is not required to sign it. Comp. L. § 6915.

The general objection, on an appeal in proceedings to quiet title, that the sheriff's deed on foreclosure, under which complainant claims, was incompetent, irrelevant, and immaterial as evidence, will not be regarded; the specific defect must be indicated.

Appeal from Ottawa. (Arnold, J.) June 20–21.—October 3.

BILL to quiet title. (Bill and cross-bill.) Linnie S. Soule appeals. Affirmed.

Angel & Soule and *Norris & Uhl* for appellant.

Thomas J. O'Brien for appellee.

COOLEY, J. The circuit judge who took the testimony and heard these cases found material facts as follows:

That one Lucy Piquette was the patentee of certain lands in Ottawa county, including a parcel of about forty-four acres now claimed by these parties respectively.

That prior to August 6, 1860, she made a mortgage of said lands, which was subsequently the subject of a suit for foreclosure, in the Ottawa circuit court in chancery, in which suit decree for sale was made, and the lands were sold to William M. and Thomas W. Ferry.

That afterwards, and on December 16, 1867, said William M. and Thomas W. Ferry, for a valid consideration, by a deed with full covenants of warranty, conveyed seventy acres, including the lands now in controversy to James B. Soule.

That on August 28, 1868, James B. Soule mortgaged the lands so conveyed to one Edward L. Craw for the sum of three thousand dollars, of which mortgage, after it had been endorsed down to fifteen hundred dollars, the insurance company became the owner.

That the foreclosure of the Piquette mortgage was invalid, and did not cut off the equity of redemption, and on September 20, 1873, Lyman D. Norris became the

owner of such equity of redemption by deed from Mrs. Piquette.

That afterwards, on June 15, 1875, Norris conveyed the premises in controversy to Edward P. Ferry, executor of the estate of William M. Ferry, at the request and by the procurement of James B. Soule, who then continued to be the owner of the title derived from the Ferrys, and also of Edward P. Ferry, executor as aforesaid, and who was also agent and attorney of Thomas W. Ferry; and that it was the intention and purpose of the parties to said conveyance that the same should operate to perfect the conveyance from the Ferrys to James B. Soule, and to discharge the Ferrys from liability upon their covenants.

And that the force and effect of the Norris conveyance was to perfect the title so conveyed by the Ferrys to Soule.

We concur in this finding, and do not deem it necessary to enlarge upon it. Some further facts, however, require to be now stated.

March 10, 1871, Soule conveyed twenty acres, part of the land, for a consideration of $5000, to one Alonzo J. Sawyer, and as a part of the consideration Sawyer was to pay $1500, the balance owing on the Craw mortgage, then held by the insurance company. The deed was expressly made subject to this payment; and in January, 1872, Soule obtained from Sawyer a bond of indemnity as further security. He afterwards conveyed six acres more of the land to his sister, Mrs. Craw.

Flavius J. Hough was then the general agent of the insurance company, and he was notified of this sale to Sawyer, and that Sawyer assumed the payment of the mortgage. Sawyer himself requested Hough to notify him as interest came due, and he did so, and Sawyer paid interest for several years.

The lands were known as fruit lands, and Sawyer, who was a man of considerable means, was purchaser for a rise of other lands in the neighborhood. In 1876, however, there was a very great depreciation in the market value of

these lands, and Sawyer became unable to meet his obligations. The insurance company then called upon James B. Soule for payment; failing to obtain it, foreclosed its mortgage by advertisement, and bid in the land. After the time for redemption expired, the company obtained possession, and filed its bill to quiet the title. Linnie S. Soule, who, with knowledge of all the facts, had received a conveyance from James B. Soule of the lands in dispute, filed a cross-bill claiming title and praying decree accordingly.

The circuit court made decree as prayed by complainant in the original bill, and the complainant in the cross-bill appeals. Edward P. Ferry, who is defendant in both bills, makes no claim.

The decree is right if the foreclosure of the Craw mortgage is sustained. But it is contended by Mrs. Soule that there are fatal defects in the proceedings, and also that before the foreclosure the insurance company had estopped itself by the acts of its general agents from resorting to her lands.

The supposed estoppel depends upon the testimony of James B. Soule, and of Craw who is his brother-in-law. Soule testifies that shortly after the sale to Sawyer, having an ambition to get the remainder of his farm freed from incumbrance, he asked Hough to have the insurance company release it. Hough said he would see about it and let him know. Some time after that Hough told him it was a great deal of bother to release it, or something of that kind, but that he considered the land sold to Sawyer good security and satisfactory and all that, and that he was glad to deal with a man like Mr. Sawyer who he knew would pay the interest. After that conversation Soule was not called upon to pay interest until 1876. Again he says: "Mr. Hough told me that it would be a good deal of bother for them to release a part of the land; that they had extended the time to Mr. Sawyer, and that the twenty acres and Sawyer were just as good security as the insurance company wanted; that he himself would be glad to have

the Sawyer land for twice the amount of the mortgage; that the insurance company would never look to me or my land for any part of the money, and that I might rest at ease about the matter." Craw's testimony tends to confirm this evidence, and Hough's to contradict it.

No claim is made upon the evidence that there was in fact at any time an extension given to Sawyer, and Sawyer himself testifies that there was none. The demand was simply allowed to remain uncollected so long as the interest was met. Soule claims, however, that by the sale to Sawyer and the assumption of the mortgage by the purchaser, Sawyer in equity became the principal debtor, and Soule, the mortgagor, the surety. If this is not strictly correct, so far as the parties are concerned, the transaction had the effect to make the land sold to Sawyer the first fund to be resorted to, and the land retained by Soule the secondary or security fund. *Metz v. Todd* 36 Mich. 473. Hough, it is shown, was aware of this fact, and made what statements he did make with knowledge of it.

The authority of *Faxton v. Faxon* 28 Mich. 161, is invoked to support an estoppel. That was the case of a distinct renunciation of a demand, made for the purpose of inducing a party to change materially his plans of life, and to incur heavy expenditures; and it was very justly held that after the change had been made and the expenditures incurred in reliance upon the renunciation, the creditor must abide by it. In effect a parol contract, made on ample consideration and performed on one side, was specifically enforced in that case. But in this case there was no contract and no consideration; there was simply a request for a discharge not acceded to, and some very strong statements that the party making the request would not be called upon for payment. It is not claimed that in this State the failure of the creditor to enforce his demand against the principal at the request of the surety would have the effect to release the surety; for *Pain v. Packard* 13 Johns. 174, which originated that doctrine, is repudiated in this State as it is in

most others. *Inkster v. First Nat. Bank* 30 Mich. 143. The estoppel, then, must stand upon the representations.

In *Parker v. Leigh* 2 Starkie 228, the acceptor of a bill of exchange drawn by one Williams, was sued upon it. It was proved in defense that the plaintiff, when applied to on behalf of the defendant, against whom he held other claims, had said he should look to Williams for payment of this bill, and upon that statement the other demands had been paid. Lord Ellenborough held this to be no defense, there being neither an express renunciation of all claim, nor a consideration for any. A somewhat similar case is *Adams v. Gregg* 2 Starkie 531; and there the statement of the holder of a bill to the accommodation acceptor, that he should not be troubled upon it, was held no defense. And see *Dingwall v. Dunster* Doug. 247; *Ellis v. Galindo* Doug. 250, note.

Two or three American cases seem to be very directly in point. In *Mahurin v. Pearson*, 8 N. H. 539, it appeared that the surety on a note had informed the holder that he wished it sued as soon as due, as he did not wish to stand security any longer. The holder replied that a part of the note had been paid and arrangements made for the remainder, and he should not call on the surety for it. Parker, J., said: "The evidence offered is not sufficient to discharge the surety. Mere delay by the creditor to collect the debt, after a request to that effect by the surety, will not operate as a discharge; and we are of the opinion that the evidence does not show such a renunciation of all claim upon the surety, as can avail to discharge him without any consideration paid, or evidence of loss sustained. Whether evidence of the latter description is admissible in such case may perhaps admit of question." In *Driskell v. Mateer* 31 Mo. 325, the evidence was that the surety said to the creditor that he must make the amount of the note out of the principal, and the creditor replied that he need put himself to no further trouble about the note; that he had made a present of it to the principal. This was held to be no release of the surety unless in consequence thereof he had

changed his situation, as by surrendering securities or forbearing to demand them. A case much like this and decided the same way is *Brubaker v. Okeson* 36 Penn. St. 519.

There is no claim in this case that Soule was misled as to the facts, unless it be as to the giving of time to Sawyer, which by itself was unimportant; for if time had been given neither the company nor Soule would have been bound by it, unless it appeared that the extension was for a consideration; for it is not the forbearance to collect, or the promise to forbear, but the contract, which operates the discharge. *Page v. Webster* 15 Me. 249: s. c. 33 Am. Dec. 608; *Tudor v. Goodloe* 1 B. Mon. 322; *Greely v. Dow* 2 Met. 176; *Veazie v. Carr* 3 Allen 14; *Agee v. Steele* 8 Ala. 948; *Wheeler v. Washburn* 24 Vt. 293; *Howell v. Sevier* 1 Lea 360: s. c. 27 Am. Rep. 771; *Berry v. Pullen* 69 Me. 101: s. c. 31 Am. Rep. 248. There is not only in this case no word respecting a consideration for an extension, but any promise of an extension is disproved. Meantime the fact was understood that the debt remained undischarged, as well as to Soule as to the land; and it was with this fact in mind that Soule confided in an assurance of an agent that he would not be called upon by the principal to pay the debt. Meantime he surrendered no security, but retained his indemnifying bond. Neither did he change his situation in reliance upon the assurances, unless it can be said that improving his own land was such a change. But as, previous to the collapse in 1876, he believed, as Hough did, that the land sold to Sawyer was ample for the satisfaction of the mortgage, it is clear that he did not suppose he was exposing property to loss by his improvements. He was putting his land in condition for use, and had every reason to suppose, and did suppose, he should enjoy his improvements in any contingency. Why should he not suppose so? He had sold the land which was liable before his own for more than three times the amount of the debt, and the record contains no evidence that any one supposed the

price was extravagant. The very great fall in market value was, evidently, wholly unexpected.

It would be dangerous doctrine which should make such talk as was sworn to in this case an absolute discharge of the surety, when there was no misleading as to the facts, no renunciation of a claim, and no promise to give a discharge, even if that could be effectual; and when it is not claimed that there was any consideration whatever upon which to base a promise. If the law were to enforce such assurances as were said to have been made here, it ought to enforce promises to make gifts; for that, in its final results, would be what this would amount to.

Passing by, then, the question made by the insurance company, whether Hough, who had no authority to give a written discharge to Soule, could nevertheless discharge his land by oral statements, and conceding that the company was bound by whatever was said by him, we fail to find an estoppel made out, and are of opinion that the company was at liberty to foreclose its mortgage against all the land, as it assumed to do.

It remains to see whether valid objections to the foreclosure sale are shown.

The record of the evidence returned to us does not contain the papers proved before the judge, but only his statement of what they were, and what objections were made to them. The insurance company, it is stated, offered in evidence the sheriff's deed on foreclosure by advertisement, together with copy of notice and proof of publication attached. The sheriff's deed was objected to as incompetent, irrelevant and immaterial; and the notice as fatally defective because it was signed "Michigan State Insurance Company" instead of "*The* Michigan State Insurance Company" which is the corporate name. This last very technical objection we pass by with the simple remark that the statute does not require the party foreclosing to sign his name to the notice: it is sufficient if the name is specified therein. Comp. L. § 6915. We are not informed that it was not. The general objection to the deed was worthless,

unless some specific defect was pointed out, and it does not appear that such was the case. The judge appears to have decided correctly the only specific objection which was made, and we must assume that if there had been any other possessing merit it would have been suggested. On the record before us, the foreclosure is not successfully assailed.

The decree should be affirmed with costs.

The other Justices concurred.

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Samuel F. Wood v. Marcus D. Elliott.

Conversion by cutting timber—Damages.

Where the grantee of land knows that the timber on it has been previously sold to another, with the right to take his own time to remove it, he cannot terminate the other's right to occupy the land with his timber without giving him notice to remove it within a reasonable time; and if, without giving such notice, he cuts the timber down, he is guilty of its conversion.

Notice by the grantee of land to his grantor to remove timber which the grantee knows has been previously sold to another, is not binding on the purchaser of the timber.

Where the measure of damages for the conversion of timber by cutting it down, is restricted to the actual value of the timber, the party guilty of the conversion cannot complain.

Error to Oakland. (Stickney, J.) June 21.—October 3.

Case. Defendant brings error. Affirmed.

Howard & Thayer, *Patterson & Collier*, and *M. M. Burnham* for appellant. A mere reservation of timber without words of limitation and inheritance, reserves only a life estate to the grantor: 2 Washb. R. P. 641, 646: 3 id. 371, 435; Shep. Touch. 100; *Curtis v. Gardner* 13 Met. 457; *Jamaica Pond v. Chandler* 9 Allen 170; *Munn v. Stone* 4 Cush. 146; *French v. Carhart* 1 Comst. 103; *Horn-*

beck v. Westbrook 9 Johns. 73; see *Haskell v. Ayres* 35 Mich. 90; and a subsequent purchaser of the land can remove it if the owner does not do so, within reasonable time, on notice: *Heflin v. Bingham* 56 Ala. 566; where converted property has been restored to the owner or sold on an execution against him, the measure of damages is not its value, but the loss actually sustained: 6 Wait's A. & D. 113; *Hunt v. Haskell* 24 Me. 339; *Felton v. Fuller* 35 N. H. 226; *Curtis v. Ward* 20 Conn. 204; *Collins v. Perkins* 31 Vt. 624; *Barry v. Bennett* 7 Met. 354; *Ward v. Henry* 15 Wis. 239; a reservation of timber does not cover that which afterward grows: *Putnam v. Tuttle* 10 Gray 48.

A. C. Baldwin for appellee. Contracts for the sale of timber have been held valid when they allowed time to remove it: *Johnson v. Moore* 28 Mich. 4; *Richards v. Tozer* 27 Mich. 452; *Russell v. Myers* 32 Mich. 523; reservations in a deed are to have the force intended by the parties: *Hall v. Ionia* 38 Mich. 498; one who cuts another's timber converts it and is bound to pay for it if the owner elects: *Guille v. Swan* 19 Johns. 381; *Reynolds v. Shuler* 5 Cow. 323; *Wintringham v. Lafoy* 7 Cow. 735; *Morgan v. Varick* 8 Wend. 591; *Indianapolis &c. R. R. v. Mustard* 34 Ind. 52; *Champion v. Vincent* 20 Tex. 811.

CAMPBELL, J. Plaintiff recovered judgment against defendant for the value of timber cut down by the latter, and claimed to have belonged to plaintiff. A good many errors are assigned, but they all come within a few heads, and a considerable part do not properly arise under the record as it became finally fixed.

On the 7th of November, 1864, Thaddeus Herriman, who owned lands on sections 4, 5 and 8 in town 4 north of range 7 east, and who had at or about that time sold a farm in section 4 to one Henry W. Thomas, gave him a conveyance "of all the wood and timber now growing and standing upon the south end of the west half of the north-

east quarter of section eight (8) town four (4) north of range seven (7) east, containing ten acres of land" * * * "the said party of the second part to have his own time to remove the wood and timber from off the said land, but is to commence to clear the said land from the west end of the said lot, and to cut the wood and timber clear, so that the land may be used for farming purposes." On the 14th of October, 1867, Thomas sold out his interest to plaintiff.

On the 8th of March, 1865, Herriman conveyed the land on which the timber stood, with other adjoining lands, to defendant "reserving the timber standing on ten acres on the south end of said lot." This deed was recorded January 5, 1866. There was no testimony in the case showing when the land was paid for. Previous to the record of this deed defendant had heard of the Thomas claim, and he offered to show that on the 6th of January, 1866, he served a written notice on Herriman, which, after referring to the deed and reservation, proceeded as follows: "You are therefore notified that I wish to use the said ten acres of land, on which said timber stands, for agricultural purposes, and you are hereby required forthwith to remove the same, or I shall require damages for the use of my land." Defendant proposed to rest his main defense on this notice, in connection with the language of the deed.

Plaintiff proceeded to remove the timber from time to time until he had taken all but what remained on two acres and a fraction, being partly a side hill, and partly on and in a lake bordering the tract. This was with knowledge of defendant, who is not shown to have raised any question.

In the end of December, 1880, defendant sent on a number of men who on a Saturday and Sunday cut down the trees, and left the wood on the land, where it remained when the suit was brought and tried. Defendant claimed it was plaintiff's wood, and that he should remove it. Plaintiff claimed that the cutting was against his right, and amounted to a conversion.

While the record presents some rulings on the question of an obligation to remove the wood in a reasonable time,

it does not become very important, if relevant at all, as the record stands. There is nothing to indicate that defendant ever took any steps to expedite the action of Wood or Thomas, who were proceeding at their leisure to remove the timber gradually, and in accordance with their grant. Assuming that he had such equities as would entitle him to require prompter action, the utmost that could be claimed would be that he might give such notice as would enable plaintiff to complete the removal in such a time as would be reasonable. Notice to Herriman, who had no interest whatever in the timber, could not be binding on the owner, and it might be questionable whether so early a notice to remove the timber forthwith, on pain of being held liable to pay for the use of the land, would have justified a sudden destruction of timber without some further warning. But inasmuch as defendant throughout knew of Wood's claim, and recognized him as owning the timber, no forfeiture could very well be relied on under any circumstances without some default after notice. Indeed, the defendant's position all through the suit, and the numerous charges which he asked, are entirely inconsistent with any claim that the timber had been lost to Wood. The defense rests on the theory that it is still his timber, and that he has a right and duty to enter on the land and take it away.

The only questions really presented are—*first*, whether the cutting was a conversion; and *second*, the measure of damages.

Upon the first question there seems to be no doubt that whatever authority defendant might have to terminate the right of plaintiff to occupy the land with his timber, it could not be terminated without notice. If this is so, he could not be compelled to accept timber cut down when he was entitled to standing timber. There is no conflict in the authorities, so far as we have discovered, on this point. Time and method may both become important elements of value or convenience, and it would be very unjust to compel any one to accept the results of a trespass as binding on him.

The charge of the court removed all the difficulties about damages by shutting out all considerations beyond the actual value of the timber. It confined the recovery within as narrow limits as could possibly be asked, and the result seems to indicate that the jury followed the ruling.

The judgment should be affirmed with costs.

The other Justices concurred.

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CHARLES E. WISWALL ET AL. v. FREDERICK S. AYRES, EBENEZER WISWALL, CHARLES G. LEARNED, JAMES S. AYRES, EBENEZER R. AYRES ET AL.

Consideration of mortgage—Refusal to put business books in evidence—Family dealings.

It is the presumption of fact that the sum mentioned in a mortgage as the consideration therefor, is correctly stated; and very convincing proof is required to rebut this presumption.

The refusal of a defendant in foreclosure to produce business books which are in his possession and which may reasonably be expected to shed light upon the transactions in dispute, is suspicious.

The defendant in a suit to foreclose a mortgage has the burden of proving that the consideration therefor, was less than appears therein if complainant claims that amount, and it is against him if his own theory of computation is as favorable to complainant as to himself.

Where dealings between partners who are connected by family ties have been carried on for a long series of years without keeping any strict account of them, but in the confidence which springs from such relations, and litigation thereon arises between them and their successors, a court will be disposed to be governed by such indications as appear in the written evidence of their transactions rather than by the recollections of the parties.

Appeal from Huron. (Stevens, J.) June 21–22.—Oct. 3.

FORECLOSURE bill. Defendants appeal. Affirmed.

Richard Winsor and *William T. Mitchell* for complain-

ants. Presumptions are against documentary evidence when it is withheld: *Page v. Stephens* 23 Mich. 363; Wills on Circum. Ev. 91; Stark. Ev. 437; *Life & Fire Ins. Co. v. Mech. F. Ins. Co.* 7 Wend. 34; *Jackson v. M' Vey* 18 Johns. 332; *Clifton v. United States* 4 How. 242; between the parties to a mortgage and their representatives the mortgage is prima facie evidence of the consideration: *Webb v. Eaman* 3 Mich. 139; Hermann on Estoppel 266.

John Atkinson, *G. V. N. Lothrop*, and *Isaac Marston* for defendants. The recital in a mortgage of the amount of consideration may be contradicted or explained: Whart. Ev. §§ 1042–4; Jones Mortg. 384; *Bowker v. Johnson* 17 Mich. 42; *Robinson v. Cromelein* 15 Mich. 316; *Colman v. Post* 10 Mich. 422; *Kimball v. Myers* 21 Mich. 276.

GRAVES, C. J. In April, 1879, the complainants filed this bill to foreclose a mortgage bearing date January 27, 1869, and executed by the defendants Frederick S. Ayres, Charles G. Learned and Ebenezer Wiswall, to Catharine A. Wiswall, wife of said Ebenezer Wiswall, and by her assigned to complainants the 25th of February, 1874. By the terms of the mortgage the consideration and sum secured was $40,105.43, stated to be payable in two years with semi-annual interest at seven per cent. The bill specified a series of payments which were admitted by complainants, and claimed that the sum of $40,000, or about that amount, then remained due and unpaid.

The defendants seriously contesting are Frederick S. Ayres, James S. Ayres, and Ebenezer R. Ayres. The two former, in answering, alleged that the consideration of the mortgage was $21,000 only, and that more had been paid than the bill admitted, and that not to exceed $20,288 remained unpaid, including interest and costs. The defendant Ebenezer R. averred that in case the mortgage had any consideration, which he denied, it had been fully paid. The defendant Learned admitted the case stated in the bill.

After some vicissitudes of practice the case was brought

to a hearing on pleadings and evidence, and on the 3d of January, 1883, the court overruled the defense, and decreed in complainants' favor for the full amount claimed, being $44,507.71.

The contending parties are not at variance as to whether there is anything payable on the mortgage. On that subject there is no case at all.

The defense is (1st) that the statement in the mortgage that a consideration of $40,105.43 existed, was untrue to the extent of $19,105.43, or nearly one-half,—the actual consideration being only $21,000; (2d) that a note made at Sandusky, Ohio, on the 8th of March, 1870, by the firm of Ayres & Learned, for $3000, and payable to the order of the firm of Ayres, Learned & Wiswall, should have been credited at that date on the mortgage, and is now rightly applicable thereon.

For the purpose of a clear view of these questions it is necessary to give attention to many surrounding circumstances.

The defendants Frederick S. Ayres, Charles G. Learned and Ebenezer Wiswall were related by marriage until the death of Mrs. Wiswall, which occurred in 1874. The wives of Ayres and Learned were sisters, and Learned and Mrs. Wiswall were brother and sister. This relation had its influence in bringing the men into business connection, and it tended, no doubt, to cause them to be more confiding, and less strict and circumspect in their mutual affairs than they would have been under other circumstances. The complainants are children of Mrs. Wiswall, and they received the mortgage from her as a gift. The defendants James S. and Ebenezer R. Ayres are sons of the defendant Frederick.

Some time in 1859 Frederick S. Ayres, Charles G. Learned and Ebenezer Wiswall became engaged as partners under the name of Ayres, Learned & Wiswall, in manufacturing lumber and in some other business, at Port Austin in this State, and their principal market was at Sandusky, Ohio. They purchased the premises in question, which, for the

purpose of this case, may be called the Port Austin property, but subject to a mortgage given November 10, 1853, by William A. Howard, Rollin C. Smith and Alfred A. Dwight to Calvin P. Austin for $31,900 payable July 10, 1854, with interest at the rate of ten per cent. The members of the firm were scattered. Mr. Learned was at Port Austin, and superintended the business at that place. Mr. Frederick S. Ayres resided at Sandusky in Ohio, and gave general attention to the matter of selling the products and procuring necessary supplies, and Mr. Wiswall lived at West Troy in the state of New York, and was chiefly relied on to provide for the larger and more urgent pecuniary needs of the firm.

At a later period Ebenezer R. Ayres and one Jonas R. Learned entered into partnership under the name of Ayres & Learned. Their business was manufacturing lumber at Port Crescent in this State, and selling it at Sandusky. Their business office was at the latter place, and Frederick S. Ayres was accustomed to transact business for his firm there and was moreover expressly empowered to act for Ayres & Learned.

When the firm of Ayres, Learned & Wiswall purchased the Port Austin property, the Austin mortgage was in process of foreclosure in chancery, a bill for that purpose having been filed by D. C. Holbrook, Esq., as solicitor for Austin, in 1857. It was considered desirable that no redemption should be made and that the pending suit should be carried to a decree and sale for the purpose of making a title through the mortgage. There was another reason also for that course. A difference existed in regard to the amount of the mortgage debt. The firm estimated it at $25,438.22, but Austin claimed a little over $500 more, with the interest on it. If the case proceeded to final decree the result would settle the amount going to Austin. It was deemed expedient, however, to make an arrangement by which the mortgage title might be brought under control. But this could only be effected by putting into the hands of Austin an amount equal to the sum the firm admitted to be

due, and agreeing to pay such further sum as the decree should ascertain to be payable. The partnership was not in funds to meet so large an expenditure as $25,438.22, but was able to raise for such purpose from three to six thousand dollars. Mr. Wiswall, however, had sufficient ready means of his own to make up the deficiency, and he was willing to apply them therefor, but only on the terms that the mortgage should be assigned to his wife as a gift from him, except as to the interest paid for by the company. This scheme was carried out. October 6, 1860, the sum of $25,438.22 was paid by Wiswall and the firm. The share paid by Wiswall is one of the questions in dispute. He claims, and the complainants insist, that it amounted to $22,000. The defendants contend that it was $21,000 only. As part of the transaction an assignment from Austin to Mrs Wiswall, bearing date September 1st, 1860, was lodged with K. C. Barker, Esq., to be delivered if the amount was found sufficient; but if found not sufficient, then on payment of the ascertained deficiency. It turned out eventually that Austin was entitled to a further sum of something more than $1100, and the firm paid it, and the assignment took full effect and passed the interest. The foreclosure proceeded to a decree for sale, and the company and Mrs. Wiswall, who was represented by her husband, agreed that the firm should bid off the property and receive a conveyance directly from the commissioner, and should at the same time secure Mrs. Wiswall by mortgage for her interest. The sale took place January 6, 1869, and acting on this arrangement the firm bid off the property at $19,150, and on the 27th of the same month received the commissioner's deed, and subsequently, but under the same date of January 27th, 1869, executed to Mrs. Wiswall the mortgage in suit. It was intended to correspond with the amount of her interest in the Austin mortgage and without reference to the formal amount bid by the firm on the foreclosure sale. March 11th, 1869, the mortgage was placed on record. There was a bond also, as accompanying security, but the original instruments were both lost by Mr. Wiswall or stol-

en from him in 1870 or 1871, and have never been recovered. A second bond was given subsequently, conditioned to pay the amount legally due, and dated back to correspond with the original papers in respect to date.

March 8, 1870, the defendant Ebenezer Wiswall, being ill, and knowing that a bank at West Troy held his note for $3000, which would mature on the 17th instant, applied to Frederick S. Ayres for that amount of interest on the mortgage with which to take up the note. Ayres had no money, but he drew a note in the name of the firm of Ayres & Learned, the concern at Sandusky, for $3000, and payable at the Troy Bank to the order of the firm of Ayres, Learned & Wiswall, the Port Austin company, on three months' time. Wiswall endorsed it in the name of his firm, and the Troy Bank passed the proceeds, less the discount, to his credit. The firm of Ayres & Learned subsequently paid it and charged it over to the firm of Ayres, Learned & Wiswall as money paid to Wiswall, and the latter firm settled for and paid it in their transactions with the Sandusky company. The firm of Ayres, Learned & Wiswall, by their clerk and book-keeper, made the item a matter of charge and account in their books as a debit of Wiswall to the company. It was thus treated, in making up the accounts, as money paid by the firm to Wiswall's use, and for which he was debtor to the company. Such is the sense of the transaction as represented by their dealings and signified by their books, and there is no evidence of any suggestion prior to this suit that their account was erroneous, and that the money should be charged against the mortgage.

The partners were interested in these proportions: Ayres held a half interest in the firm, and Learned and Wiswall a quarter each. October 31, 1871, Wiswall sold out to Frederick S. Ayres, and at this time the company books showed that Wiswall was indebted to the firm in the sum of $13,732.83, which included the item of $3000 which the firm had paid to Ayres & Learned on Wiswall's account. The state and composition of this account between the firm and Wiswall, were matters which vitally concerned this transfer

from Wiswall to Ayres, and they necessarily challenged the attention of the parties. By the express terms of the bargain, the defendant Ayres assumed and agreed to pay this debt of $13,732.83, and hence this $3000 item as part of it. The whole of this indebtedness was taken out of the consideration, and the arrangement operated, therefore, as a payment of this $3000 by Wiswall to defendant Frederick S. Ayres.

But this is not all. Ayres expressly agreed, as part of the same trade, that the mortgage to Mrs. Wiswall was to be paid by himself and Learned, and the amount was allowed and taken out of the purchase price, and the sale was made subject to the lien. It appears that some time prior to this transaction the defendant James S. Ayres had acquired a small interest from his father, Frederick S., and had been taking part in the management, and was privy to the state of the accounts. It also appears that he was more fully recognized after Wiswall's retirement, and that the firm, as then constituted, assumed the name of Ayres, Learned & Co. Now it is certain, that before this new firm commenced, the Wiswall account had been fully settled. Of this the evidence leaves no doubt. The item of $3000 was settled with it. It ceased to exist. Wiswall paid it to Frederick S. Ayres, and Frederick S. Ayres blotted it out by accounting with those who still retained interests in the late firm. The fact that it may have slipped in to the account by misapprehension, when it should have been credited on the mortgage, affords no reason for giving it that application now. It was actually appropriated and applied in the settlement and cancellation of accounts, and its whole force legitimately spent, and it cannot be now resuscitated and appropriated again. It has no more paying ability than a bank bill that has been redeemed and destroyed. The substantial effect of what happened was that instead of Mrs. Wiswall's receiving the $3000 on her mortgage, the company charged her husband with it, and eventually collected it of him. In brief, the sum became money borrowed by

Wiswall, and the result was a repayment by him. The defendants are not out of pocket.

It was not until this suit was being commenced, and after eight years had run on the transaction, that any claim was preferred or intimated for an application of this money on the mortgage. The explanation offered is that the transfer of the item to the account against Wiswall was an unauthorized act of the book-keeper of the firm, and was not discovered until the foreclosure was threatened or begun. In any view of the case which can be supposed, the Court would be reluctant, on such an explanation, to disregard the delay and changes which have intervened, and break in upon the various settlements and adjustments which have taken place. But since the actual dealing fully disposed of the matter on grounds which took away all equity from the defendants, and nothing remains to recall or rearrange, there is no chance for any question.

October 20, 1874, Charles G. Learned and James R. Learned, who, in some way not explained, had become interested, sold out to the defendant Ebenezer R. Ayres, who agreed to pay their share of the indebtedness of Ayres, Learned & Co., as the fact appeared upon the books. It was also a part of the trade, and expressly stipulated and declared, that the mortgage to Mrs. Wiswall, for $40,105.43, was payable by Ebenezer R. Ayres and Frederick S. and James S. Ayres; that the same was allowed and taken as part of the purchase price on such purchase by said Ebenezer R. Ayres from said Charles G. and Jonas R. Learned, and that the sale was subject to that incumbrance. The mortgage property was now vested in the defendants Frederick S. Ayres, Ebenezer R. Ayres and James S. Ayres, subject to the incumbrance.

As we have seen, they are the parties who resist the complainants' claim, and the matter of defense on which they lay the most stress may be here taken up. Their objection is that the mortgage was given for too large a sum. In view of the circumstances, it is not admitted that these parties have any right to question the accuracy of the orig-

inal consideration as stated in the mortgage. The object of the suit is to enforce payment of the security in exact accordance with its express provisions. Frederick S. Ayres, being one of the three mortgagors, became, as we have seen, a grantee of Wiswall,—one of the other two,—under an express covenant that he would pay the mortgage, and was allowed to retain from the purchase price a full consideration; and the evidence is satisfactory that the arrangement applied to James S. Ayres, and that his interest was identified with his father's. Subsequently Ebenezer R. Ayres became, as we have also seen, a grantee of the Learneds on the same terms. These persons knew what sum the mortgage professed to secure, and on an adequate consideration they assumed whatever remained of it. There is no want of privity or any appearance of fraud. It would seem difficult to withdraw the question from well-settled principles, and allow the defendants to repudiate the security in a point actually covered by the assumption of it.

But, as the case is open to broader considerations, this point may be left undetermined. The facts are, however, present, and cannot be put aside. They have a direct bearing on the merits of the attack against the consideration as expressed in the mortgage. The nature of the defense, the situation and relation of the parties, and the character of the transactions implicated, rendered it expedient for the defendants to bring forward, seasonably and fairly, whatever written evidence was in their power.

The presumption of mere fact is that the representation of the debt given in the mortgage by the parties to it was not false, but true, and nothing short of clear and cogent evidence could establish the contrary.

A further observation may as well be made here. The inference is very pointed that the old books of Ayres, Learned & Wiswall would shed considerable light upon the matter in dispute. The defendants were requested to produce them, and did not. They now criticise the nature of the request and the occasion of it, and seek to excuse or palliate the omission as though the result was only a possible

loss of evidence to complainants. But this is not a correct view. The very position of the defendants prescribed the production of the books as an act of candor and fairness, and also as a measure of self-protection against those unfavorable presumptions which arise from the non-production of evidence in such cases. The doctrine is elementary, and citations are unnecessary.

The circumstance that first challenges attention on the statement of the defense is the magnitude of the alleged error.

Had the discrepancy been a comparatively small amount, it would not be very difficult to imagine that an inaccuracy had occurred which did not reveal itself, and passed without being detected. But it seems hardly credible that in making up a transaction of $40,000, an error could creep in of more than $19,000, and not be found out, or at least suspected, by the vigilant men of business who were concerned And when the fact is recalled that Frederick S. Ayres and Charles G. Learned retained the mortgage several weeks for execution, with ample time for examination and reflection, we find additional ground for disbelief. The form of the amount is not wholly unimportant; it is not a round sum. It gives the impression that it was obtained by calculation and with some deliberation, and not by a lumping process and in a hurry. Both sides have endeavored to support their respective theories by applying particular methods of computation, but nothing decisive has been gained. The experiments have shown that a sum nearly equivalent to that in the mortgage may be obtained on the theory of either side. As the defendants have the burden of proof, it makes somewhat against them that this test is harmless to complainants.

We have seen that the mortgage was given in January, 1869, and was suffered to run for a period of more than ten years before this attempt to foreclose. During this long period nine several payments were made, aggregating more than $30,000, and many communications, oral and written, were interchanged in relation to the mortgage. In many

ways more or less direct, and on numerous occasions, it was recognized as a valid incumbrance, according to its terms; and in this connection we may recall the transactions in which the payment of it was deliberately assumed. Along with these positive and important acts running through ten years, there is the further circumstance that the amount of consideration was never in any manner questioned until the complainants insisted on having the matter closed up; and then the objection originated with counsel, and not with the defendants.

After the lapse of so many years, and when the early transactions in which the mortgage originated have become obscure, the explanations which were once practicable have become impossible. The memories of the chief actors have grown dim, and no satisfactory relation of the things which they well understood when the mortgage was made can be drawn from them now. The papers which they made the evidence of their affairs, and their particular acts and general conduct in reference thereto, are greatly preferable to statements called out by this controversy, and at variance therewith. And it is much to be regretted that the old books were not produced for inspection. Their absence is a circumstance against the defendants, but the fact is of no great consequence as the case is situated. Upon a careful review of all the circumstances it is not possible to say that the defense is made out.

Some points have not been mentioned. The stamping of the mortgage is one. And there are suggestions on the part of the defense not expressly noticed. It seems unnecessary to extend this opinion for the purpose of following out the able arguments from the bar. No better exposition can be found than what appears from a history of the case.

The decree should be affirmed with costs.

The other Justices concurred.

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THOMAS SINCLAIR v. CHAS. G. LEARNED AND JONAS R. LEARNED.

Foreclosure and tax sales—Tender—Surplus—Assent to purchaser's possession—Supervisor's certificate to assessment roll—Tax purchaser's duty—Comp. L. § 1141.

The presumption of law that a public officer performs his duty applies where the question is whether a sheriff's deed on foreclosure was immediately filed by him as required by Comp. L. § 6920; and unless the circumstances of the case overturn it, prevails so far as to throw the burden of proof upon the party who questions the fact.

Notice of a foreclosure sale is indispensable to its validity, and as it is the act of the party, and not of the officer making the sale, the presumption of the performance of official duty does not apply for the purpose of making out a valid foreclosure without actual proof of notice.

A mortgagee has a right to refuse any tender of the amount due on the mortgage, if made by one who, as between the mortgager and mortgagee, is a stranger to their dealings and therefore has no right of redemption: so *held* where tender was made by one who was neither mortgager nor mortgager's grantee and who did not act in the interest or at the request of the mortgager and had himself no interest in the equity of redemption but only held some tax-titles which were not subject to the mortgage.

Non-payment by the sheriff to the mortgager, of a surplus received on foreclosure sale, does not defeat the sale, for the sheriff must account for the money to the mortgager even though he fails to obtain it, and if the mortgager redeems without getting it, he still has an unquestionable right to have it taken into account.

The mortgager's assent to the possession of the foreclosure purchaser should be presumed if much time has passed without any question as to the validity of the foreclosure; and such assent would entitle the purchaser to hold as mortgagee, if not as owner, except as against proceedings to redeem.

A tax-sale is void if the supervisor's certificate to the assessment on which it is based states only that he has assessed the property "at its true cash value" without adding the words "and not at the price it would sell for at forced or auction sale." Comp. L. § 991.

A tax is void if the supervisor, in apportioning an increase in the valuation of the lands on the assessment roll, distributes it upon the real estate only, and not on the personalty also. Comp. L. §§ 993-5, 999.

Comp. L. § 1141 provides that the holder of a tax-title shall not be entitled to possession as against the holder of a subsequent tax-deed until he shall have paid or tendered to the latter the amount of the tax for which such subsequent tax-deed was given. *Held* that the subsequent title which will thus preclude possession is not necessarily a legal tax-title, though the tax on which it was based must have been one that was not merely arbitrary but had some warrant in law.

Every tax-sale in Michigan is a sale of the complete title, and if legal cuts off all prior titles.

The payment as taxes of arbitrary demands unwarranted by law cannot be coerced by indirect means if it is not compellable by tax-warrant; and validating acts or legislation withholding rights until payment is made will impose no obligation to pay them.

Whatever the Legislature can dispense with in advance it can dispense with retrospectively by enacting that its omission shall not prejudice. So *held* of certificates to an assessment roll.

Certificates to an assessment roll are necessary only because they are required by statute; and it is within legislative power to provide in express terms that a tax-sale shall not be void even though the certificate was defective in substance or was altogether omitted.

A bill will not lie to set aside taxes or a tax-sale on the ground that the supervisor's certificate to the assessment roll did not comply with the statute, because such an irregularity would not injure complainant and his case would therefore be without equity.

One who seeks to vacate a tax-sale on the ground that the tax was excessive must first pay or offer to pay what is equitable.

Error to Huron. (Stevens, J.) June 21.—October 3.

EJECTMENT. Plaintiff brings error. Affirmed.

Winsor & Snover and *Wm. T. Mitchell* for appellant. A sheriff's deed on statutory foreclosure is invalid if not deposited with the register of deeds within a year from the date of sale: *Doyle v. Howard* 16 Mich. 261; and the deed itself is not sufficient evidence of the regularity of the sale without proof that the statute was complied with: *Barman v. Carhartt* 10 Mich. 338; *Hebert v. Bulte* 42 Mich. 489; a tax is void if not legally assessed: *Joyner v. Sch. Dist.* 3 Cush. 572; Cooley on Taxation 3.

Engle & Engle for appellees.

COOLEY, J. In this action of ejectment the plaintiff claims the land in controversy under deeds from the Auditor General given on sales thereof for delinquent taxes of the years 1861 and 1862, and also by a quitclaim deed from the original purchaser from the United States, bearing date in 1880. The defendants, on the other hand, claim to have acquired the title of the patentee through the foreclosure in 1866 of a mortgage given by him in 1859; and as the mortgage does not appear to be disputed, the foreclosure, if valid, would have left nothing for a subsequent quitclaim by the patentee to operate upon. The defendants also claim that the plaintiff's tax titles were cut off by a subsequent sale to Jonas R. Learned, for delinquent taxes of 1874; or, if not cut off, that no suit can be maintained upon them so long as the tax title of 1874 is outstanding in another party than the plaintiff. They also show the payment of taxes by themselves since 1874, and they claim the benefit of such payment under the statute which will be hereinafter mentioned.

Though the evidence of possession is not very distinct, it seems to be assumed in the case that defendants are in possession, and they claim to have taken possession under the foreclosure. Proofs of a regular and complete foreclosure are not, however, made. The defendants did not prove the publication of notice of sale, and there was no positive evidence that the sheriff's deed, given on the foreclosure, was filed as the statute requires. It was shown that the register of deeds of the county at the time the sale was made, kept no books to show the date when such deeds were received in his office; and the case was therefore entirely without any direct evidence to show whether the deed was or was not duly filed. On this state of the proofs the plaintiff disputed the right of the defendants to claim any rights under the foreclosure.

As the statute, Comp. L. § 6920, made it the duty of the sheriff to file the deed immediately, it would seem that the presumption of law that an officer performs his duty ought to prevail until the fact was disproved. This is a

very necessary presumption where considerable time has elapsed since the official act was done or should have been done, and it ought to prevail so far at least as to throw the burden of proof upon the party questioning it, unless the circumstances of the case overturn it. *Ward's Lessee v. Barrows* 2 Ohio St. 241; *Conwell v. Watkins* 71 Ill. 488; *Farr v. Sims* Rich. Eq. Cas. 122: s. c. 24 Am. Dec. 396; *Hilts v. Colvin* 14 Johns. 182; *Hartwell v. Root* 19 Johns. 345; *State v. Howard* 10 Iowa 101. This rule was applied in *Cofield v. McClelland* 16 Wall. 331, in support of a conveyance of public lands made by a probate judge, which could only be lawfully made after publication of a notice which was not proved to have been given; the court speaking of it as a rule well settled and often applied.

The presumption, however, would not make out for the defendants a legal foreclosure of the mortgage, for the notice of sale was an indispensable requisite, and the notice was the act of the party and not of the officer. The foreclosure was also assailed on other grounds. The plaintiff being on the stand as a witness on his own behalf, his counsel, as the record states, "proposed and offered to prove by him that the mortgagor, Babbitt, went into the army, and before going paid the mortgage debt by lumber taken from the land in question and sold to the mortgagee's firm under a contract, and for that reason the mortgage was not put on record for several years after its date; after which they recorded and proceeded to foreclose it; that he was present at the foreclosure sale; that the sale was not a fair one and not made in good faith; that the mortgagee bid in the property; that the plaintiff was prepared to bid it in at a much higher price than it was sold for; that he tendered and offered to pay the full sum secured by the mortgage, with interest and costs; that the mortgagee's attorney was willing to accept it, but the mortgagee refused to allow him to pay and discharge the lien of the mortgage; that he bid upon the property a sum larger than the mortgagee had bid, when a party in the interest of the mortgagee called him aside and advised him not to bid, as the surplus would

go to the mortgagor, and that meanwhile the sheriff struck of the property to the mortgagee; and that the property, except for this action, would have brought more." Also "that the land was bid off by the mortgagee for more than the amount due, interest and costs, even if nothing had been paid upon it, and that no money or surplus was paid to or deposited with the register of deeds, or paid to the sheriff." All this proposed evidence was objected to by the defendants and ruled out by the court.

It will be noticed that the proposed evidence attacked the foreclosure on four distinct grounds: *First*, that the mortgage debt had been previously discharged; *second*, that a tender of the debt was made and refused before the sale was made; *third*, that the sale was fraudulently conducted; *fourth*, that the surplus bid on the sale above the mortgage debt, was not paid over or accounted for. Notice will be taken of these severally, though not in the order here given.

The tender proposed to be proved appears to have been made by the plaintiff. The objection to it was that the plaintiff was not in position to make it. He was not mortgagor, or the grantee of the mortgagor, or in any manner at that time interested in the equity of redemption. He had tax titles, it is true, but these were not subject to the mortgage. There was no offer to show that the tender was made for or in the interest or at the request of the mortgagor. It was therefore made by one who as between the mortgagor and mortgagee was a stranger to their dealings and an intermeddler. Nothing is plainer than that such a person has no right of redemption. If the mortgagee had accepted the money, he could not afterwards have claimed rights under the mortgage; but it is assumed that he refused it; and this he clearly had a right to do. *Lomax v. Bird* 1 Vern. 182; *Grant v. Duane* 9 Johns. 591; *Smith v. Austin* 9 Mich. 465; *Byington v. Bookwalter* 7 Iowa 512; *Eaton v. North* 25 Wis. 514. The alleged tender, if made, was therefore immaterial.

The fact that the sale was for more than the amount due,

and that the surplus was not paid over, is said to show that the sale was incomplete, and that no title passed for that reason. *Miller v. Miller* 48 Mich. 312, which is relied upon as supporting this proposition, holds only that the sale is incomplete if the successful bidder takes back his offer immediately upon acceptance. It was not proposed to show that such was the case here. The purchaser received the deed, caused it to be recorded, and claimed the land under the foreclosure. There was therefore no ground for any suggestion that the offer to purchase was recalled and the sale abandoned. And it is not claimed that the mere failure to pay over the surplus while the purchaser was insisting upon the sale and the sheriff was recognizing his right would defeat it. The sheriff must account to the mortgagor for the money even though he failed to obtain it, and if the mortgagor redeemed without having received it, his right to have it taken into account would be unquestionable. The fact of non-payment has therefore no importance in this case unless as it may bear upon the question of fraud in the sale.

The question of alleged payment of the mortgage demands more attention. The offer was to show payment by the mortgagor; and it is clear that if the mortgage had been paid, no sale could afterwards have lawfully been made under the power. The time of payment is only vaguely stated in the offer. The mortgagor, it is said, "went into the army;" and before going, paid the mortgage in lumber taken from the land. What army he entered is not stated, or when he went. Probably, however, we shall be justified in assuming that the army intended was the army employed in the late civil war, and that the time of entering it was during the continuance of that war. It was certainly, according to the offer, before the time of the sale in 1866 that the payment was made. What is then noticeable is that for fourteen years after the mortgagor's land had been sold on a satisfied mortgage, and sold, too, as plaintiff claims, in disregard of the mortgagor's rights in other particulars, and

notwithstanding an offer of another party to pay the mortgage a second time, the mortgagor takes no steps, apparently, to contest and set aside the unlawful and fraudulent sale, but allows it to stand of record with every appearance of validity so long as he remains the owner; and question is made concerning it for the first time, so far as we are informed, after fully fifteen years had elapsed from the time of the sale, and a still longer period from the time of alleged payment, and is then made by a party to whom the mortgagor, after this long lapse of time, has quitclaimed his interest.

Whether, where parties interested adversely to a mortgage foreclosure allow a period of time sufficient for barring rights of entry to elapse without taking steps to contest the sale, they can then be suffered, in a suit at law, to prove that at some prior time, which may have been still longer before the sale than the period which has elapsed since, they satisfied the mortgage by payment, is a question deserving of very serious consideration. It is certain that if this may be done, the evils against which the statute of limitations is intended to guard have not been reached in cases of this description; for the purchaser at the mortgage sale may be called upon to meet evidence of payment thirty years or more before the time of trial, and fifteen years or more after proceedings in assertion of the continued existence of the mortgage had been taken and acquiesced in. As such proof could be made against any other purchaser at the mortgage sale as well as against the mortgagee himself, there would manifestly be no security whatever in paying money on a statutory foreclosure if such a right were recognized.

The circuit judge appears to have been of opinion that proof of payment before the sale, or of fraud in making the sale, were not available in a suit at law, and that the plaintiff should have filed his bill to redeem or to have the sale annulled in equity. Whether it would be universally true that a sale fraudulently made or made after payment must be contested in equity we need not now inquire; as we

agree with the circuit judge that under the facts of this case it should have been so contested. After this great lapse of time, without question being made as to the validity of the foreclosure, it should be presumed that the mortgagor has assented to the purchaser's possession; and the assent is sufficient to entitle the purchaser to hold it—as mortgagee at least, if not as owner—except as against proceedings to redeem. No error is, therefore, discovered on this branch of the case.

More serious questions arise upon the tax titles. The plaintiff, as has been said, holds conveyances for the taxes of 1861 and 1862, and if these or either of them is valid, and he has a right to rely upon them under the circumstances of this case, the mortgage becomes of no moment, for the title of both mortgagor and mortgagee would be cut off by the sales for taxes. It does not appear by the record that either of these tax sales was contested, and for the purposes of this opinion it will be assumed that they were in all respects regular and legal.

But the defendants, as we have seen, claim under a subsequent sale of the lands for the taxes of 1874, and they also show that they paid subsequent taxes to the amount of $73.54, upon the lands in controversy. They then rely upon the statute of 1869, § 1141 of the Compiled Laws, which declares "that no person shall be entitled to the recovery of the possession of land purchased and held by such person from the state, or held as grantee of a previous grantee or grantees of the state, for the non-payment of taxes, nor shall any such person or his legal representatives be lawfully entitled to the possession of any such lands, unless such person shall have, at any time before final judgment in his favor, or at the time of entering into such possession, either paid all the taxes levied and assessed upon such lands, subsequent to the date of any tax deed under which he claims, or tendered the amount of taxes thus paid to the person who paid the same, if such person be the person against whom recovery is sought, or shall have acquired all the tax titles given for the taxes levied and assessed subsequent to

such first-acquired tax title, and previous to the entering into such possession."

The plaintiff meets the defendants' claim on this branch of the case by showing *first*, a tender of the sum so paid by the defendants for taxes, but whether with interest does not appear; and *second*, certain defects in the tax assessment for 1874 which were sufficient to render it invalid, and which as he claims preclude the defendants from relying upon his purchase for that year, for any purpose whatever.

One of the defects relied upon consists in this: that the supervisor, in certifying to his assessment for the year, after stating that he had assessed the property described in his roll "at its true cash value," neglected to add the words required by the statute, "and not at the price it would sell for at a forced or auction sale." Comp. L. § 991. This omission we have held to be fatal to a tax sale based upon the assessment. *Silsbee v. Stockle* 44 Mich. 561; *Dickison v. Reynolds* 48 Mich. 158.

Another defect was caused by an error of the supervisor in dealing with the equalization. The assessment made by him, it appears, footed up $96,335. The board of supervisors thought the valuation of lands, as compared with other assessments in the county, was relatively too low, and they increased it by adding $10,000 to the total assessment of the township. The supervisor of this township appears to have supposed it then became his duty to spread the $10,000 as an addition to the several assessments of land on his roll; and he proceeded to do so; increasing the assessment of the land now in controversy from $400 to $460. This made the whole burden of the increased assessment of the township fall upon the real estate, and was erroneous for that reason. The statute, while it contemplates an equalization as between the townships with reference to real estate only, does not assume that the assessments of real and personal estate made by any supervisor are relatively unequal or unjust, and therefore does not change or disturb them, but leaves the burden or benefit of any increase or diminution made by the supervisors in the total assessment of his township to be shared alike

by both realty and personalty. Comp. L. §§ 993, 994, 995, 999. The tax upon this land was therefore excessive, and the title was void for that reason. *Case v. Dean* 16 Mich. 12; *Edwards v. Taliafero* 34 Mich. 13; *Hammontree v. Lott* 40 Mich. 190.

The tax title for 1874 being thus found to be invalid, it remains to see whether defendants can derive any benefit from it under the statute of 1869. The plaintiff denies that they can, and insists that the tax title intended by the statute must be a legal tax title; or at least must be a title obtained on a sale of the lands for legal taxes. *Upton v. Kennedy* 36 Mich. 215. The question presented is very important, and is partly one of statutory construction and partly of constitutional power.

It seems certain that the tax title contemplated by the Act of 1869, which is to preclude the recovery by the plaintiff upon a prior tax title, is not necessarily a *legal* tax title; for the statute was not needed for the protection of the holder of such a title. Every sale of lands under our tax system is a sale of the complete title; and if legal, all prior titles are cut off by it. The statute, if it had the protection of any such sale in view, was to that extent merely idle; for it was assuming to give protection to a title which was already unassailable, as against one which was already destroyed. We have no warrant for imputing so meaningless an intent to the Legislature. On the other hand we agree with the plaintiff that, though the words of the statute of 1869 are very general and in terms require the plaintiff to acquire all tax titles subsequent to his own, there must be an implied exception of some at least; but what the exception shall embrace is the question.

If what has been levied under the name of a tax is a mere arbitrary demand, made by the public authorities without warrant of law, it is not in the power of the Legislature, by any device whatever, to compel its payment. It is too plain to admit of discussion that what the Legislature cannot do directly it has no power to do indirectly. If it cannot

coerce payment of what is called a tax by means of a tax warrant, it cannot do so through withholding the party's rights until he makes payment. An assumed tax must be a tax in fact, or no number of validating acts can put any one under obligation to pay it. This is familiar doctrine, and requires no support from authority, though abundance might be had.

But the defects in tax proceedings do not often go to the jurisdiction; they are more commonly found in a failure of the officers connected with the tax proceedings to obey some mandatory requirement of the statute. Such a requirement is always supposed to be important; but it is not always the case that there is reason to believe the failure to observe it would operate prejudicially to the person taxed. Indeed it does not always have his interest specially in view. We have an illustration in the requirement which was disregarded in this case,—that the supervisor's certificate to the assessment roll should show that he did not assess the property at a value which he estimated might be obtained at forced sale. This was adopted on grounds of public policy and to prevent the systematic undervaluation of estates; and when a tax title based upon an assessment roll not properly certified is held void, it is not from consideration of the interest of the tax-payer, but because the statute has made the certificate an imperative necessity. But there is no doubt whatever that the Legislature might have dispensed altogether with this or any other certificate to the tax-roll; and what it might have dispensed with in advance, it may dispense with retrospectively by enacting that its omission shall not prejudice. *People v. Lynch* 51 Cal. 15; *Butler v. Toledo* 5 Ohio St. 225; *Dunden v. Snodgrass* 18 Penn. St. 151; *Boardman v. Beckwith* 18 Iowa 292; *Lennon v. New York* 55 N. Y. 361; *Astor v. New York* 62 N. Y. 580. It would be entirely competent, therefore, to provide in express terms that a tax sale should not be void, even though the certificate to the assessment roll was defective in substance or was omitted altogether.

But with this tax title there was the further difficulty that

an excessive portion of the taxes of the township was laid upon the land. How large the excess was does not distinctly appear by the record, and we have no means of accurately estimating it, as the amount of the personal assessments is not given. It is evident, however, that the excess was small, and if the supervisor was accurate in assigning to this land $60 as the proportion to be assessed to it if the whole $10,000 increase were to be added to the realty, the personalty of the town must have been assessed at $30,000 or thereabouts. Taking that to be the amount, the proportion of the increase to be assigned to the personalty would have been under $3200. Real estate owners were therefore, wronged in the tax only to the extent that they would have been had property to the value of $3200 been omitted from the roll and the burden it should have borne been thrown upon them; and this, in the case of a parcel like that in controversy, could not have been very serious. But the precise amount could be readily computed from the tax-roll.

The statute of 1869 was aimed at a specific evil, and was meant to remedy a gross injustice. It was notorious that persons claiming to be owners of lands were neglecting the payment of taxes upon them, relying upon their being paid by some other claimant, or, in case nobody made payment, and the land in consequence was sold for delinquent taxes, expecting to defeat the sale because of some official neglect or technical fault. In either case they escaped the burden of taxation, and when a sale was defeated, it fell upon a party who received nothing in consideration for his payment. It was not good public policy to countenance this species of injustice; and when the claimant who was thus evading the payment of taxes was himself relying upon a tax purchase, it was very proper for the State to refuse him its aid to recover the land under his tax deed until he had done what was just in respect to subsequent taxes and tax sales. And nothing short of the payment of all such levies as the land was equitably chargeable with, could be justice in such a case.

If the plaintiff, instead of resorting to a suit at law, had

filed his bill in equity to set aside the taxes for 1874 or the sale based upon them, because the supervisor's certificate did not comply with the statute, his prayer should have been refused for the reason that the irregularity was one which did not injure him, and consequently his case was without equity. *Albany & Boston Mining Co. v. Auditor General* 37 Mich. 391. If he claimed to have the sale vacated because the tax was excessive, we should have made it a condition that he first pay what was equitable. *Merrill v. Humphrey* 24 Mich. 170; *Connors v. Detroit* 41 Mich. 128. This would be eminently just and right; and the result would be calculated to discourage the neglect to pay taxes on a calculation that they might be defeated on some technicality. But this is substantially what was meant to be accomplished by the Act of 1869. The purpose was to preclude the claimant by tax title from holding the land while at the same time he cast the burden of taxation upon another.

Under the showing in this case, then, the defendants were entitled to be repaid the sums they had paid for taxes of other years than 1874, with interest from the time of payment, and also the amount of the taxes of 1874 with interest after deducting the excess; and plaintiff should pay or tender these sums before judgment in his favor. The tax title for 1874, being invalid for the reasons given, could be relied upon as a payment only.

The judgment should be affirmed with costs.

The other Justices concurred.

WILLIAM CUBIT v. LEWIS O'DETT ET AL.

Ditches—Liability of highway officers for injury to land.

Highway officers have no more right than private persons to cut drains which will flood the lands of private owners.

The discretion of the overseer of highways, in deciding how and where

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he will distribute highway labor, is limited by the rights of individuals, and he and his assistants are jointly liable for the invasion of those rights.

Trespasses are not excused by good faith, though they may be aggravated by bad faith.

In an action against a highway officer for injury caused by a ditch which he has dug, defendant cannot complain of an instruction that he would not be liable unless the ditch brought upon the plaintiff's land the drainage of a greater area than was drained upon it before.

Error to St. Clair. (Stevens, J.) June 22.—October 3.

CASE. Defendants bring error. Affirmed.

Avery Brothers and *Isaac Marston* for appellants. Damages for injury to a freehold are recoverable only for the period preceding the action; and if the wrong continues, successive actions may be brought: Cooley on Torts 619; *Cumberland Canal Cor. v. Hitchings* 65 Me. 140; *Hatfield v. Central R. R.* 33 N. J. L. 251; *Savannah & Ogeechee Canal Co. v. Bourquin* 51 Ga. 378; *Van Pelt v. Davenport* 42 Ia. 308; *Bare v. Hoffman* 79 Penn. St. 71; one whose freehold is injured by the construction of a ditch, but who can avoid the injury by slight expenditure, is bound to do so: *Hayden v. Cabot* 17 Mass. 169; *Loker v. Damon* 17 Pick. 284; *Indianapolis & W. Ry. Co. v. Birney* 71 Ill. 391; *McCredie v. Buxton* 31 Mich. 390; and can recover only such expenditure: *Kansas Pacific R. R. v. Mihlman* 17 Kan. 224; farmers have a right to drain their premises: Angell on Water Courses §§ 108, 337, 338; *Gannon v. Hargadon* 10 Allen 106; *Williams v. Gale* 3 H. & J. 231; Cooley on Torts 577, n. 2.

Chadwick & Cline for appellee. The authorities are liable for flooding one's premises: *Ashley v. Port Huron* 35 Mich. 296; so are those who cause water to set back or flow down on another's land: *Grand Rapids Booming Co. v. Jarvis* 30 Mich. 308; 1 Addison on Torts (Wood's ed.) 96; Cooley on Torts 479, 580; *Miller v. Laubach* 47 Penn. St. 155; *Martin v. Riddle* 26 Penn. St. 415; *Laney v. Jas-*

per 39 Ill. 46; *Livingston v. McDonald* 21 Ia. 160; *Pettigrew v. Evansville* 25 Wis. 223; *Butler v. Peck* 16 Ohio St. 334.

Cooley, J. The complaint in this case is that defendants have flooded the plaintiff's land by means of a ditch which they cut along the highway, and which had the effect, while draining their own land lying to the west of him, to cast upon his land a large amount of water which otherwise would not have flowed in that direction. There are two counts in the declaration, the second only of which requires particular mention. The allegation of damage in that count is, that by the flooding of the land, and the deposit of sand and other substances thereon, it has been rendered unfit for cultivation and worthless. In defense it was claimed that what was done in cutting the ditch was rightful, because done under the direction of the overseer of highways; and it was at the same time denied that the ditch carried upon the plaintiff's land any water except such as would naturally have flowed there.

The plaintiff's evidence tended to show that the water did not naturally flow along the route of the ditch from the land of defendants to his own, and that the drain commissioner for that reason had refused to lay out a ditch there when applied to for that purpose. It also tended to show that the permanent injury to the land, if the flow was to continue, was very considerable. The evidence to this effect was objected to by the defendants, upon the ground that the flooding, if a wrong at all, was a continuous wrong from day to day, and might be the subject of repeated actions to which the recovery in this suit would be no bar. Also that the plaintiff has no right to assume that a wrongful flooding will be persisted in, and be permanent.

It probably ought to be presumed that any action found to be an invasion of another's right will be discontinued. *Bare v. Hoffman* 79 Penn. St. 71. But there was evidence in this case that permanent injury had been done, which the mere discontinuance of the flooding would not relieve. Moreover, although this was a case of continuous injury

from day to day, the injury was not attributable to successive wrongful acts of defendants: they had set the waters in motion by digging the ditch, and then, though they abstained from doing anything further, the injury would go on. To assume, therefore, that defendants will not further injure the plaintiff, is to assume that they will proceed to take some positive action to stop the continuous injury. This might be done, perhaps, by a new ditch, which should carry the water away from the plaintiff's land after it had been deposited there; or it might be done by obstructing the existing ditch. A new ditch could not be cut as a mere act of volition on the part of the defendants, for it would need to be cut on the plaintiff's land where they have no right to go except with his consent; and we cannot assume that consent would be given. The existing ditch might be obstructed without going upon the plaintiff's land for the purpose; but as it is not upon the land of the defendants, and they are doing nothing, so far as we know, to keep it open, there may be question whether they are liable from day to day, as a man may be who maintains a nuisance on his own premises. But there is nothing in this case requiring of us an opinion on that question.

The defendants contended that the plaintiff might relieve himself of the continuing nuisance by a small expenditure of money in cutting a new ditch to drain off his land; and that under these circumstances he was entitled to recover nothing for injury caused by the continuous flooding beyond what the cost of such a remedy would be. This contention appealed to the principle that every man is bound to make the injury he suffers at the hand of another as light as possible, instead of aggravating it, or possibly allowing it to increase. *Loker v. Damon* 17 Pick. 284; *Indianapolis &c. R. R. Co. v. Birney* 71 Ill. 391; *Seely v. Alden* 61 Penn. St. 302; *McCredie v. Buxton* 31 Mich. 383; *Kansas Pac. Rw. Co. v. Mihlman* 17 Kan. 224. There was some evidence in the case to found this contention upon, and the judge charged the jury that in estimating the damages they should take into account whether the injurious effects of the

ditch might not be overcome by the construction of others, and whether such other ditches could be constructed by the plaintiff without injury to a lower proprietor. This was intended as a recognition of the principle contended for, and fairly submitted the matter to the jury.

The circuit judge excluded evidence offered by defendants to show that what they did was done under the direction of the overseer of highways. As we understand it one of the defendants was himself the overseer; but the fact is not important. Highway authorities have no more right than private persons to cut drains the necessary result of which will be to flood the lands of individuals. This was shown in *Ashley v. Port Huron* 35 Mich. 296: s. c. 20 Am. Rep. 629, where many authorities are referred to. The highway overseer no doubt has a discretion in deciding how and where he will expend highway labor; but it is a discretion limited by the rights of individuals, and when he invades those rights, he becomes liable. *Tearney v. Smith* 86 Ill. 391. And when he is liable for a lawless act, all his assistants are liable with him for the consequent injury. Story on Agency §§ 311, 312; *Brown v. Howard* 14 Johns. 119; *Coventry v. Barton* 17 Johns. 142: s. c. 8 Am. Dec. 376; *Fiedler v. Maxwell* 2 Blatch. 552; *Tracy v. Swartwout* 10 Pet. 80; *Smith v. Colby* 67 Me. 169. This rule sometimes, when the agent has acted in good faith and without knowledge of the want of legal authority, may seem to operate oppressively, but it is a necessary and very just rule notwithstanding, and full protection of the citizen in his legal rights would be impossible without it. Absence of bad faith can never excuse a trespass, though the existence of bad faith may sometimes aggravate it. Every one must be sure of his legal right when he invades the possession of another.

Whether the cutting of the ditch caused a larger extent of territory to be drained upon plaintiff's land than was drained upon it in its natural state, was made a question of fact before the jury. The plaintiff gave evidence tending to show that a natural barrier to the flow of the water in his direction from the land of the defendants was cut through

in making the ditch; and in view of this, and other evidence having a contrary tendency, the circuit judge instructed the jury as follows:

"The plaintiff insists that at a point on this quarter-line road there was a natural embankment or rise of land, and that by cutting through this embankment and connecting with the ditch along the west side of the road with the ditch on the portion of the road east of the claimed elevation, that the result has been to increase the flow of water on plaintiff's land, which has injured his crops, carried sand into his ditches and upon his land, and injured the soil by the action of the water standing upon it.

"Upon the part of the defendants it is contended that the plaintiff's land is low, and that a large portion of the surrounding country necessarily drains upon it, and that the effect of the ditch of which the plaintiff complains is only to carry upon the plaintiff's land such water as would naturally flow there; and furthermore, that the ditch upon the west portion of the quarter-line road was not connected with the portion of the ditch on the easterly side of the rise of land by defendants or by persons acting in concert with them.

"It is a general rule that the proprietors of upper or higher lands have a right to the natural drainage of such lands upon those lands that are lower, and when lands are so situate that the water falling or collected by melting snow and ice naturally descends upon them, such lands must suffer, whatever may be the result of the natural discharge of the water of the higher lands upon them; but the proprietors of higher lands are not authorized, by means of ditches or trenches, to increase the flow of water down upon the lower proprietor to the injury of his land. And if you shall determine from the evidence that by reason of the construction of the ditch along the west portion of the quarter-line road and connecting such ditch with that portion of the ditch east of the rise of land claimed to be upon said road that an increased quantity of water has been carried upon plaintiff's land and damaged his crops and premises, and you are satisfied from the evidence that the defendants are responsible for digging the ditch through the rise of land, then, in that event, the plaintiff is entitled to recover such damages as he has proved that he has sustained by reason of the increased flowage of water. In other words, should you conclude from the evidence that prior to 1879 there was a natural rise in the land that obstructed the flow of water

upon plaintiff's premises from that portion of the country lying at the westerly end of the said quarter-line road, in section one, that is termed the 'tamarack,' and that by cutting through this barrier the defendants have caused an increased quantity of water to be discharged upon plaintiff's land, then they are responsible to the defendants for the damage sustained by such an increased flow of water.

"The plaintiff is not obligated to construct ditches for the drainage of any more water than that which naturally falls or flows upon his land, and if the defendants, either by the removal of a natural barrier or the construction of a ditch, have caused water to flow upon his land that would not otherwise have flowed there, then in either event they are liable for the damage resulting from such increased flowage of water."

The fair import of this language is that the defendants would not be liable unless the ditch brought upon the plaintiff's land the drainage of a greater area than was drained upon it before. If we are correct in this, the defendants have no just ground of complaint of the instruction.

The judgment must be affirmed with costs.

The other Justices concurred.

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FREELING W. PECK v. THE CITY NATIONAL BANK OF GRAND RAPIDS.

Poundage—Assignment of error on the record.

An action for sheriff's fees will not lie upon the quantum meruit, as at common law he was not entitled to them.

"Service of execution" covers every act and proceeding that may be required for collecting the amount of the judgment, including the sale of the property, when that shall be necessary.

A sheriff who has levied only on real estate is not entitled to poundage until the property taken is sold or money collected on the judgment; and this is especially so where statutory provision is made for the payment of his fees.

Judgments are under the control of the parties recovering them, or of their attorneys, and they may restrain the sheriff from proceeding to collect them.

Error may be assigned upon the record where the only question is whether the facts found support the judgment, the finding being treated in such cases as a special verdict.

Error to Kent. (Montgomery, J.) June 22.—Oct. 3.

ASSUMPSIT. Defendant brings error. Reversed.

John C. Fitz Gerald and *Allen C. Adsit* for appellant. A sheriff's right to fees is statutory: *Campbell v. Cothran* 56 N. Y. 281; and restricted to what the statute allows: *Crofut v. Brandt* 58 N. Y. 116; services not specifically provided for must be considered paid by the fees allowed for other work: *Crocker v. Supervisors* 35 Wis. 286; *Preston v. Bacon* 4 Conn. 472; compensation for a levy is measured by the sum actually collected: *Taylor v. Ranney* 4 Hill 621; *Spafford v. Beach* 2 Doug. (Mich.) 150; *Bryan v. Buckmaster* Breese (appx.) 22; *Shepard v. Rowe* 14 Wend. 262.

Stuart & Sweet for appellee. A sheriff is entitled to his full poundage for the sum endorsed on the execution if he levies on land and in consequence of a settlement does not sell: *Hildreth v. Ellice* 1 Cai. 192; *Alchin v. Wells* 5 Term 471; *Adams v. Hopkins* 5 Johns. 252; *Boswell v. Dingley* 4 Mass. 411; *Scott v. Shaw* 13 Johns. 378; *Parsons v. Bowdoin* 17 Wend. 14; *Bolton v. Lawrence* 9 Wend. 435; *Germ. Am. Bk. v. Morris Run Coal Co.* 68 N. Y. 590; *Baldwin v. Shaw* 35 Vt. 273.

SHERWOOD, J. The plaintiff was sheriff of Kent county, and, at the request of the attorney for the defendant, on the second day of October, 1880, levied an execution in favor of defendant, issued upon a judgment rendered for the same of $10,302.77, upon real estate alleged to be owned by the judgment debtor, but the title to which the defendant claimed was fraudulently conveyed to the judgment debtor's wife. And again, on the 4th day of December,

1880, levied the same execution upon the same land, and made and filed a notice of said levies with the register of deeds, as required by law; and, after making said levies, the defendant requested the plaintiff to proceed no further until the question of title could be settled. On the 18th day of October, 1881, the wife of the judgment debtor filed her bill against said sheriff to remove the cloud from the title to said land created by the said levies, and enjoined said defendant and said sheriff from making sale of the property under the execution; and said suit was pending and ready for hearing when this suit was brought.

The sheriff has, ever since said levies, been ready and willing to proceed and advertise and sell the said lands, but has been prevented by the aforesaid instructions of the defendant and his attorney and by the injunction.

The defendant, before the commencement of this suit, tendered and offered to pay said plaintiff his fees and charges claimed, to the amount of $3.40. This sum the plaintiff declined to receive, and claimed, in addition thereto, that he was entitled to percentage or poundage on the whole amount of the judgment, amounting to $135.58, and brings this suit therefor.

The only question in the case being whether the sheriff is entitled to the percentage claimed, at the circuit the plaintiff had judgment for the full amount claimed, and defendant brings error.

The common law gave no fees to sheriffs. *Mitchell v. Reynolds* 10 Mod. 139; *Hildreth v. Ellice* 1 Caines 192; *Campbell v. Cothran* 56 N. Y. 279; 2 Bac. Ab. "Fees" 463. No question of quantum meruit is therefore applicable to this subject. *Preston v. Bacon* 4 Conn. 471. The written law fixes the sheriff's compensation for his services in serving process and collecting on executions, and any charges made and collected in violation of law, in excess of amounts prescribed, are visited with heavy penalties. Our statutes upon this subject in this State will be found in 2 Comp. L. 1871, § 4685, on pages 2048, 2049, and 2050; 2051, 2110; and Pub. Acts of 1881, pp. 103, 104 and 105; *Burk v. Webb* 32 Mich. 182.

The statute relating more particularly to the question raised in this case reads as follows:

"for serving an attachment for the payment of money, or an execution for the payment of money, * * * for collecting the sum of two hundred and fifty dollars or less, two and one-half per cent., and for any sum more than two hundred and fifty dollars, one and one-quarter per cent.; advertising goods or chattels, lands or tenements, for sale, on any execution, if a sale be made, one dollar; and if the execution be stayed or settled after advertising and before sale, fifty cents. The fees allowed by law and paid to any printer by such sheriff for publishing an advertisement of the sale of real estate for not more than six weeks, and for publishing the postponement of any such sale, the expense shall be paid by the party requiring the same. The fees herein allowed for the service of an execution and for advertising therein, shall be collected by virtue of such execution, in the same manner as the sum therein directed to be levied."

The fees for services in making the levy, and for traveling in serving the execution, for making certificate of levy and copies thereof, and copy of the writ, and his fees for filing notice of levy with register of deeds, for drawing and executing the deed made on the sale, and making return of the execution, and for doing each and every thing necessary to be done or performed, are specially provided for in the statute. Pub. Acts 1881, pp. 103, 104 and 105.

It will be noticed that it was evidently the intention of the Legislature to reduce, as far as possible, the compensation for services of sheriffs to a known and absolute certainty. No prospective fees are contemplated or can be allowed. There is no question made but that the fees charged for actual service rendered in this case are right; but it is insisted there has been no such service as is contemplated by the statute, to entitle the sheriff to his percentage on the amount stated in the execution; that there has been no sale of the property; that the levy was on real estate and directed by the plaintiff's attorney; the sheriff could take no possession of the property, and he has incurred no risks; that it is only upon the satisfaction of the execution in this case,

or upon the amount actually realized, that the sheriff can charge his poundage, and the execution not having been satisfied, or any part thereof, the plaintiff can charge nothing.

The plaintiff claims that, after making his levy, he had an interest therein to the extent of the statutory percentage on the amount the execution directed him to levy, and that, having been prevented by defendant from completing the service of the execution by sale, he was entitled to receive his percentage.

The statute of 28 Eliz. c. 4, impliedly permitted the taking of fees by the sheriff for executing certain process. That statute declared he should take of no person for serving an execution upon the body or property, more or other consideration than is allowed by the statute,—that is to say, twelve pence for every twenty shillings when the sum exceedeth not one hundred pounds; sixpence for every twenty shillings over that he should so levy and return and deliver in execution, or take the body in execution for. It is evident from this language that the compensation in the statute mentioned was a commission upon the amount collected on the execution, or in case of a *ca. sa.* on the amount of the debt, on completing the service of the writ by taking the body of the defendant; and Grose, Justice, in *Woodgate v. Knatchbull* 2 Term 158, referring to this statute, says that it "was the intention of the legislature that the sheriff should be paid in proportion to the sum levied out of the sum levied, and that the sheriff should only levy what was really due." The term "levy" is here used in its strict sense. It includes both the seizure and the sale of the property taken upon the execution. 2 Bouv. Law Dict. 39; *Campbell v. Cothran* 56 N. Y. 279.

This statute did not make the fees to the sheriff a charge to the defendant, and the plaintiff had to pay them. By the statute (43 Geo. III. c. 46) the sheriff was allowed to levy his poundage in addition to the debt mentioned on the execution. "The principle of the statute was to measure the compensation to the sheriff for executing a fi. fa. by the amount collected upon it. If he collected nothing, no com-

pensation was due. This was the general principle." Based upon these two English statutes is founded the statute of the state of New York upon this subject. This statute, in New York, has frequently come under the consideration of the courts of that state and in some others; in New York it seems to be settled that when the sheriff proceeds to sale on a fi. fa. he is entitled only to his poundage on the sum actually made (*Campbell v. Cothran* supra 284; 1 Cai. 194;) and whenever the plaintiff interferes and prevents a sale by settlement or compromise, and a satisfaction of the judgment is obtained, he is entitled to poundage on the amount realized by the plaintiff. Allen on Sheriffs 355; *Hildreth v. Ellice* 1 Cai. 192; *Parsons v. Bowdoin* 17 Wend. 14; *Adams v. Hopkins* 5 Johns. 252; *Scott v. Shaw* 13 Johns. 378; *German-Amer. Bank v. Morris Run Coal Co.* 68 N. Y. 590; Crocker on Sheriffs sec. 1162.

To the same effect are the decisions under the English statute, and in several of the states. *Alchin v. Wells* 5 Term 471; *Bullen v. Ansley* 6 Esp. 111; Impey on Sheriffs 159; *Boswell v. Dingley* 4 Mass. 411; *Baldwin v. Shaw* 35 Vt. 273; *Preston v. Bacon* 4 Conn. 471. In none of these cases is it pretended that an allowance of poundage to the sheriff without a sale of the property is within the words or the letter of the statute (Hosmer, C. J. in *Preston v. Bacon* 4 Conn. 477); and all seek to justify the conclusion by placing it upon the ground that service has been performed, or risk incurred, which would be uncompensated unless in such cases the sheriff is allowed his poundage. See cases cited. And it is conceded that in many cases the application of the rule will work injustice; that the statute intends compensation for risk necessarily incurred, or for actual services rendered, and frequently the plaintiff will be compelled to pay when no risk or service is involved, to make compensation where no service has been rendered. I Caines 194.

It is the right and privilege of the plaintiff or his attorney, and always has been, to control the judgment and the collection thereof, and the action of the sheriff when re-

quired, and to aid him in making such collection. Allen on Sheriffs 357; Herman on Executions 210; *Jackson v. Anderson* 4 Wend. 480; *Gorham v. Gale* 7 Cow. 739; *Godfrey v. Gibbons* 22 Wend. 569. And while the rule contended for by plaintiff's counsel, and which finds recognition in some of the authorities above referred to, may be reasonable and proper where poundage is the only compensation the sheriff can receive for any or all of his services in making the money on the execution, certainly the reason for the rule entirely fails when the statute, as in this State, provides a specific compensation for each and every service and proceeding taken, (among which making sale of the property is one,) in making service of the execution.

Service of an execution includes every act and proceeding necessary to be taken by the sheriff to make the money, and includes a sale of the property when necessary. 1 Caines 194. It is for collecting the money with or without sale that the percentage or poundage is given, and when the execution is levied upon real estate only, as in this case, the sheriff has no interest in it beyond his fees for making the levy until the money is collected or sale is made, and then he is entitled to his poundage on the amount collected, or for which it is sold. In such case, until sale is made, the sheriff incurs no risk or responsibility; he is not entitled to the possession of the property, and is constantly subject to the direction of the plaintiff in the execution as to further service in making the collection. 4 Wend. 480 supra.

In the present case no sale of the property was made, neither was any money collected; the plaintiff had only made his levy on real estate which had been pointed out by the defendant's attorney. No extra labor or other service had been performed by the sheriff than making the levy. The amount tendered was sufficient.

The only question in this case is, do the facts found support the judgment? The finding of facts must be regarded as a special verdict; they do not support the judgment rendered in the court below. Error was properly assigned

upon this record, and plaintiff's objection to a review here is not well taken. *Trudo v. Anderson* 10 Mich. 357; *Amboy, Lansing & Traverse Bay R. R. Co. v. Byerly* 13 Mich. 439.

The judgment must be reversed with costs of both courts and a new judgment entered on the finding for the amount tendered.

The other Justices concurred.

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SARAH J. ATWOOD v. WILLIAM FROST.

Executor's sale of devised lands.

An executor cannot be empowered by the probate court to sell devised land of which the devisee has taken possession, for the purpose of satisfying debts of the estate. Comp. L. §§ 4353-7.

Error to Kalamazoo. (Mills, J.) June 22.—October 3.

EJECTMENT. Plaintiff brings error. Reversed.

Dallas Boudeman for appellant.

Edwards & Stewart for appellee.

COOLEY, J. Ejectment. The plaintiff claims title to the land through Sarah J. Dibol to whom it was devised by Benjamin Atwood, the former owner. Defendant claims the land under an executor's sale made for the payment of Atwood's debts. The description in the declaration is "twenty-four acres off the south end of the west forty acres south of the highway, of the south-east quarter of section eleven, township four south of range nine west."

From the finding of facts it appears that Benjamin Atwood died April 20, 1874, and that by his will he devised the forty acres from which the land described in the declaration is taken, to Sarah J. Dibol. The will was duly probated

May 22, 1874, and letters testamentary issued to Sylvester Fredenburg, named executor therein. December 15, 1879, the probate court made an order on the petition of the executor licensing him to sell seven parcels of land belonging to the estate, and situate in the counties of Kalamazoo and Allegan, one of which was described as "the west half of the south-east quarter of section eleven, town four south range nine west, Kalamazoo county, Michigan, except eighteen acres out of the north-west corner thereof." This description includes the land now in controversy. Under this license the executor on May 1, 1880, sold one of the parcels of land described in the license for $2500, and he had previously sold two others for $575. Neither of these was the parcel last above described. May 17, 1880, the executor petitioned for the final settlement of his accounts, and an order was made for hearing on this petition June 14th. The final account does not appear to have been filed until June 18th, and was not then settled. On July 3, 1880, the executor filed in the probate court a petition in which he recited the sales made by him as aforesaid, and stated that the sums received were insufficient for the satisfaction of the demands against the estate, of which $2232.27 then remained unpaid, and praying that the devisees and legatees who had received property from the estate under the will be decreed to pay the same in proportion to the value of the property received by them respectively. The court granted the prayer of the petition and made an order of contribution in which the sum assigned to be paid by Sarah J. Dibol was set at $378, the land devised to her being valued at $1200. Payment was ordered to be made within twenty days, and in default, the executor was authorized to proceed and make sale under the license granted the preceding December. This order of contribution was made on due notice to the parties concerned.

November 1, 1880, the executor filed a petition to correct the assessment made upon the devisees and legatees. In this petition the debts were represented to be $2582.27 instead of the sum before reported. The probate court

granted the prayer of this petition, and increased Mrs. Dibol's assessment to $431.57. It does not appear that any notice of this action was ordered or was received.

Mrs. Dibol did not pay the assessment made upon her, and on December 11, 1880, the executor sold the land devised to her, at public auction, and it was struck off to defendant as purchaser for the sum of $445. The sale was immediately reported to and confirmed by the probate court, and a deed given to carry it into effect. Plaintiff, who had previously become owner of the Dibol title, was then in possession, but defendant obtained possession afterwards and this suit was instituted.

In the circuit court the case was made to turn upon the validity of the probate sale, and that court held it to be valid. It will be noticed that it was made under the license of December 15, 1879. The sale took place more than six years after letters testamentary were issued, and it is insisted was void for that reason. Public Acts 1877 p. 126; Pub. Acts 1879 p. 120. But it is also claimed that it was void because made to enforce a decree of contribution; the statute not contemplating that such a decree shall be enforced by such a sale. This last objection to the sale appears to us conclusive.

The statute provides that the devisees and legatees who shall, with the consent of the executor or otherwise, have possession of the estate given to them by the will before their liability to contribute towards the debts, etc., is determined, shall hold the same subject to that liability. Comp. L. §§ 4353–4356. It further provides that "the probate court may, by decree for that purpose, settle the amount of the several liabilities, as provided in the preceding sections, and decree how much, and in what manner, each person shall contribute, and may issue execution as circumstances may require; and the claimant may also have a remedy in any proper action or complaint in law or equity." Comp. L. § 4357.

The action of the executor and of the probate court assumed that the land in dispute had been delivered into the

possession of Mrs. Dibol with the executor's consent. That being so the proceedings to compel her to contribute must have been taken under this statute. It was never contemplated that the executor might still treat the property as assets to be disposed of in the ordinary way. If he could sell lands as he did in this instance, he might retake personalty from a legatee and dispose of it at discretion as he might have done if it had never passed out of his hands. But surely this would have been incompetent.

The method of procedure in these cases involves substantial rights. If the probate court had ordered execution against Mrs. Dibol, and this land had been seized to satisfy the assessment made against her, there would have been a year's redemption; but by this summary process property to the value of $1200 is taken for less than forty per centum of that sum, and no redemption permitted. The defect in the proceedings is therefore of the most substantial character, and could not be overlooked even if it did not go to the jurisdiction, as we think it did.

Other objections made to the sale become immaterial.

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

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

ABRAHAM A. VAN WORMER v. WILLARD CRANE ET AL.

Covenant to keep in repair—Damages by the elements.

"Damages by the elements," which are ordinarily excepted from a lessee's covenant to keep in repair, cover destruction by fire occurring without fault or negligence in the lessee.

Error to Muskegon. (Russell, J.) June 22.—Oct. 3.

ASSUMPSIT. Plaintiff brings error. Affirmed.

McLaughlin, Delano & Bunker for appellant. If a lessee covenants to repair and keep the premises in repair during the term, and redeliver without reservation in his covenant, he is bound to rebuild them if burnt down by accident, negligence or otherwise: Wood's L. & T. 599 § 373; *Bullock v. Dommitt* 6 Term 650; *Earl of Chesterfield v. Duke of Bolton* Comyn 627; *Beach v. Crain* 2 N. Y. 86; *Phillips v. Stevens* 16 Mass. 238; *Pym v. Blackburn* 3 Ves. Jr. 34; *Monk v. Cooper* 2 Strange 763; *Hallett v. Wylie* 3 Johns. 44; *Fowler v. Bott* 6 Mass. 62; *McIntosh v. Lown* 49 Barb. 550; Chitty on Contracts (11th Am. ed.) 468; *Leavitt v. Fletcher* 10 Allen 119; and "make good any injury which human power can remedy, even if caused by storm, flood, fire, inevitable accident or the act of a stranger:" *Tilden v. Tilden* 13 Gray 103; *Ely v. Ely* 80 Ill. 532; *Hoy v. Holt* 91 Penn. St. 88: 36 Am. Rep. 659; *Linn v. Ross* 10 Ohio 412; *Forward v. Pittard* 1 Term 27; *Polack v. Pioche* 35 Cal. 416; *Kling v. Dress* 5 Rob. (N. Y.) 521; accidental fire is not included in the meaning of the term "Act of God:" Story on Bailments §§ 25, 489, 507, 511, 528; *Forward v. Pittard* 1 Term 33; 2 Pars. on Cont. (5th ed.) 159, 161; *Miller v. Steam Nav. Co.* 10 N. Y. 431; *Merchants' Despatch Trans. Co. v. Kahn* 76 Ill. 520; *Hyde v. Navigation Co. etc.* 5 Term 389; Angell on Carriers § 156; *Moore v. Mich. Cent. R. R. Co.* 3 Mich. 23; *McHenry v. Railroad Co.* 4 Harr. (Del.) 448; Edwards on Bailments § 543; *Merchants' Despatch Co. v. Smith* 76 Ill. 542; Hutchinson on Carriers §§ 182, 184; *Chamberlain v. Western Trans. Co.* 44 N. Y. 305; *Gilmore v. Carman* 40 Am. Dec. 96; *Friend v. Woods* 6 Gratt. (Va.) 189.

Keating & Dickerman for appellees.

COOLEY, J. Action of covenant broken. The covenant was contained in a lease of land upon which was a planing-mill and box factory, and by it the lessees undertook "that they will, at their own expense, during the continuance of the lease, keep the said premises and every part thereof in as good repair, and at the expiration of the term

yield and deliver up the same in like condition as when taken, reasonable use and wear thereof and damages by the elements excepted." The breach assigned was that the planing-mill, etc., was "wholly destroyed or consumed by fire, which said fire was not caused by the elements," and that defendants neglect and refuse to rebuild.

On the trial when the lease was offered in evidence the defendants objected that the destruction of the buildings by fire and the failure to rebuild constituted no breach of the covenant set out; and the circuit judge so ruled. This ruling necessitated a judgment for the defendants, which the plaintiff brings to this Court by writ of error.

The plaintiff relies upon a line of cases in which it has been held that if one covenants unconditionally to repair, or to surrender the premises in good repair, he is liable for the destruction of buildings not rebuilt by him, though it may have occurred by fire or other accident. *Paradine v. Jane* Aleyn 26; *Chesterfield v. Bolton* Com. 627; *Walton v. Waterhouse* 2 Saund. 422*a*, note; *Bullock v. Dommitt* 6 Term 650; *Phillips v. Stevens* 16 Mass. 238; *Tilden v. Tilden* 13 Gray 103; *Beach v. Crain* 2 N. Y. 86; *Ross v. Overton* 3 Call 309; s. c. 2 Am. Dec. 552; *Ely v. Ely* 80 Ill. 532; *Hoy v. Holt* 91 Penn. St. 88: s. c. 36 Am. Rep. 659. But this is not a case of a covenant unconditionally to repair, for the lessees have taken care to make an exception which was probably supposed to be important. And the question now is whether the injury which has occurred is an injury within the intent of the exception.

"Damages by the elements" must be conceded to be a somewhat uncertain expression. Strictly speaking, the elements are the ultimate, undecomposable parts which unite to form anything; as the gases which form air and water are the elements respectively of those substances. But the term is used in many other senses, and the definitions of lexicographers would be of little service to us in this case.

Anciently it was supposed there were four elements of material things—earth, air, fire and water; and when it came to be known that this classification had no scientific

basis, the term had found a place in common speech which it still retains. Injuries to buildings by wind, rain, frosts and heat are spoken of as injuries by the elements, and all the ordinary decay from natural causes is classed in the same category. Probably no one would make any question respecting this.

The injury in this case was caused by fire. No fault in connection with it is charged upon the defendants, and it seems to be taken for granted on both sides that the fire was accidental. We may therefore assume that the fire was one which occurred without traceable fault, and that it is to be classed as a calamity for which no one is responsible except as he may have expressly undertaken to be so.

If a flood had destroyed this building the defendants would not be held responsible, because it would have been said the damage is of a sort that must be referred to the elements within the understanding of the parties in entering into this covenant. If a tornado had destroyed it, the same would have been said. We cannot suppose the parties intended to except natural and ordinary decay from wind and rain, and not the more sudden and grievous calamities proceeding from the same sources. The general expression "damages by the elements" will cover all such injuries if it will cover any of them. But an injury by fire is as much an injury by the elements as an injury by wind or flood, and we should be at a loss for any ground on which to distinguish it under this covenant.

We have no doubt the parties intended by this exception to include all damages resulting from fire, as much as those attributable to air or water, unless traceable to the agency of man. The purpose was to excuse the lessees in cases where the damages from the causes mentioned had happened without their fault, and a popular phrase was made use of to express this intent, instead of specifying the particular injuries which were in mind. In the popular acceptation of the phrase, injuries by the elements are such injuries as result from the operation of the most common destructive

forces of nature against which buildings need to be protected; and of these fire is the chief.

This being our conclusion, the judgment must be held correct, and it will be affirmed with costs.

GRAVES, C. J. and CAMPBELL, J. concurred.

SHERWOOD, J. (concurring). In this case the plaintiff relies entirely upon the construction of the covenant to repair contained in the lease, for recovery. The covenant is as follows:

"That parties of the second part will, at their own expense, during the continuance of this lease, keep the said premises, and every part thereof, in as good repair, and at the expiration of the term yield and deliver up the same in like condition as when taken, reasonable use and wear thereof and damages by the elements excepted."

If the plaintiff's declaration states a cause of action, it is difficult to see why the testimony received against the objection of defendants' counsel was not relevant and material. The question whether the declaration is sufficient or not, should have been raised by demurrer; but as the case is presented we must consider it on the exceptions taken. This practice, however, as has been frequently observed, is not to be commended, and should be abandoned. Counsel have endeavored to apply to the case the distinction made by the authorities between the liability of an assignee and the sub-lessee of a term, in order to determine who is entitled to the damages claimed, if any are recovered in the case, thereby insisting that Van Wormer is not the proper party plaintiff. We do not deem it necessary to discuss that subject. It is sufficient to say upon this point that the testimony offered shows that defendants, if liable at all to the plaintiff, are so liable as his lessees.

The only question, therefore, is, what is the defendants' liability under the covenant to repair, above recited, contained in the lease; what was the scope of the obligation assumed? Did it extend to buildings accidentally destroyed

by fire, without fault or neglect of the tenants? And in such case did it require them to rebuild?

Under the civil law, the landlord was bound to repair or rebuild in case of injury or of destruction of buildings by unavoidable calamity, as tempests, fire or enemies (4 Kent's Com. 110), and the tenant was not liable.

Independent of any contract or express agreement, at common law a tenant for years must treat the premises in such a manner that no substantial injury shall be done them through any negligent or willful misconduct on his part, and must make fair and tenantable repairs; such as putting fences and buildings in order, by putting up or relaying the one when necessary, and replacing doors or windows broken in the other during his occupation or term; but he is never bound to rebuild the premises which have become ruinous or accidentally destroyed by fire; neither is he liable for mere wear and tear of the premises, nor bound to replace any portion thereof worn out by time. 4 Kent's Com. 110 note *d*; *Auworth v. Johnson* 5 C. & P. 239: 3 Bl. Com. 228; 2 Cooley's Bl. 515; *Leach v. Thomas* 7 C. & P. 327; *Cheetham v. Hampson* 4 Term 318; *Stanley v. Agnew* 12 M. & W. 827; *Thomson v. Amey* 12 Ad. & El. 476; Tayl. Landl. & T. 234; Wood's Landl. & Ten. 582.

The bare relation of landlord and tenant is a sufficient consideration for an implied promise to treat the premises occupied by him in a good and proper manner, according to the custom of the country or place in which they are located, and to make the ordinary repairs thereto, not new or permanent, of course, but such as will keep them from going to decay and dilapidation, and which reasonable care will dictate (Tayl. Landl. & Ten. 235; *Brown v. Crump* 1 Mar. 567: 6 Taunt. 300; *Powley v. Walker* 5 Term 373); and the general covenant to repair extends no further. *Mantz v. Goring* 4 Bing. N. C. 451; Tayl. Landl. & Ten 247; Wood's Landl. & Ten. 591; *Gutteridge v. Munyard* [7 C. & P. 129] 1 Moody & Rob. 334.

If the landlord wishes to impose upon the tenant the duty of making repairs beyond these he can only do so by

express covenant in his lease to that effect. The tenant may bind himself to any extent he pleases by express covenants in his lease. *Beach v. Crain* 2 N. Y. 86; *Digby v. Atkinson* 4; Camp. 275; *Cline v. Black*, 4 McCord 431. And it is insisted in this case that the defendants covenanted to the extent claimed by the plaintiff, and that they were liable to rebuild or pay the amount required for that purpose.

In construing the covenants contained in a lease the cardinal rule is that the intention of the parties shall govern; and the courts will not extend or enlarge the obligation of the lessee beyond the plain meaning of the language used and the intention existing at the time it was made; and if there is not an express stipulation to the effect to restore buildings and other property leased, destroyed by casualties from fire or water, without fault or neglect on the part of the tenant, the loss must fall upon the landlord or reversioner. *Phillips v. Stevens* 16 Mass. 238; Wood's Landl. & Ten. 602.

The general obligation of the lessee to repair and his covenants to do so are not to be enlarged beyond their fair intent, and the tenant should not be held responsible for any damages in case of injury or destruction not anticipated, contemplated or intended when the lease was made, and the usual and commonly accepted meaning of the words used in the ordinary transactions of life should be given to the language used in the covenant.

Applying these rules of construction to the covenant contained in this lease, what does the word "elements" mean as there used? What did the parties understand it to mean when they placed it in the lease? It is claimed by the plaintiff's counsel that it does not include accidental fire or a burning by fire connected with any human agency, but burning caused by lightning or arising from some action of the elements alone; that the legal signification of the word as used in this lease is synonymous with the phrase "act of God;" that the word "elements," as here used, means earth, air, fire and water; but to enable the defendants to claim the benefit of the exception contained in the covenant to repair, such injury must result from the action of the ele-

ments entirely; that the lightning must kindle the fire; the earth must be convulsed; the air must blow in tempest or tornado; the water must come in water-spouts, or from sudden irruption of the sea breaking by its own force over the barriers.

We are not able to agree with the learned counsel in this construction. It is contrary to the rule laid down by this court in *Harlow v. Lake Superior Iron Co.* 36 Mich. 105. It was there well stated by Mr. Justice Marston in construing the lease in that case, that "it would not only be unjust, but contrary to the well-settled rules of construction, to dispose of this case upon any narrow or technical view, based upon any particular word or clause in the lease."

In this case a large and valuable portion of the property rented consisted of a building containing a large amount of machinery, and, when used, large amounts of combustible material of various kinds were constantly accumulating, thereby greatly increasing the risk and chances of destruction by accidental fires. In all probability the danger of destruction from such fire would be a hundred and perhaps a thousand times greater than from fire by lightning, and still we are asked to believe that the defendants, when they made this lease, were willing to assume the greater risk, and were content to be exempt from damages only by lightning. We cannot accept this view as either reasonable or proper.

It is true, the defendants might have thus covenanted had they chosen to do so; and had they done so in unmistakable language, however unreasonable it might appear to us, it would be our duty to uphold the contract as the parties made it, so long as it contained no unlawful promise. But that the ordinary meaning of the word "elements" used here was intended by the parties is too clear to admit of any other construction. Fire is one of the elements, and of all the most dangerous, and whether it comes from spontaneous combustion, from the crater of the volcano, or from the clouds, it is still the same element, recognized as such in all the English lexicons, and we can see no reason

for giving the word a different or more limited meaning in legal instruments; and we have no doubt but that accidental fire, without fault or neglect of defendants, was intended by the parties to be included in the clause containing the exception.

Counsel have called our attention to the case of *Polack v. Pioche* 35 Cal. 416, where the exception contained in a covenant to repair was similar to the one in this case. In that case "damages by the elements or acts of Providence" were excepted. There, an embankment of a natural reservoir which had been raised by the people in the vicinity was filled with water by unusual rains, and the bank was broken by a stranger, and by reason thereof the water flowed over sundry premises to and upon those demised to the defendant, and did a large amount of damage. The tenant refused to repair, and the landlord brought suit and was allowed to recover six thousand dollars. In that case the court holds: "Damages by the acts of God, and damages by the action of the elements, are convertible expressions in the law of leases," meaning the same thing.

I have examined the case carefully and I am not satisfied with the construction given to the exception there under consideration, or with the reasoning relied upon to support the rule adopted by the court. Mr. Justice Sanderson, in delivering the opinion of the court, said: "The elements are the means by which God acts, and we are unable to perceive why damages by the elements and damages by the acts of God are not convertible expressions." It is true God uses all the elements in his own way, and while so using them, if damages ensue thereby to the premises of the plaintiff, it is conceded such damages would fall within the exception and the tenant would not be liable. Now, why is this? Because the injurious act was one over which the tenant had no control and could not prevent. God not only himself uses these elements, but also permits man to use them in the most ordinary affairs of life. In fact, their use by man in the economy of the Great Creator is made an absolute necessity in preserving human existence. The

dangerous character of some of the elements renders it necessary in their use to observe great care and caution, and when, in any given case, such care has been exercised and the demised property has been destroyed by fire, the damage is by the element, and although human agency may have been used in some remote manner in producing the fire which finally caused the injury, it is, no less, damage by the elements; and if the tenant had no knowledge of, or control over, the agency or physical cause producing the fire, it is difficult to see why he should be liable in the one case any more than in the other; or why such case is not within the exception contained in the covenant as well as the other.

In *Polack v. Pioche*, as the case is stated, had not the embankment creating the reservoir been injured through some human agency, the defendant's case would have fallen within the exception. The defendant in that case, however, had no more control or power over the human agency setting the destructive element in motion than he would have had over the operations of nature producing the same result. Then why should the tenant be held liable in the one case more than in the other? He is without fault in both cases. The reason for his non-liability is as strong in the one case as in the other, and I think the rule should be the same. I think injury to the demised premises, without fault or neglect of the tenant, by fire purely accidental or unknown as to cause, should fall within the exception contained in the covenant in this case.

The covenant is in general use in this State, and has been for many years, and I think injuries accruing to demised property, under the circumstances contained in this record, are understood by business men, conveyancers and the profession generally, to be within the exception. A contrary holding would be a great surprise to our people, and in many cases might deprive parties, not only of a competency, but of a fortune, when it was not their intention in making their lease even to place their property in jeopardy.

It is certainly our duty in our holding to avoid any such

result, unless clearly authorized by the contract of the parties. The liability of the tenant for personal property, leased in the manner this was, I do not think is that of a common carrier. These tenants were not insurers of this property, but bailees for hire, and could only be held to ordinary care and prudence. There may be some question whether the personal property would be included in the covenant to repair. It is not, however, necessary in this case to decide that point now.

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

CAMPBELL, J. concurred.

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ELLEN GAVIGAN v. DOUGLASS SCOTT.

Replevin for property taken on execution—Witness.

A wife replevied, as her own, property that had been seized on execution against her husband, and on the trial called her husband to show that it belonged to her. *Held* proper to cross-examine him as to his own use of the property, and of its proceeds, and also as to his business, what he did with his earnings, and where his wife got her money to pay for the property in suit.

In replevin by a wife for property claimed by her, but seized on execution against her husband, there was evidence that the husband had given a chattel mortgage on it; but, being called as a witness for his wife, he testified that he did not remember doing so. *Held* proper to put the mortgage in evidence.

Where defendant in replevin justifies under a writ of execution, the record of the judgment and proceedings on which it issued are receivable in evidence.

Defendant's counsel has a right to comment to the jury upon the plaintiff's omission to produce important witnesses who are within reach.

The mere fact that a husband has given a chattel mortgage on his wife's property does not tend to show that he owned it, if there is no evidence of his wife's consent or knowledge therein, or that it was given for her.

Error to Alpena. (Emerick, J.) June 6.—October 10.

REPLEVIN. Plaintiff brings error. Reversed.

J. D. Turnbull for appellant. As between man and wife, use and possession of property is not evidence of ownership in the husband: *White v. Zane* 10 Mich. 333; *Hill v. Chambers* 30 Mich. 422; *Davis v. Zimmerman* 40 Mich. 24.

J. B. Clayberg for appellee. Possession and use of property and personal control over it are more convincing facts, sometimes, than testimony of interested persons as to ownership: *Comstock v. Smith* 20 Mich. 344; and may justify a verdict against such testimony: *Molitor v. Robinson* 40 Mich. 200; a wide range is allowable in cross-examination in such cases: *Campau v. Dewey* 9 Mich. 381; *Dann v. Cudney* 13 Mich. 239; *Thompson v. Richards* 14 Mich. 172; *D. & M. R. R. v. Van Steinburg* 17 Mich. 99; *O'Donnell v. Segar* 25 Mich. 367; *Wilson v. Wagar* 26 Mich. 452; *Campau v. Traub* 27 Mich. 215; *Hamilton v. People* 29 Mich. 173; *Haynes v. Ledyard* 33 Mich. 319; *N. Y. Iron Mine v. Negaunee Bank* 39 Mich. 644.

SHERWOOD, J. The plaintiff in this case is the wife of John Gavigan, against whom the defendant, as sheriff of Alpena county, held an execution in 1882 for service, requiring him to collect thereon about the sum of four hundred dollars, and which the defendant levied upon a threshing-machine and horse-power as the property of the defendant, and took the same into his possession for the purpose of making sale thereof under the execution. Thereupon the plaintiff laid claim to said property as hers, and demanded possession thereof. Defendant refused to give it up, and plaintiff brought her suit in replevin therefor. The defendant had judgment at the circuit, and the plaintiff brings error.

It is in evidence, and not controverted, that the plaintiff ever since her marriage, which was in 1869, has carried on various kinds of business; that what property her husband had when he married he gave to her, and that she has always

carried on the business, done it in her own name,—her husband, whenever doing any of the business, acting as her agent; that at the time the transaction occurred out of which this suit arose, she was keeping hotel,—her husband worked and made purchases for her when necessary in carrying on her business, acting as her agent; that the real estate they occupied was owned by her and she held the title thereto; that the plaintiff's husband made the purchase of the threshing-machine at Battle Creek, she claiming that it was for her, and that she signed the notes given for the purchase money, and obtained one Albert Pack to endorse the notes with her; that she ran the hotel and had her husband run the threshing-machine; that she had the benefit of her husband's labor in carrying on her business and acquiring property, and in all her dealings with others the accounts on both sides were kept in her name, and that defendant was informed at the time he made the levy that plaintiff owned the property.

It was claimed by the defendant's counsel that the judgment sought to be collected, and upon which said execution issued, was rendered in an action of trespass for an assault and battery committed by said John Gavigan upon the plaintiff therein named, and the property levied upon was that of the defendant in execution and not that of Mrs. Gavigan.

The trial was had before a jury, and the husband was sworn and examined by the plaintiff as a witness, and testified to the purchase and ownership of the machine by the plaintiff, and upon the cross-examination the defendant attempted to show that what he had testified to was not correct, and that the witness purchased and owned the property, and for that purpose asked the witness six questions, which were objected to as immaterial. The first, second and fourth relate to the witness' use of the property and what he did with its proceeds; the third, fifth and sixth inquire after the witness' business, what he did with his earnings, and where the plaintiff got her money to pay for the property. Of course, if they were proper for any pur-

pose, the objection taken was untenable, and we think they were all proper as tending to discredit the witness, or to show ownership of the property in him.

The record shows that some time, either at or after the time of the purchase of the machine, a chattel mortgage was given upon the property by John Gavigan to secure the payment of the notes given for the machine, and bearing same date as the notes, and filed two days thereafter. This mortgage was offered in evidence by defendant's counsel, and was received, against plaintiff's objection that it was immaterial. There was no error in this. Plaintiff had placed her husband upon the stand as her witness, and he testified that he did not remember giving such a mortgage. The evidence was proper to test his recollection as well as credibility. The record of the judgment and proceedings whereon the execution was issued were properly received in evidence. The defendant was an officer, and sought to justify under his writ. Defendant's counsel had the right to notice, in his remarks to the jury, that important witnesses for the plaintiff, who were within reach, were not produced or sworn in her behalf. It was a circumstance in the case, and the ruling complained of in this regard does not fall within any of the decisions heretofore made by this Court. *Knowles v. People* 15 Mich. 413; *Anderson v. Russell* 34 Mich. 110.

There was but little testimony given in the case, and mostly by John Gavigan; and there was no attempt to impeach or contradict him, except by the introduction of the mortgage. Only Mr. Pack's book-keeper, and the defendant were sworn on the trial, beside Mr. Gavigan, and their testimony was strongly corroborative of his; in fact, the book-keeper says the plaintiff bought the machine, and there is no evidence showing, or tending to show, that she ever transferred or conveyed it in any manner to Mr. Gavigan.

The court, in giving his charge to the jury, told them in substance, among other things, that the mortgage was competent testimony as tending to show ownership of the property in the husband. We think, as the case went to the

jury, this was error. The instruction would have been correct had there been any evidence in the case tending to show that the plaintiff consented to the giving of the mortgage, or that it was given for her by him, or that she had knowledge of the giving of the same, but without proof of either of these facts it was improperly received for the purpose stated.

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

GRAVES, C. J. and CAMPBELL, J. concurred.

COOLEY, J. I do not understand that the judge's instruction submitted the evidence respecting the chattel mortgage to the jury as evidence tending to show title in John Gavigan. If I did, I should agree it was erroneous.

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EDMUND HALL v. THE TITTABAWASSEE BOOM COMPANY.

Boom-companies—Lien on logs—Use of streams.

A boom company's statutory lien for running logs is acquired if the work is done by one who has contracted with the company to do it as the company's agent, and who is to be paid a gross sum for the job.

Individuals driving their own logs have the same rights as log-driving companies in streams that are navigable for that purpose; but if an individual practically concedes the right of a company to regulate the time of letting his logs into the stream, he waives any objection to its customary action in that respect, and if he is not prepared, when his logs enter the stream, to take care of them, he cannot complain if they become intermingled with the logs of the company and subject to its control, which it must exercise, however, in its own interest and in that of the owners of logs in its keeping.

Boom companies have a lien for their services in breaking jams and driving logs whose owners have not put on a sufficient force to do it, not only under the Boom statute itself (Comp. L. § 2793) but under the General Act relating to log-driving. Act 83 of 1879.

Where the logs of an individual owner have become intermingled with

those in the charge of a boom-company without his consent, but without the fault of the company, the latter acquires a lien for its services in driving them which it does not waive by refusing to deliver them to the owner on demand, unless he tenders not only a reasonable compensation for the services, but enough to cover the cost of separating his logs from the rest.

One who seeks to break a lien on the ground that the demand is excessive should tender what he himself considers reasonable.

A lien-holder cannot be said to refuse to state the amount he claims when he merely refuses to vary from schedule rates of which both parties have knowledge.

Where a log-owner demands all his logs from a boom-company which claims a lien for its services in driving them, the latter does not lose its lien by detaining more of the logs than is necessary to preserve it, though such a detention may possibly give ground for an action.

In an action involving the existence of a lien for services, a full showing should be had as to the items that go to make up the claim, and full cross-examination should be permitted. The reasonableness of the claim is for the jury, and they cannot be instructed as to their conclusions thereon.

One who holds property under claim of a lien is under no obligation to take it to a certain point, at the owner's request, merely to enable the owner to replevy it.

In replevin for logs on which defendant claims a lien for driving them and for storage, the jury cannot be instructed that the charge for storage should be proportioned to the length of time they were held, as this involves considerations of fact, and it might be unjust that an owner who should be favored with an early delivery of his property should also be favored with the smaller charges.

In replevin for logs on which a boom-company claims a lien for labor in running them down a particular stream, it is for the plaintiff to show that the company's articles of association did not authorize it to operate in that stream if it did in fact operate there.

Error to Saginaw. (Gage, J.) June 6–7.—October 10.

REPLEVIN. Plaintiff brings error. Affirmed.

Edget & Brooks for appellant. A log-owner's right to control his own logs in the stream cannot be interfered with: *Atty. Gen. v. Evart Booming Co.* 34 Mich. 462; as to the liability for labor in running logs under contract, see *Johnson v. Cranage* 45 Mich. 18; *Edson v. Gates* 44 Mich.

253; a boom company has no authority to interfere with jams of logs not under its control, and not about its booms: *Ames v. Port Huron Booming Co.* 11 Mich. 139.

Hanchett & Stark and *John Moore* for appellee. Charges for running logs include money paid to laborers, cost of supplies and use of property: *Pere Marquette Boom Co. v. Adams* 44 Mich. 403; a lien is given by statute on every thousand feet of logs run for the work done thereon: *Mann v. White River Booming Co.* 46 Mich. 39; *Chadwick v. Broadwell* 27 Mich. 12.

Cooley, J. The defendant is a corporation organized under "An act to authorize the formation of corporations for the running, booming and rafting of logs," approved February 4, 1864. The first thirteen sections of the act contain no provisions important to the present controversy. The fourteenth section has been several times amended, the last time being in 1881,—Public Acts, p. 237,—and now reads as follows:

"(2788.) Sec. 14. Every such corporation shall, by their corporate name, have power to acquire, use and hold all such real and personal estate, by lease or purchase, as shall be necessary for the purpose of carrying on the business of such corporation, with the full right of selling and disposing thereof, when not further needed for the use of such corporation: provided, that their real estate shall not exceed fifteen thousand acres. They shall have power and the right, in any of the navigable waters of this State, named in their articles of association, to construct, use and maintain all necessary booms for the business of such corporation: provided, always, that they shall first have obtained from the owner or owners of the shores along which, or in front of which, they desire to construct such boom or booms, either by lease or purchase, their permission to erect and maintain such boom or booms in front of his or their lands: and provided further, that such boom or booms shall be so constructed, and so far as practicable used, as to allow the free passage of boats, vessels, crafts, logs, timber, lumber or other floatables along such waters. They shall have power to make all necessary contracts for the driving, booming, rafting and running logs, lumber, timber and other floatables. They shall have power to carry on the

business of driving, booming, rafting and running logs, timber, lumber or other floatables, or either of them, as they may from time to time determine; and for the use of said boom or booms in the care and custody of logs, timber, lumber, and other floatables, in all cases where no rate is fixed by contract, to charge and collect a uniform and reasonable sum for boomage, and for such boomage, and for driving, rafting, or running of logs, timber, lumber and other floatables, such corporation shall have a lien on the logs, timber or other floatables driven, boomed, rafted or run; and such corporation shall be entitled to retain the possession of such logs, timber, lumber, or other floatables, or so much thereof as may be necessary to satisfy the amount of such boomage and reasonable charges for driving, rafting or running of logs, timber, lumber and other floatables, and all expenses for taking care of the same, until the same shall be determined, satisfied and paid in the manner hereinafter prescribed; and whenever any such logs, timber, lumber or other floatables shall be delivered by any duly authorized corporation to any other duly authorized corporation, for transportation or delivery at its proper destination, such lien shall remain a lien upon such logs, timber, lumber or other floatables, for the benefit of such [said] first corporation, until the same shall have reached its proper destination; and said first corporation shall be deemed not to have lost its lien on the said logs, timber, lumber and other floatables, and shall have the power to take and retain possession of the same, in common with any other party having a subsequently acquired lien thereon, or so much of the same as may be necessary to satisfy the amount of such boomage, and reasonable charges for driving, rafting or running of logs, timber, lumber or other floatables, until the same shall be determined, satisfied and paid in the manner hereinafter prescribed; and all charges for running, driving, booming, towing or rafting of saw-logs and lumber by such corporation shall be by the thousand feet, board measure." [How. St. § 3917.]

The seventeenth and eighteenth sections provide for the enforcement of demands in favor of the corporations by suit; and the nineteenth is as follows, (Comp. L. § 2793:)

"Sec. 19. If any person or persons shall put, or cause to be put, into any navigable river, creek or stream in this State, or shall have in any such river, creek or stream, any logs, lumber or timber, for any purpose, and shall not make

adequate provision, and put on sufficient force for driving or running the same, or for breaking jams of such logs, timber or lumber, in or upon such river, creek or stream, at the head of or along the side of such boom, or shall, for want of adequate provision, or want of sufficient force, allow such logs, timber or lumber to jam or accumulate at the head of such boom or booms, or along the side thereof, thereby obstructing the navigation of such river, creek or stream, it shall be lawful for such corporation, at the head of or along the side of whose boom or booms such jam or accumulation of logs, timber or lumber shall form, to cause such jams to be broken, and such logs, timber or lumber to be driven, boomed, rafted or run, at the expense of the person or persons owning such logs, timber or lumber; and such owner shall be liable to such corporation for the breaking of such jams, and the driving, booming, rafting of said logs, timber and lumber, and the cost and expense thereof; and such corporation shall have a lien on such logs, timber or lumber, for breaking such jams, and for driving, booming, rafting or running such logs, timber and lumber, and the cost and expense thereof, and shall be entitled to take and retain possession of such logs, timber or lumber, or so much thereof as may be necessary to satisfy the amount of such charges for breaking such jams, and for driving, booming, rafting and running of said logs, timber or lumber, and expenses and costs thereon, until the same shall be satisfied and paid; and such corporation shall proceed to collect such charges, costs and expenses, in the same manner, in all respects, as provided in sections seventeen and eighteen of this act." [How. St. § 3922.]

The defendant has for several years been engaged in the business of running, driving and booming logs on the Tittabawassee and its branches, and was so engaged in the season of 1882. There was at that time in force an act, constituting chapter 43 of the Compiled Laws, the first section of which, as amended in 1879,—Public Acts, p. 83—here given:

"Section 1. The people of the State of Michigan enact that section one of an act entitled 'An act to provide for the floating of logs and timber in [the] streams of this State,' approved March sixteenth, eighteen hundred and sixty-one, be so amended as to read as follows: That if any person or persons shall put, or cause to be put, into any lake, river, creek or stream of this State, any logs, timber or lumber

for the purpose of floating the same to the place of manufacture or market, and shall not make adequate provisions and put on sufficient force for breaking jams of such logs, timber or lumber in or upon such lake, river, creek or stream, or for running or clearing the same from the banks or shores thereof, or for running or driving the same, and shall thereby hinder the removal of any logs from the banks or shores thereof, or for running or driving the same, and shall thereby hinder the removal of any logs from the banks or shores thereof, or shall thereby obstruct the floating or navigation of such lake, river, creek, or stream, it shall be lawful for any other person, company, or corporation engaged in floating or running logs, timber or lumber in such lake, river, creek or stream so obstructed, to cause such jams to be broken, and such logs, timber, or lumber to be run, driven and cleared from the banks of such lake, river, creek or stream, at the cost and expense of the person or persons owning such logs, timber or lumber; and such owner shall be liable to such person, company or corporation for such cost and expense, and such company, person, or corporation so causing such jams to be broken, or such logs, timber or lumber to be run, driven or cleared, may have a lien on such logs, timber or lumber for his or their reasonable charges and expenses for breaking jams and running, driving and clearing the same, and shall be entitled to take and retain possession of such logs, timber or lumber wherever the same may be found, or so much thereof as may be necessary to satisfy the amount of such charges and expenses and all costs thereon, until the same shall be determined, satisfied and paid in the manner hereinafter prescribed."

The operations of the defendant were carried on upon the Tittabawassee river and its tributaries,—the Pine, the Chippewa and the Tobacco,—and were continued down into the Saginaw. The action now under review is replevin for four million feet of pine logs. The plaintiff testified that he was the owner of the logs; that he had placed the same in streams tributary to the Tittabawassee, for the purpose of running the same down to his mill at Bay City for manufacture; that he was informed by the president of defendant that these logs had been run out of defendant's booms after July 26, 1882, and stored as the same were run out in defendant's store boom, known as the Melbourne boom,

upon the Saginaw river, and were composed entirely of logs cut in the season of 1881–2, and there was no contract made between the plaintiff and defendant in respect to the rafting, running or storing of the logs by defendant.

The plaintiff further testified that he had a conversation with the president of the defendant company, July 25, 1882, on the subject of the logs which were to be run out after that date. Plaintiff and defendant had disagreed in attempting to contract for the running of his logs, and plaintiff had insisted on running his own logs, and attempted to make an arrangement with the president to put men on and to divide the logs. They agreed to hit upon some plan, if possible, to modify the differences, and reduce them as much as possible. Mr. Weideman, the president, was very courteous, and very anxious to accommodate as far as possible. Plaintiff endeavored to make arrangements to put on men and divide the logs at some point,—anywhere that would be agreeable to the company, where his logs could be got at,—and told the president he had men employed, with tools ready, and offered to take his logs wherever he could find them, and endeavored to learn from Mr. Weideman whether he would be permitted to do this at any point. Mr. Weideman was somewhat reticent, but in some form of words he told plaintiff, as he understood it, that he would not be permitted to take the logs at any point; that all logs not under special contract would be taken and tied up at the Melbourne boom. Plaintiff, in this conversation, told the president he had a large boom at Bay City, and requested that his logs be stored there without expense, under control of the company, instead of in the Melbourne boom, but the request was not acceded to. At this time the plaintiff expressed his willingness to pay any charge the company might have upon the logs accrued up to that time, and had made the like offer before, but was uniformly advised by the president that he would receive nothing less than the full amount stated in printed stipulations, which the plaintiff had refused to sign.

A portion of plaintiff's logs were put into Chippewa

river about twelve miles west of Mt. Pleasant, above the boom limits of defendant; another part were put in on the Chippewa nearly in the same vicinity; another part on the Coldwater, which is a branch of the Chippewa; a small portion on a branch of the Tobacco, and some on the upper waters of the Tittabawassee. The logs put in upon the Chippewa were run pretty late in the season of 1882, until they were stopped by jams below, and then they lay there quite a long time before the full jam was run into the boom limits; that the whole quantity of logs put in by the plaintiff was from eight to ten million feet, and to the best of his information the quantity driven into the boom limits of defendant was seven million feet; that in all cases the running which he did or had done was to the boom limits, and in the case of the Chippewa logs, the plaintiff contracted to have them run right down to the trips of the defendant, and to fill up all space clear to the trips, but he was unable to say whether it was done or not; that he had never run logs down in rafts below the defendant's booms; that at the time of the conversation with Mr. Weideman the logs in controversy were in the boom company's limits, but not rafted out; that he did not ask the president to deliver the logs at any particular point, but was endeavoring to secure the designation of some point on the river where he could co-operate with defendant in dividing his logs from the mass of the logs; that it would now seem that there was no place where he could co-operate with the defendant except at the rafting boom, but Weideman knew more about that than he did, and he wanted him to say. He heard nothing about it, that they were to be separated at the rafting boom. His impression was, from what he knew of the Bryant trip, that it was understood he could come up to that trip and run his logs through there, but he would not be certain about it. The work of taking the logs that were to be detained up there from those that were to go to Bay City, would have to be done at trips where they could be separated. The practicable way of doing this is to do it above Saginaw City, but he is unable to say how much room there

is there for doing it; he has not been there for several years. The way he understood it now was that the logs could not be separated at the Bryant trip, but should be run down and separated at the sorting gaps of the rafting boom. In the conversation he had with Mr. Weideman the latter would not tell him how much work had been put on his logs, and plaintiff did not know where they were, nor what the charges should be.

For the defense Mr. Weideman was sworn, and testified in substance as follows:

That he was acquainted with the Tittabawassee river from 1859 to the time of suit, and with the method of handling logs therein by the defendant; that defendant does no business except that of running, driving, booming, rafting and delivering logs; that it puts no logs into the stream and has no control over the putting of logs into the stream by others; that in the year 1882 the company received all logs on the Pine river at the company's dam, on the Chippewa river about three miles above the upper dam, called the Campau dam, about twenty miles above Midland, and on the Tobacco river at the dam about ten miles above its junction with the Tittabawassee. That after the logs are delivered into the limits the defendant causes men to be put on there, or, as was the case in 1882, by contract, for the breaking and driving the logs down the streams to the rafting gaps, and it also takes in the rear and cleans the banks and farms where the logs may be run out by high water, and brings down the rear clean; that the times for taking in the rear vary in each year; that the company has trips or booms across the river,—one on the Chippewa and one on the Tittabawassee, just above Midland City,—for the purpose of keeping the logs there until the spring freshet subsides enough to make it safe to run below and prevent their spreading over the land adjacent to the streams, the banks below Midland being low; that when the water goes down the trips are left open and the logs are run out through them from time to time, as the company can take care of them and raft them out below; that in 1882 the

Tittabawassee in the spring was full of logs, the jam extending from Midland up about thirty-three miles, as near as the witness could estimate the same, of solid jam, and on the Chippewa there was, probably, four miles of solid jam of logs; and the Tittabawassee remained full until August or September, when defendant commenced to get a good deal of space; that about two hundred different owners put logs into the stream, bearing about twelve hundred different marks.

That in the spring of 1882 defendant contracted with Andrew J. Scott to take all the logs in and on the shores and banks of the Tittabawassee, Chippewa, Pine and Tobacco rivers, at and below the upper lines of the company's boom limits in said streams, and run the same to the Loretto House, some four or five miles above the Bryant trip, for the round sum of twenty-two thousand dollars.

That the Chippewa and Tittabawassee are navigable streams for the floating of logs anywhere within defendant's limits during the entire season, but dams are used on both streams to facilitate the getting down the logs, and are necessary to enable the company to drive the logs down the stream as rapidly as the company's facilities enable them to raft it out below. That the jam in 1882 on the Tittabawassee filled the whole river from bank to bank with logs two or three deep, and except for shore booms these logs would, on the rise of the stream, run out on the adjoining lands. As the water subsides the logs lie along the banks, and remain until the water rises again, and then the company must take them in. This is what is called taking in rear.

That all logs owned by different persons are mixed promiscuously together. The logs were run by Scott under his contract in 1882 to the Loretto House, and from there to the Bryant trip by the defendant, without contract. The Bryant trip or boom is across the Tittabawassee, about seven or eight miles above its mouth, where the entire mass of logs is stopped and held by the company. The trip can be opened and closed as necessity requires. Immediately

below the Bryant trip one-half the river is boomed and occupied by the defendant for the distance of four or five miles, for passing its logs down to its rafting gaps, which are reached about two and a half miles above the mouth of the Tittabawassee river, and extend from that point to the mouth. These are a series of trips or gaps where the logs are rafted. The reason for booming and running the logs only in a part of the river from the Bryant trip to the rafting gaps, is to leave a portion of the channel open for scows and other water-craft. As the logs pass through each rafting gap they are sorted, and those with certain marks picked out, and the balance are passed down through the other booms or gaps in succession: those with certain marks being taken out each time, until the Fitzhugh boom is reached, where the logs are rafted up.

That the stoppage of the logs at the Bryant trip is necessary to turn them into the rafting booms, and all the space in the river is occupied which is available for rafting purposes. The navigable part of the river is used for passing out strings or rafts from the upper gaps down through the lower sections. Sometimes, when there is a vast accumulation of different marks which there is not space to assort in the sections and booms named, the same are run to and assorted in the Green Point boom, so called. In addition to the booms named the company has store booms,—one on the Shiawassee, one on the Saginaw opposite Wright's mills, and two below Zilwaukee known as the Melbourne store-booms.

That the quantity of logs rafted by defendant in the year 1882 was over 600,000,000 feet, the operations commencing April 25th and lasting until November 18th. The utmost diligence was employed in getting out all the logs that could be got. The rafting consists, after the logs have been assorted by marks, of shoving or towing the same into the different strings, where they are pinned and the rope put upon them, and the logs thus fastened together; and when the string gets of length most convenient to handle, they are run down to the making-up ground and there put

into rafts, and from that point they are towed down the Saginaw river to the various mills. In the opinion of the witness the separation could not be effected by any different process than that adopted. The logs in controversy were rafted out the same as other logs controlled by the company, and the charges not being paid they were towed to the Melbourne boom, which was the general storing ground of the company, and on the way to the destination of the logs at Bay City.

Witness had a conversation with plaintiff prior to July, when plaintiff stated he would put men on his logs within the boom limits on the Chippewa, and run the logs through. Witness told him he would let him know what time they would begin to move on the Tittabawassee, and did so. The Chippewa laid still early in the spring, while the old stock was being rafted out on the Tittabawassee. They struck the Chippewa and commenced rafting out about the 25th or 26th of July, and this conversation must have been in the first part of that month. Plaintiff did not, to the knowledge of the witness, have any men on to run the logs down the Tittabawassee from the Chippewa. The company let out logs from the Chippewa and the Pine; at one time, for instance a week, a certain amount of logs, for instance fifty million feet, and then stopped, and if necessary, put a boom across the river and prevented the logs from running any more out of there, and then let them out of the Tittabawassee, in order *first*, that the respective owners in each stream might have a reasonable proportion of time on their logs; and *second*, to reduce the number of marks running in the stream and thus facilitate the rafting of the logs. The marks on the two rivers are entirely distinct.

That the logs put in the stream by plaintiff in the season of 1880–81 were all run out and stored in the Melbourne boom, and taken from there by plaintiff and charges paid July 26, 1882, and the logs now in controversy were then run to and stored in the Melbourne boom because plaintiff refused to pay charges on them, and the company held

them for their lien. Plaintiff's mill is six or seven miles below this boom. If plaintiff's logs were put into the river and no force employed by him to assist in running them, defendant would have to run them, as they would be so mixed with the general mass of logs that it would be impossible to bring the mass along without bringing these also. They would obstruct the running of other logs and obstruct the clearing of the banks. And it was only practicable to separate these logs from the others at the rafting booms where it was done. It could not be done at the Bryant trip. The work done on plaintiff's logs was not in any respect different from the work done on other logs handled by the company, and he could only get at the expense by taking an average by the thousand feet.

The witness was then permitted, under objection, to give evidence that in his judgment the expense and actual outlay of running the six hundred million feet of logs from the company's limits to the point where they were made up into rafts was 42.65-100 cents per thousand feet; from that point to the Melbourne boom 19.60-100 cents; and that the reasonable charge for storage in the Melbourne boom was twenty cents per thousand feet. Also that the reasonable rental value of defendant's property actually used in the business, aside from the Melbourne boom, was $20,000. The manner in which the witness made up his estimate was given in detail, and included items classified as labor, board, rear account, expense account, rope account, shore rents, rafting pins, insurance and taxes, scaling, damages, profit and loss and pile-driver account. In the rear account was included the payments to Scott and cost of repairing dams. In expense were included salaries to officers, directors and clerks. The item of damages was paid for the overflow of lands, and for permission to take logs off where they had been carried upon the land. The pile-driver account was expense incurred in repairing booms. The charges of defendant to log-owners are proportioned to the distance run and are uniform. It would be impossible to determine how

much expense was incurred on any particular million feet of logs.

The testimony of this witness tended to show that in the season of 1882 the logs might possibly have been all brought down without the aid of dams and floods, by keeping men steadily employed upon them; but they might not have been. The dams greatly facilitated the driving. It was the practice of defendant to boom the mouth of the Chippewa until the logs in the Tittabawassee had been brought down, and then to let the logs out from the Chippewa; that they run first from one and then from the other, without consulting the log-owners. The logs for the season of 1881 were let out of the Chippewa early in April. Then the jam was suffered to accumulate. It shut itself because the jams were very hard to break, and needed no boom to close it. It was not closed at that time by booms. The new logs were held back till the last of June or first of July; that being the general course of defendant.

The orders of witness for the season of 1882 were first, to run out of the Tittabawassee seventy-five or a hundred million feet of logs; then to break the jam of the Chippewa and Pine, and take in the rear of old logs as clean as possible, and work up to the new logs so as to be sure to get all of them. When the old logs were out of the Chippewa, the mass was to be stopped again, and this was done until further instructions to let them out were given in July. In the mean time Mr. Scott, under instructions from the company, practically held control of all the logs within the limits of its operations.

The plaintiff's logs could have been separated at the Bryant trip and turned out into the navigable channel by putting men on there and assorting the logs as they passed down, letting the plaintiff's logs pass out into the navigable part of the stream; but it would have cut down the work of the boom over two-thirds. Not more than two hundred million feet could then have been got down. There was no talk with plaintiff about permitting it, and it was so impracticable witness would not have allowed it. It would

have sacrificed the interest of log-owners as well as of the company. Witness thought the whole business was done with as much dispatch and as cheaply as was practicable.

Witness was informed in the spring by Mr. Briscoe, the plaintiff's agent, that he had secured a force of men and held them in readiness to take plaintiff's logs wherever they might be, and get them out of the way, and later, after the new logs came in, Briscoe gave witness written notice that he had men secured and on the ground ready to do it, and to care for the logs when the company turned them loose, or to take the logs wherever the company might see fit to assort them, and that he stood ready to assist in assorting them; witness replied that it could not be done for the reason that every place on the river was occupied during the work of assorting the logs, and told him substantially not to put men on at any point below the Loretto House and interfere with his work; that the company had all the men that were necessary.

When plaintiff requested the logs to be put into his own boom at Bay City, he gave witness to understand he would replevy them there. Briscoe offered at one time to pay 63 cents per thousand, and take the logs in Melbourne boom, or 73 cents for delivery at the mill in Bay City, which was declined. The number of men employed by defendant below Bryant trip was 550.

The entire running account of the company for 1882 was $96,754.86. In this was included $6250 for estimated depreciation on new tugs procured for the business at a cost of $25,000.

Further evidence was given for the plaintiff by Mr. Briscoe, and for the defendant by Mr. Burt, one of its directors, but it is not important to repeat it here. The evidence of Mr. Burt was directed mainly to the cost of operating the company's business. It was shown for the defendant that before the season of 1882 opened it had contracts with ninety-four log-owners for running their logs, and that it actually run the logs for two hundred and three persons.

The defendant waived a return of the logs in case of

judgment in its favor, and asked for a judgment for the amount of its charges.

In his charge to the jury the circuit judge instructed them that whatever was done by Scott, under his contract with the defendant, was done for and as the agent of defendant, and if any lien accrued therefor in favor of any one, it accrued in favor of defendant. He then proceeded:

"It is not disputed in this case, as I understand it, but that Mr. Scott ran all these logs from the extreme limits of the Tittabawassee Boom Company's booms to the Loretto House.

There is no evidence in the case, that I remember of, tending to show that Mr. Hall had any men upon the stream at all engaged in running logs or clearing the banks, or did any work upon them above the Loretto House.

There is some evidence in the case with reference to the request made by Mr. Hall upon the president of the boom company desiring to know when he would run logs out of the Chippewa river; but I don't remember of any testimony tending to show that Mr. Hall did any work above the Loretto House.

Now, with reference to the navigation of the tributaries and the navigation of the Tittabawassee river. All parties under the law have a right to put logs into these streams. The testimony in this case shows that these rivers were navigable to the extreme limit of the Tittabawassee Boom Company's operations at all seasons of the year, so far as their limits extended; that logs might be run by the natural flow of the water during all seasons of the year. Every person had a right to put logs into that stream or these streams to run; every person had a right of passage down the stream for his property. The right of navigation is really and simply the right of passage; but no person has a right to put property in the stream, with the intention of floating that property down the stream, without making some provision upon his part in the case of logs to prevent those logs from obstructing the general navigation of the stream, and he ought also to make provision with reference to the owners of the property along on the banks of the stream, so that these logs might not lodge upon the banks of the stream, and thus injure the property of the owner. If these provisions are not made, and the general floating or navigation of the stream is obstructed,—and that word "obstruct" in the statute may be defined; for the purpose of

this case we may consider it as synonymous with hindering, impeding, retarding."

Then referring to the statute of 1879, already given, the judge proceeded:

"If you find as a matter of fact that Mr. Hall put, or caused to be put, into the streams tributary to the Tittabawassee these saw-logs, for the purpose of floating the same to the place of manufacture or market, and that he did not make adequate provision and put on sufficient force for breaking jams of these logs, or for running the logs or clearing them from the banks or the shores, or driving the logs, and that in consequence of his failure to make such provision the general navigation of that stream was obstructed, then Mr. Scott, acting in the employ of the boom company, had a right, under the statute, to run these logs from wherever he might find them to the Loretto House; and the boom company being a corporation engaged in floating or running logs, a lien upon these logs would exist and attach in favor of the boom company for their reasonable charges and expenses.

Now this lien is not affected at all by the manner or action of the boom company with reference to floating their logs out of the Chippewa river. It is evident, from the testimony in this case, that so large a number are put into these several streams tributary to the Tittabawassee that the streams are choked, we might say, with the property; the extreme capacity of the stream is used.

Now it is evident that in order that parties putting logs into the Tittabawassee above the Chippewa might have the same opportunities that those upon the Chippewa have in the navigation of the main stream, and that parties upon the Chippewa may have equal rights with those upon the main Tittabawassee, that at certain periods of times the navigation of one river should be suspended; otherwise the entire stream might be obstructed, and the interest of neither party be advanced.

These rivers are but highways, and that plan is adopted wherever highways are obstructed. If you were to go during those seasons of the year when travel is quite extensive in the city of New York, in the lower part of Broadway, you would find that highway filled with teams, carriages, wagons, men on horseback—a continual procession—upon that street; you would also find that there were other teams, horses and wagons coming into that street from the side streets leading into it, and in such great numbers that they

cannot all pass and repass and move down the streets at the same time. Now the plan they adopt where the street is so extensively traveled, in that street, is to stop the travel entirely for a short period of time,—for instance, on Broadway,—until the wagons that gather in from the side streets are allowed to enter Broadway and pass down or out as they desire, and the hindrance in that side street is removed and they can go forward; and so each street in turn, that they may all have a chance to travel Broadway.

Now the same plan is adopted in Chicago. The Chicago river is spanned by numerous bridges. There is a continual travel up and down Chicago river; vessels, steamers, propellers, canal boats; and across the river, crossing the bridge, a stream of people, teams, wagons, etc.

Now the rights of the respective parties are considered, and for a time the navigation of the Chicago river by steamers is stopped until the travel may pass across the bridges, and then again the bridges are opened and they become blocked up on each side, so great is the extent of travel, until the steamers may pass.

The plan adopted upon this river is something similar to that, and a plan which has so far commended itself, wherever a highway is used to so great an extent that it becomes necessary.

As I understand the testimony in this case, for a limited period of time the main Tittabawassee is shut off in order that the property in these side streams—the Tobacco, Chippewa—may pass out; and then again the travel on these highways is temporarily suspended, and the property coming down the Tittabawassee is allowed to pass.

Now, so long as this is conducted with reference to the best interest of all parties having property on these several streams, and so long as the plan promotes the general navigation of the entire stream, and accomplishes the object that they all desire, namely, the speediest method and the least expensive in bringing this property to the common market on the Saginaw river, that plan, I charge you as a matter of law, is a proper plan, and cannot be complained of by the plaintiff in this case.

If the defendant in this case obtained a lien upon this property by reason of the labor performed upon it by Mr. Scott, it had a right to retain possession of that property until that lien was satisfied and paid.

We find from the testimony that in the navigation of that river below the Loretto House, a boom was placed across the river, and that the place is known as the 'Bryant Trip,'

that at that point the defendant stopped all the logs in the stream by means of this boom; and that their plan of operations with reference to the logs that they contracted to run, and other logs that were in their charge, and other logs that they were running, was to pass those logs from that point for four or five miles on the right-hand side of the river, and that piles had been driven near to the right-hand side, or near the center of the river, I think,—perhaps the testimony discloses,—but piles had been driven dividing the river as it were so that the logs might pass down upon the right-hand side, and that the other side might be used by other interests navigating the stream.

It appears by the testimony in this case, and is not disputed, that from the Bryant trip down to the mouth of the Tittabawassee river scows were in the habit of going up and down the river, and sometimes small steamers; that this channel was left open and unobstructed, so that that class of property might navigate the stream, and any one else who might desire to navigate through that channel might use it. In the opposite side they passed their logs until they arrived at their sorting gaps, several of which were constructed a short distance below the Bryant trip, and from that point to the mouth of the Tittabawassee.

An incident to the navigation of this stream with saw-logs is the sorting of the logs. It appears from the testimony in this case that there were 203, at least, different owners of property whose logs were stopped at the Bryant trip; that owners had several marks, so that there were 1200 different marks of logs. Now it is evident that at some point, at least some place, these logs must be stopped, in order that each party might take his own. A party putting logs into the stream and intermingling his logs with the logs of other parties was not only bound to provide for running and driving the logs, but he is also bound to provide for separating his logs from the common mass—to assist in the work of assorting at such a point in the period of navigation, during the time of navigation, when it is most desirable and least expensive, when the general interest, not only of the log-owners, but of others navigating the stream, would be best subserved.

The log-owners contracting with the boom company to do this work for them were acting in the line of their duty. Now, if Mr. Hall, plaintiff in this case, had desired to sort his own logs, he ought to put on a reasonable and proportionate force at the Bryant trip, or at some point where they could be best sorted; and if the boom company at that point

had acquired a lien upon its part, he ought also to have paid that lien, or tendered, by producing currency of the country denominated 'legal tender,' or gold, sufficient to discharge the lien. He then would have had a right to take possession of his property and do what he wished with it—do with it in such way as he might choose.

The boom company, having acquired a lien, had a right to retain possession of the property under this statute, and they had a right to separate that property from the common mass by sorting, and rafting it out and running it to a place of safety and storing it until their lien was paid.

I said that the plaintiff, before he can take possession of his logs, must provide a reasonable and proportionate force to assist in sorting, and pay the lien or tender the amount. He might do this in lieu of payment of the lien; he might under section two of this statute, have offered a bond, approved in accordance with the statute, and with the penalty provided for in the statute, not less than double the sum claimed by the boom company; and giving such a bond would have been equivalent to a tender of the money; the statute provides for that. That section of the statute that provides for giving a bond provides that a condition of that bond shall be that the party will pay such sum as shall be found and determined as due for the charges and expense in breaking jams, running, driving and clearing the logs, and also providing for the care and safety of the same.

In construing the statute, we construe all the sections together, so that these acts performed by the boom company relative to the care and safety of the property are properly a part of the lien that they acquired by reason of the work performed by Mr. Scott.

You will remember the testimony as to what point on the Tittabawassee river these logs could have been best assorted, and the logs of the plaintiff separated from those of the other log-owners. If that was the best point, having the navigation of the river in view, and the interest of all the parties navigating, not only the owners of logs, but others, that was the point where he ought to have made his tender for any lien acquired up to that point; that is the point where he ought to have provided a sufficient force to assort his property from the remaining property in this mass,—the proportion reasonable, of course, considering the magnitude of the remainder of the property; and he should also have paid a lien or tendered a bond.

The next question to consider in this case is the matter of 'reasonable charges and expenses.' You will remember

that in reading these two sections, that in the first section they used the words 'reasonable charges and expenses,' and in the other clause they also used the words 'for the care and safety of the property.' The defendant in this case called Mr. Weideman, the president of the boom company, as a witness, and he testified that in his judgment the reasonable charges and expenses of the company in and about this property up to that point—up to the point of towing on the Saginaw river—was forty-two and 65-100 cents per thousand feet. That was his judgment.

Mr. Burt, I think, one of the directors, also testified in regard to it as his judgment. On cross-examination the counsel for the plaintiff desired, and properly, to ascertain the basis upon which this judgment was founded, and in consequence of questions put to the witnesses you have ascertained the basis upon which this judgment is based by Mr. Weideman and by Mr. Burt. They have said to you that it was impossible, from the very nature of the case, to show exactly the days labor or the actual expense put upon this four millions of logs; that their business was so great in its extent, and the property was all handled together, that the way they arrived at the reasonable charge and expense was by ascertaining the entire business for the year, and the total quantity of logs run and rafted by them, and the expenses incurred in and about their business; and they had made an average per thousand.

Now, it is, I think, the duty of the court to say to you what subjects might properly be considered by the boom company in making up this average, but whether the amount that they charged in each instance is a reasonable and proper sum or not, under the circumstances, is for you to determine. The expense of running and driving and clearing the banks of the streams of logs; all the labor performed upon them; the cost of rafting,—are all proper subjects to be considered in determining the reasonable charge and expense. These were necessary, at least. The law provides that if a party is navigating a stream, and that by reason of that navigation the waters of the stream are raised and overflow private property, that the parties shall pay reasonable damages to the party owning the property so overflowed.

Now, there is a mass of logs extending for many miles on the streams, and reaching from bank to bank; and Mr. Hall's (the plaintiff's) logs were a part of the common mass. Now, if by reason of that large quantity of property there floating down the stream lands were overflowed and damages resulted, it would be but reasonable that each party

having logs upon the stream should pay his proportionate share and expense of these damages. Therefore, I charge you that the matter of damages to land overflowed would be a proper subject for consideration.

The statute provides that before the boom company can transact its business it is absolutely necessary that they should obtain permission, either by lease or purchase, from the parties owning the property along the stream where they seek to establish booms, or trips, or sorting gaps; and therefore I charge that, as the statute requires them to do this, it is necessary that they should do it before they can carry on their business; that the matter of shore rents is a subject you may consider in deciding their charges.

Now, with reference to the repair of dams, the testimony of the president of the boom company, as I remember, is that the rivers were navigable through the entire season of the year by the natural flow of the water. Mr. Weideman tells us in his testimony that if, in the navigation of these logs down the river, they are allowed to proceed on only the natural flow of the water, while they would all flow down in time, yet it would take so long a time, and their progress would necessarily be so slow, that but a limited quantity could be rafted out of the river during any one year; and that, therefore, they have erected dams within the limits, not to create a navigation, because there is a broad distinction between making a navigation where none exists in fact, and accelerating, you might say, the navigation of these streams by this means, where a natural navigation exists at that time.

Now, if erecting these dams, accelerating the navigation of these tributaries of the Tittabawassee river, the streams being navigable themselves in all seasons of the year by the natural flow, and the cost of these dams did not increase the expense, but lessened it, and proved advantageous to the parties navigating the streams,—as I understand the testimony of Mr. Weideman, that the logs came quicker and at less expense, notwithstanding this expenditure of the money, than they would have come by the natural flow of the water, although they would have come in that way,—now that is something that the plaintiff in this case could not complain of; and especially so, as he must have known that these means existed and were used for the purpose. Therefore, the repair of that property is a proper item to be considered in ascertaining the expense of the boom company in their business.

A company of the character of the Tittabawassee Boom

Company must necessarily operate through agents. Its business is a very extensive business, involving the expenditure of thousands upon thousands of dollars each year. Such a business as that requires a board of managers; the statute provides for such a board, and provides that the board shall consist of not less than a certain number; they are obliged to have a certain number to manage this business; and the president has testified that he managed this business under the board of directors. It is necessary that they have book-keepers to keep an account of their transactions,—account of their transactions with Mr. Hall, as well as others, to be kept; the labor of the men upon those logs,—an account must be kept, and they must be paid; their board must be provided for, etc. Above all, such a company requires one general head.

Now, the item of the salaries of the officers of the boom company,—such officers as were necessary to properly transact its business,—and the salaries of the agents, book-keepers and such employes as were necessary for the boom company to have in order to carry on their business in a proper, business-like manner, are proper subjects to be considered in the matter of expense.

The testimony discloses that before the boom company could successfully carry on this work it was necessary that an amount of money should be expended in the building of boom and gaps; they had warehouses for the storage of their property, and offices for the transaction of their business, and a dock. Now, we look at this matter precisely the same as we would look at any other business matter, taking the common-sense, business-like view of it. Certainly a corporation of this magnitude, to carry on their business, do have need of warehouses and a dock; they certainly need a boom—it is apparent. Now a reasonable expenditure for these purposes is entirely proper, and therefore a fair rental value of the property used by them in their business is a proper subject for consideration in determining the cost of the work.

The matter of rope used in rafting the logs is a proper subject for your consideration,—the cost and expense of the rope—and I desire to say further in regard to the rope that if the plaintiff had any rope belonging to the defendant, he was not under any obligation to retain that rope unless he desired to do so, and if he returned the rope the defendant ought to credit him with the rope returned, at its fair value at the time of its return; and the result of such a credit

would be really to charge him with the depreciation of the rope in its actual use by him.

There are certain kinds of property used in business, as you are all well aware, which depreciate in value by reason of its use. Its worth grows less every day that it is used. A merchant, in taking an account of stock at the end of the year, to ascertain what his profits are, will always take into account, if he is a good merchant, the depreciation of the stock below the cost price. If he calls his stock year after year worth just as much as it costs him, if he continues business any length of time, he will find himself a bankrupt, if he operates his business in that way.

Depreciation of property used in business is just as much a part of the expense of the business, in the judgment of the court, as any other subject, and therefore a depreciation, for instance, of tugs would be a proper subject to take into consideration. And these things must be taken into consideration by business men – parties transacting business— before they can ascertain what their real profit is in the business.

Now, I have indicated to you the subjects that are proper for you to take into consideration. Of course, the towing of the logs is a proper subject, from the Tittabawassee river to the place of storage. The company had a right to provide for their care and safety, and, having rafted them out of the Tittabawassee river, they had a right to tow them to a place of storage, and provide for their care and safety, unless the plaintiff was there at the mouth of the Tittabawassee river and desired to take possession of these strings of logs or rafts of logs himself, and tender to the boom company their lien up to that point, or give his bond under the statute. If he was not there at the mouth of the river to receive these strings and make this tender or give his bond, they had a right then to tow these logs down to a place of safety and store them. Now the matter of storage is a proper matter for you to take into consideration.

Having given you the subjects that are proper and those that are excluded, whether the charges are reasonable or not, that is a question of fact for you to determine on these different subjects. Of course, you are to determine that from the evidence in the case. Mr. Weideman and Mr. Burt viewed these items as reasonable costs; they make the general statement that such a percentage, in their judgment, that these is reasonable, and therefore it follows in their judgment that these are all reasonable. Now, in determining whether they are reasonable or not, you are not to say what you

think they are worth, but where there is a dispute in this case as to whether the charge is reasonable or not, and that dispute arises from the evidence, you are of course to consider the evidence upon that point, and ascertain what the reasonable sum is from the evidence. There is a conflict here on the question of storage, and possibly on some of the other questions; you will remember from the evidence what other points there is a conflict of evidence about. You must determine from the testimony what, as a matter of fact, is a reasonable sum to charge for that purpose."

And after disposing of certain requests for instructions on the part of the defendant, the judge proceeded:

"Now what I said to you, gentlemen of the jury, is that the plaintiff in this case, if he sought to take possession of his own logs during the progress of the navigation of this river, that he ought to have been present, for instance, at the 'Bryant Trip,' where there was a navigable portion of the stream separate from the booms of the boom company, with a proportionate and reasonable force to assist in the assortment of his own logs, and that he ought to have tendered at that point, or some other point in the stream, the amount of the lien the company had acquired, or at any other point where I have stated that he ought to have made a tender or given a bond. I notice an amendment to the statute of 1864, in 1881, No. 200, which provides that all charges for running, driving, booming, towing or rafting of saw-logs or lumber by corporations organized under that act, should be by the thousand feet, board measure. I think that if a party tenders a certain sum per thousand feet, board measure, if it is sufficient to cover the reasonable charges and expenses per thousand feet, that a tender of such a sum would be sufficient, and that the company ought to release for each thousand feet paid them. Of course, no such tender has been made in this case, but it is to cover a point in the case where the boom company claim that this lien that they had extended not only to the four million feet of property, but they have a lien upon the 4,112,000 replevied for logs not yet run out of the boom. I think the lien is a lien per thousand feet for the reasonable charges and expenses of running, booming and rafting, and care of the property, and, when each thousand is paid for, it would be their duty to release it; and section two that we have been considering sustains that view in providing for a bond. The bond would be to pay—would be so much per thousand feet. I only speak of it so that there might be no miscon-

ception of what Mr. Hall might have done to take possession of his logs. I say there is nothing of the kind in this case."

Under these instructions the jury returned a verdict for the defendant of $3290.78, upon which judgment was rendered. The plaintiff brings error.

I. It is contended on the part of the plaintiff that defendant never acquired any lien by virtue of the work done by Scott under his contract: *First*, because the logs of plaintiff which the contracting parties did not know would be run at all, or, if they were, would not be cared for by himself, could not be considered within the scope of Scott's contract; and *second*, if they could be considered within the contract, the party who would have a lien upon them would be Scott, who performed the labor and was given possession of the defendant's property for the purpose, and not the defendant. We do not concur in either view. The contract contemplated that Scott should receive and run all the logs defendant would be at liberty to take charge of within the limits specified in the contract; but it contemplated that he should do so as agent and not otherwise. It was as competent for the defendant to employ Scott to perform the whole labor for a specified sum, as it was to do it all through numerous men employed by the day or month; and the defendant would be principal and entitled to the lien in the one case as much as in the other.

II. It is further contended that no lien could arise as against the plaintiff by reason of anything done above the Loretto House, because so long as the company, or the contractor acting under the directions of the company, exercised the power of holding back the logs at discretion, and of determining how long they should be run and when they should again be started, any individual owner was practically powerless to manage or control his own logs.

This contention presents one of the most serious of the many difficulties inherent in the business of running, booming and rafting logs on the small rivers of the State. The testimony in this case shows very clearly—what nobody dis-

putes—that in order to make the navigable quality of the streams serviceable to log-owners it is essential that the use be either regulated by a single head, or be managed by the numerous parties concerned with greater fairness and more constant care for the interests of others than can reasonably be looked for. These streams are highways in which every man with occasion to use them has equal rights. But the logs thrown into them demand facilities far beyond their natural capacity; so that the illustration of the crowded streets of New York, made use of by the circuit judge, though forcible, is far from being adequate; for in these it is not only necessary to check the movement in one to allow it to proceed in another, but it is necessary to do more, and accelerate the movement by artificial floods as the only means of bringing the logs to their destination within the year. These artificial floods the defendant has provided for at great expense. It has also purchased or leased extensive booming grounds, and constructed booms which are indispensable to the business, and it employs a body of officers and a large number of men regularly, whose business it shall be to make the streams within its limits perform the service of which they are capable. All these preparations and expenditures do not give to the defendant superior rights to the plaintiff, and we find no evidence in the record that the defendant claimed superior rights until after the logs had been delivered at the Bryant trip. Plaintiff requested that he might be informed when the jam would be let out of the Chippewa, that he might put on men to take charge of his own logs. He seems to have made no objection to the time of letting out the logs being determined by defendant; he made no request that they be let out at any different time, or any attempt to let them out himself. All he asked was that he be informed when it was to take place. This may well be taken as a concession on his part that the defendant, who represented 202 log-owners in the navigation, and who had made extensive and costly preparations to make the navigation as effective as possible, was better entitled to regulate the passing of the jams than any single log-owner

could be, and as a waiver of any objection to its customary action in that regard.

The plaintiff did not put men on, as he contemplated doing, and the evidence that it then became necessary to run his logs with the others is unquestioned. No one claims that it would have been practicable to separate them until the rafting gaps were reached.

III. It is further urged that the circuit judge was in error in instructing the jury that the defendant might acquire a lien under the statute of 1879 for the services performed in running the plaintiff's logs down to the company's booms. The defendant is incorporated under the Act of 1864,—Comp. L. ch. 88,—and that act, it is said, makes provision for such services as it is authorized to perform for others and for the lien it may have therefor. And the lien is only given either (1) when the log-owner has failed to make adequate provision or to put on sufficient force for driving or for breaking jams at the head of or along-side of the company's booms, thereby obstructing the general navigation of the stream; or (2) when the log-owner, for want of sufficient force or adequate provision, actually allows the logs to accumulate at the head of or along-side of the company's booms, thereby obstructing the navigation of the stream. It makes no provision for services above the head of the booms.

It is not disputed that the general act, as amended in 1879, makes provision for services in preventing jams or obstructions above the booms, wherever the navigation is or may be affected. The terms of that act are as general as could well be, and it purports to empower "any person, company or corporation" to perform the service which the owner of the logs has neglected. We do not perceive any ground on which we can say that this means, not what it says, but any person, company or corporation except the very corporation who would be best prepared to perform the service, and could do it with most expedition and economy. A much more reasonable inference would be that the Log driving and Booming companies were the corpora-

tions the Legislature specially had in mind, not only because their own business would invite the intervention, but because, in so far as the service was one in the public interest, they could best perform it. And there is no incongruity and no confusion in holding that the defendant may have the benefit of the general law and also of the act under which it is incorporated.

IV. It is further claimed that if defendant had any lien upon the logs of the plaintiff at the time demand was made for their delivery, the lien was waived or lost by the refusal of the president to deliver the logs when demanded, or to specify what the expenditures of the defendant in respect to them had been, or to accept anything less than the full contract rates of the defendant for running, booming and rafting them.

To understand the bearing of this claim it is necessary to review briefly the course of things up to the time when the demand and refusal took place.

The plaintiff and a large number of other persons had put logs into the Tittabawassee and its tributaries without making provision for running them. Every log which was put in assisted in forming a jam; and the evidence shows very clearly that without the intervention of somebody with a large force of men—*first*, to keep the logs within the banks during the continuance of early spring floods; *second*, to pass the logs from the tributaries into the main stream; and *lastly*, to break the head of the jams and keep them in motion,—it would be absolutely impossible that all the logs, or even the major part of them, should be brought down at all. Some of them would be stranded on adjacent farms and give rise to actions for damages, the others would block up the stream, neither moving forward nor permitting the navigation of the stream by boats or otherwise. It was in this condition of things that the defendant intervened to move forward the logs in the direction of their destination, and at the same time to provide for and protect the general navigation. Its very heavy expenditures for the purpose and the large force employed

rendered this possible; and its services were not only valuable to all the log-owners, but, so far as the testimony shows, must have been indispensable.

But while the defendant was performing these services, its officers and agents could not distinguish between the logs of different individuals, and could not know or assume that one log or batch of logs cost them more or less trouble or labor than another. Logs bearing twelve hundred different marks were cast together into the waters within the limits of their operations; and every log assisted in forming the jams and required like care with the rest. Any attempt to distinguish between the logs by the only possible method, namely, by the marks, would necessarily have impeded the running, for it would have required a separate examination of each log; and even this could have been of no value unless the logs bearing the same marks could be brought together and separated from the rest; and this was impossible except at the sorting gaps. When, therefore, the plaintiff put his logs into the limits covered by the operations of the defendant, and they were taken charge of to be run by the defendant, it was indispensable that they should be run to and through the sorting gaps, for the very plain reason that they could not sooner be delivered without stopping the navigation of the stream for the purpose. But this would have been a public nuisance, and would inevitably have led to difficulty and litigation. The demand, therefore, for any delivery except at the sorting gaps or below there must have been futile, because impossible to be complied with.

The plaintiff, however, was entitled to receive his logs at the first place where it was practicable to separate them from the mass without unreasonably impeding the navigation; and if he tendered reasonable charges up to that time and failed to receive the logs, he could be charged nothing by defendant for their subsequent care. But the plaintiff appears to have demanded the privilege of putting his own men on to assist in the separation of the logs. Whether men not under the direction and control of defendant could have been of assistance in this work we do not

know; but as it must necessarily be done within the booms which the defendant had constructed and was maintaining at heavy expense, it could not have been the right of the plaintiff to avail himself of these booms for the purpose without making some allowance therefor. The plaintiff had the same right with the defendant to procure land and construct booms for the reception and sorting of logs. He has not exercised that right; and it is not necessary to look beyond this record for reasons amply sufficient to account for this. With a jam of logs thirty or forty miles in length, filling the stream two or three deep, and mixed, as they must be, promiscuously together, it is apparent at a glance that sorting booms under different managements must impede instead of aiding each other, and that all parties concerned must find their interest subserved by permitting some one to construct the booms and take charge of the business. It is only upon this ground that we can account for the fact that all this large number of men having an interest in navigating the Tittabawassee and its tributaries for logging purposes, have refrained from constructing booms for gathering and assorting the logs as they are brought down, and left their construction and management to the one corporation that has seen fit to invest the necessary capital. But when they do so, and then avail themselves of the facilities afforded, they must make reasonable compensation. And whether we call what the defendant is entitled to demand reasonable compensation or reasonable costs and expenses is immaterial, for it comes to the same thing. The logs cannot be handled, cared for and sorted without the expenditures which the defendant has made; and these must necessarily be taken into the account in determining what the handling, care and sorting have cost.

But the defendant could not fix its charges arbitrarily, or bind the plaintiff by its schedules. When the president showed the schedule and refused to vary from it, or to deliver the logs until the full rates were paid, the plaintiff might have done at once, what he did afterwards at the Melbourne boom,—replevy the logs and go before a jury on the question

of the reasonableness of the charges made. If he wished to cast upon the defendant the risk of expenses in litigation, he could have made tender of the amount he deemed reasonable, before beginning his suit. But any tender must have covered the cost of delivering the logs to him; and this, as has been seen, must have been a delivery at or below the sorting gaps. He could not take them while they were unassorted in the jam.

The position of things, then, at the time of the demand was this: Neither the plaintiff nor Mr. Weideman, managing for the defendant, knew where the logs then were, except that they were somewhere above the sorting gaps. The plaintiff demanded them, expressing a willingness to pay reasonable costs and expenses upon them up to that time, and to assist afterwards in separating them. Mr. Weideman insisted upon full schedule rates as reasonable and refused to accept less. He also refused to allow the plaintiff's men to come within the boom of the defendant to assist in the sorting and delivery. Whether in this last he was right or wrong is immaterial, and we need not add to what has already been said on the subject. The offer of the plaintiff fell short of the just rights of the defendant, for it allowed nothing for the necessary cost of separation and delivery. And if Mr Weideman demanded more than was just, the plaintiff failed to take advantage of his fault by making a tender of what he considered reasonable. The lien would therefore continue, and the logs would go forward subject to it, and subject to such further charges as were incident to their case.

In the brief for the plaintiff it is said that Mr. Weideman refused, when the demand was made, to name any sum he claimed; but it cannot be said that he left the plaintiff in any doubt on this point. He insisted upon the schedule rates; and it appears from the testimony on both sides that the parties had had negotiations respecting these rates, and had them in print. They were, besides, the same rates which were charged to others, and must have been matter of public notoriety. What Mr. Weideman refused to do was to name any sum variant from these.

V. The point is made further that the defendant retained all the logs when a comparatively small portion would have been sufficient for the protection of its lien. No question of this sort appears to have been made before the suit was brought, but the plaintiff demanded all the logs and the defendant refused to deliver them before its charges were paid. If demand had been made in such form as to present the question, and defendant had persisted in retaining all, it might then have become necessary to decide whether the lien was general, covering all the logs of a particular owner, and attaching for the whole amount on any part not surrendered up, or whether the lien was upon each particular thousand feet of the logs, or upon each separate batch of logs, and would be waived to the extent that any were delivered up without payment. But these questions are not in the present record. The lien was upon all the logs, and an unnecessarily excessive detention might possibly have given ground for an action, but could not of itself amount to a forfeiture of rights.

VI. Several questions are made regarding the basis which it was admissible to put before the jury for their estimate of the proper charges to be made by the defendant. The circuit judge permitted a very full showing of defendant's receipts and expenditures, and full cross-examination in respect to them; and this seems to us the only proper course to pursue. It could then be seen by the jury at what expense the defendant was moving and delivering the quantity of logs expressly or by implication committed to its care, and if in their opinion any item of expense was unnecessary, or excessive, or not roperly chargeable to the business, they could exclude it from consideration in making up their estimate. Mr. Weideman made an estimate of what should be charged to each thousand feet of logs, but he at the same time gave the basis for this estimate, and the jury were thus enabled to judge of its reasonableness. The whole subject properly belonged to them, and the judge was not at liberty to instruct them as to the conclusion they should reach.

The judge was requested to instruct the jury that if the

plaintiff in good faith offered to receive and store the logs in his own boom at Bay City without charge and without surrender of any lien, it was the duty of defendant to take them there, and it could not charge for storage while declining to do so. But what appeared was that plaintiff desired the logs taken to his boom for convenience in taking them on writ of replevin; and it does not seem that defendant was under obligation to assist in that. The logs might have been replevied at or above the Melbourne boom as well as at Bay City.

It was claimed that the charge for the storage of the logs ought to be proportioned to the time they were retained; but an instruction to that effect could not have been admissible, because the considerations involved are of fact, not of law. But the statutes governing the case aim at uniformity of charge and burden among the several log-owners, and it may be that a jury would find it grossly unjust, under some circumstances, that the owner who was favored with the first delivery of logs should be favored with the smaller charges also.

The point is also made that a part of the logs were put into the Tobacco river, and that defendant is not entitled to make any charge for running them, because, by its articles of association, its operations do not extend to that stream. But the answer to this is that there is no showing that the Tobacco river is not within the limits of defendant's operations as defined in its articles. It certainly was within them as actually conducted.

No error appearing in the record, the judgment should be affirmed with costs.

GRAVES, C. J. and SHERWOOD, J. concurred.

CAMPBELL, J. I have had some difficulty in satisfying myself that the record in this case does not contain errors. But the complications are such upon the facts that it seems to me no way has been pointed out whereby the jury could have been guided to any more satisfactory conclusion. The anomaly under our laws of a practical appropriation by one

company of the control of a navigable stream is a serious matter, and I am not prepared to say that, without State regulations sufficient to adequately protect all rights, the action of defendants is not open to legal complaint.

But in this case plaintiff dealt with defendant in regard to the running of his logs within certain limitations, and recognized them as authorized to handle them. Under such circumstances, and without some agreement to the contrary, it could not be expected that they would be required to be compelled to do anything in the final dealing with them which should imperil or complicate the other large interests in their custody; and as the case stands I think the matter was left properly to the jury for want of any more tangible basis of calculation than they had before them.

I concur in the result.

The other Justices concurred.

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DANIEL M. ADAMS v. CHARLES WOOD.

Replevin for property not wholly paid for—Demand.

Replevin for goods, on the ground that they were wrongfully detained, will not lie where defendant came lawfully into possession of them, unless the wrongful detention is proved; and, if there has been no wrongful conversion by defendant, it must also be shown that plaintiff demanded the goods before bringing suit.

Demand need not precede an action of replevin for goods, the taking of which by defendant constituted a trespass, unless the trespass has been satisfied or the plaintiff is estopped from asserting it; but where the wrongful taking arises out of contract relations, and defendant holds in good faith, demand is necessary.

Demand and refusal, before bringing replevin, will not make defendant's lawful possession unlawful.

Retention of title by the seller until full payment is made is not necessarily inconsistent with the buyer's right to the possession of the goods, and, if no time is fixed for completing payment, the buyer is entitled to reasonable time before the seller can demand the return of the goods and replevy them.

Judgment for the return of goods replevied from a buyer by the seller restores to the buyer the possession of the goods without impairing the seller's rights under their contract of sale.

Case made after judgment from Kent. (Montgomery, J.) June 7.—October 10.

REPLEVIN. Defendant had judgment. Affirmed.

Taggart & Earle for plaintiff. Demand is unnecessary before bringing replevin, if defendant claims title: Wells on Replevin § 374; *Smith v. McLean* 24 Ia. 322; *Seaver v. Dingley* 4 Greenl. 306; *Homan v. Laboo* 1 Neb. 204; *Perkins v. Barnes* 3 Nev. 557; Morris on Replevin 78.

Gleason & Bundy for defendant. Detention of goods lawfully obtained does not become unlawful until demand is made for them: *Darling v. Tegler* 30 Mich. 54; *Campbell v. Quackenbush* 33 Mich. 288.

SHERWOOD, J. This action is replevin for a horse alleged to have been wrongfully detained, and damages for detention.

At the circuit the judgment was for defendant for return of the property and ten dollars damages for detention, with costs; and in favor of plaintiff for a special interest to the amount of ten dollars. The proceedings are before us for review upon case made after judgment.

At the request of the parties the circuit judge made written findings of the facts and of the law. The exceptions are to the findings upon the law. The court finds as facts that the plaintiff sold and delivered the horse to the defendant previous to bringing the suit; that the sale was conditional—the title to the horse to remain in the plaintiff until paid for; that at the time suit was brought defendant had paid $30 of the purchase price, and $10 remained unpaid; that no demand was made of defendant for the horse before suit; and that the use of the horse from the time of the seizure was worth ten dollars. Upon these facts the circuit

judge found the suit prematurely brought and the parties entitled to the judgment rendered above stated.

It is insisted by the defendant's counsel that a demand for the property claimed, and a refusal by defendant to deliver it up, was necessary before the plaintiff could bring his suit, and this seems to be regarded by them as an important question in the case.

There are no fictions of law to be indulged in, in the action of replevin. It originates in wrong and can only be supported while it exists. The consequences of a judgment against the defendant were once of a very serious character, and in modern practice in many places are not unfrequently of more than ordinary importance to him, as they not only concern his property but place in jeopardy his liberty until the judgment is satisfied. 1 Britton, c. 28; Mirror, c. 2 § 26; *Exp. Chamberlain* 1 Sch. & Lef. 320, n; 3 Bl. Com. 146; *Leonard v. Stacy* 6 Mod. 140; Wells on Replevin p. 7 § 12; *Hovey v. Coy* 17 Me. 266.

The action originally was confined to a wrongful distress or taking, and no demand was ever necessary in such a case. Wells on Replevin p. 3 § 5; Gilbert on Distress 4; Bradley on Distress 1; *Le Roy v. East Saginaw City Railway* 18 Mich. 234. It was afterwards extended to a wrongful detention of property as well, but in such case the wrongful detaining in some way, must always be made to appear before the plaintiff can maintain his suit. *Hickey v. Hinsdale* 12 Mich. 99; *Burt v. Burt* 41 Mich. 82.

When the taking is lawful, and there has been no wrongful conversion by the defendant, there is nothing to put him in the wrong until the person entitled has made a demand for the property and the defendant has refused to give it up. *Cadwell v. Pray* 41 Mich. 307.

Whether or not a person is wrongfully possessed of personal property, depends many times upon the character of the original taking through which he claims from the rightful owner, and not on the good faith or assurance upon which he receives the property, and the necessity for demand not unfrequently is made to depend entirely upon this

fact. For instance, when such original taking is felonious, no matter in whose hands the property may be subsequently found, the owner is entitled to his writ, without demand, because no person can acquire a rightful possession through a felonious taking. *Trudo v. Anderson* 10 Mich. 357; *Ballou v. O'Brien* 20 Mich. 304; *Seaver v. Dingley* 4 Me. 306; Wells on Replevin p. 199 § 347; *Barrett v. Warren* 3 Hill 348; *Ayers v. Hewett* 19 Me. 281. And the same is true when the original taking is a trespass, so long as the trespass remains unsatisfied and the owner is not in some way estopped from asserting the wrong. *Jackson v. Dean* 1 Doug. (Mich.) 519; *Baker v. Fales* 16 Mass. 147; Wells on Replevin p. 38 § 54; *Riley v. Boston Water-power Co.* 11 Cush. 11; *Galvin v. Bacon* 11 Me. 28. A different rule prevails when the taking, though wrongful, arises out of contract relations with the rightful owner, and is claimed to be in pursuance thereof. In all such cases, before any wrong can be imputed to the party in possession in good faith, and before he can be subjected to the expenses of a suit, he must be requested to give up the property and refuse so to do. *Campbell v. Quackenbush* 33 Mich. 288; *Barrett v. Warren* supra; *Morris v. Danielson* 3 Hill 168.

In the present case the declaration is for the unlawful detention. Plea, general issue, with notice of ownership by defendants.

It is found by the circuit judge that the plaintiff sold and delivered the horse to the defendant. The defendant, therefore, came lawfully in possession of the property.

It is also found that while the defendant was thus to have possession, the title was to remain in the plaintiff until paid for, and it is not found, nor does it anywhere in the case appear, that the defendant had ever sought to dispose of, change, or in any manner encumber the title to the property, or do any other act or thing in violation of his contract of purchase; and the payment of ten dollars of the purchase money only remained to be made in order to discharge the title to the property from any claim of the plaintiff. There is no finding or proof showing the plaintiff entitled to the

possession of the property at the time this suit was brought; no demand was made for the property or the balance of the purchase money.

It does not appear by the terms of the sale that the ten dollars was due at the time suit was brought. These facts certainly do not show a wrongful detention of the property by defendant. It is claimed by counsel for plaintiff that the character of the plea and notice excused the necessity for demand. Suppose this to be true, we do not see how it would aid the plaintiff; a demand and refusal are circumstances only tending to show a wrongful detention. *Hill v. Covell* 1 N. Y. 522; *Lockwood v. Bull* 1 Cow. 322; *Buckland v. Barton* 2 H. Bl. 136; *Baldwin v. Cole* 6 Mod. 212; *McCombie v. Davies* 6 East 538; *Hoare v. Parker* 2 Term 376. But unless the plaintiff is entitled to have his demand complied with at the time it was made, it can lay no foundation for the action or change the character of the defendant's possession. *Kelsey v. Griswold* 6 Barb. 436.

Counsel for plaintiff insist that his title retained gave him the right of possession. Conceding this as an abstract proposition, while retaining such title he could part with the use and possession of the property, which it seems to be unquestioned he did in this case, and then brought his suit without any right to retake the possession he had thus transferred. Title in the plaintiff is not necessarily inconsistent with both possession and the right thereto in the defendant. The case shows no time within which the defendant was to make payment. In such case a reasonable time is intended, and it does not appear that that time had arrived when this suit was brought. *Child v. Child* 13 Wis. 20; *McLaughlin v. Piatti* 27 Cal. 452; *Summons v. Austin* 36 Mo. 307; *Hunt v. Strew* 33 Mich. 85; *Hunt v. Chambers* 21 N. J. L. 620. The effect of the defendant's plea and notice upon the necessity for demand, supposing the plaintiff otherwise entitled to maintain his suit, we do not deem it necessary to pass upon in this case. Under the facts found, demand became immaterial. The taking appears to have been without right. Wells on Replevin p. 199, § 348, and cases

cited. *Stewart v. Wells* 6 Barb. 79. The judgment for the return of the property did no more than transfer the possession to the party from whom it had been wrongfully taken. It did not impair the plaintiff's rights under his contract of sale, upon which there was a contest. It gave him the amount of his interest therein, and with this he should have been satisfied.

The judgment must be affirmed with costs.

The other Justices concurred.

ALBERT J. NELSON v. ALFRED E. DUTTON.

Alteration of interest clause in note—Evidence.

In an action on a promissory note in which the interest clause had been altered by erasing the words "after maturity" some time after it was given, the question was whether the alteration was made with the maker's consent. The payee's wife testified to being in and out of the room while the maker and the payee were talking about some notes which the former had given to the latter, and being asked what was said about their bearing interest, answered "They were all to draw interest but the ninety-day note" [which was not the one in suit.] She was farther asked "What was said by them about your husband's erasing the word 'maturity,' if anything?" and she answered "Well, he said that was to be done. He says 'The notes were to draw interest, wasn't they,' and he says 'Yes, all but the ninety-day note.' He said that was all right." On cross-examination she said she did not remember whether she saw any of the notes or saw them signed, or when they were signed or whether the conversation was before or after they were signed. *Held* that the evidence did not warrant submitting the case to the jury on the theory that the maker told the payee to alter the note or that he approved of his doing so, after the fact.

Agreements for ten per cent. interest must be written. Comp. L., § 1632. Whether any liability arises from a parol ratification of an oral agreement that the interest clause in a note may be so changed as to lengthen the period for which ten per cent. interest shall be paid —*Q.*

One cannot recover under a declaration in which he claims as indorsee

of a note bearing ten per cent. interest, if the interest clause in the note sued on is invalid.

A mere inference that a note sued on is identical with a note referred to by a witness, cannot support a judgment.

Error to Clinton. (V. H. Smith, J.) June 8.—Oct. 10.

ASSUMPSIT. Defendant brings error. Reversed.

O. W. Barker and *Cook & Daboll* for appellant.

A. Stout for appellee.

COOLEY, J. This is a suit upon a negotiable promissory note, and the plaintiff's right to recover depends upon the question whether an alteration confessedly made in the note after it was signed, and not made by the defendant, was consented to by him. The alteration consisted in the erasure of the words "after maturity" from the clause for the payment of ten per centum interest, so as to make the note bear interest from its date, instead of from the time it fell due.

The note was given to one Esler, and by him sold to the plaintiff. The plaintiff gave evidence that the note was in its present condition when he bought it; that after obtaining it he called the attention of defendant to it, who said it had been altered since he gave it. The evidence tended to show, however, that the note was one of several given at the same time, and that defendant admitted that the understanding under which they were given was that all the notes but one should bear interest from date. Besides this, there was the evidence of Mrs. Esler, the wife of the payee, which it is claimed relates to the time when the notes were given, and which, so far as is important, is given in the margin.[1]

[1] *Q.* Did you hear a conversation at your husband's office between him and Alfred E. Dutton about some notes your husband took of Dutton?
A. I did.
Q. State what was said about the notes drawing interest.
A. They were all to draw interest but the ninety-day note.
Q. What was said by them about your husband's erasing the word "maturity," if anything?

The defendant denied that he ever authorized the alteration, and showed that the note was offered for sale by Esler before the words "after maturity" were stricken out. The plaintiff gave evidence to show a subsequent ratification, and this, under the view we take of the case, will be noticed further on.

In submitting the case to the jury the circuit judge made use of the following language: "Mrs. Esler states that she was present at the time of the signing and executing these notes. I understand her to say there was something said by the parties in relation to interest; that Mr. Dutton said or told Mr. Esler to erase those words."

It seems to us that this is altogether too strong a statement of Mrs. Esler's evidence. In the first place, there is no identification of the notes, or of the time when they were given. We may infer that there was no other transaction between these parties in which notes were given by defendant, but we have no evidence to that effect, and cannot

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A. Well he said that was to be done. He says, "The notes were to draw interest, wasn't they," and he says, "Yes; all but the ninety-day note." He said that was all right.

CROSS-EXAMINATION.

Q. Who was present at the time these notes were executed?

A. I don't remember.

Q. Was there any other lady in the house when these notes were made?

A. I think this lady was there—Mrs. Outwater.

Q. Where was she when you heard this conversation between your husband and Mr. Dutton?

A. She was in the dressmaking department.

Q. Where was witness at the time you heard this conversation between your husband and Mr. Dutton?

A. I was passing in and out of his office.

Q. State whether the door was open from the office leading into the dressmaking department.

A. Yes.

Q. State whether the conversation you heard at that time, between Mr. Esler and Mr. Dutton, was before or after these notes were signed by Mr. Dutton.

A. I don't remember.

Q. State whether you, at that time you heard that conversation, saw any of these notes.

A. Well, I don't remember.

Q. Can you state, of your own knowledge, the time when Mr. Dutton signed these notes?

A. No; I can't tell the date; I don't remember.

Q. You did not see him sign any of the notes?

A. I don't remember.

make the inference the basis of judgment. Then the opportunity Mrs. Esler had of obtaining exact information of what was going on was so slight that but little importance should be attached to her evidence, especially when it was given for the purpose of establishing the wholly improbable allegation that the payee of a note, who was authorized to make an important change in the paper at the very time it was executed, instead of making it or having it made by the debtor himself immediately, postponed doing so until after he had offered the note for sale.

The judge further said to the jury: "If you find that defendant authorized this alteration,—that the matter was talked over as to interest, and his attention was called to it, and he told Mr. Esler to strike out those words, and Mr. Esler did so subsequently within a short time; and that, within a short time afterwards, he was shown the note and he said it was all right and he would pay it,—then the plaintiff is entitled to recover the amount due upon it." We do not think there was evidence in the case to justify submitting the case to the jury upon this theory. See *Swift v. Barber* 28 Mich. 503. The verdict and judgment for the plaintiff must, therefore, be set aside and a new trial granted.

It was claimed on the trial that there was sufficient proof of a subsequent ratification of the alteration; and on a new trial the theory of ratification may perhaps be relied upon. It seems proper, therefore, to call attention to the fact that by the statute a promise to pay ten per centum interest is required to be in writing; and it is not very obvious that a subsequent parol acceptance of an unauthorized contract to that effect could be effectual. It is also to be noted that the plaintiff sues as indorsee of a note purporting to bear ten per centum interest; and if the interest clause is invalid, there seems to be no ground for recovery in his name, because the note without interest would be a different note from the one indorsed to him.

GRAVES, C. J. and CAMPBELL, J. concurred.

SHERWOOD, J. This case is an action of assumpsit upon a promissory note reading as follows:

"$200. ST. JOHN'S, MICH., October 22nd., 1878.

One year after date, for value received, I promise to pay to the order of W. J. Esler, two hundred dollars, at the banking office of Shaver & Grisson, St. Johns, with interest at 10 per cent. [after maturity]. A. E. DUTTON."

Plea, general issue, accompanied by an affidavit of Dutton denying the execution of the note under oath.

The case originated in justice's court, where the plaintiff recovered; and was twice tried at the circuit, the defendant prevailing on the first and the plaintiff on the second trial; and the case is now before us on bill of exceptions.

From the record it appears that the note in this suit, with three others given, for one hundred dollars each, were made and delivered at the same time and in the same transaction, to the said W. J. Esler, payable to him or order, due in three, six and nine months, respectively; and all contained the same clause as to interest, viz., "with interest at ten per cent. after maturity." Within two days after the note was drawn Esler transferred the three and six months' notes to Shaver & Grisson, bankers, and the $200 note, within three or four days, to the plaintiff in this suit, he paying therefor $180.

It is claimed on the part of the plaintiff that after these several notes were drawn and delivered to Esler, it was agreed between him and Dutton that on the ninety-day note and the one in suit the interest should run from date, and that the words at the end of each of those notes, "after maturity," might be stricken out by Esler, and that he accordingly did so before he transferred the $200 note to plaintiff; that the next day after plaintiff received said note he met the defendant in the presence of said Esler, at the office of the latter, and informed the defendant he had bought the note of Esler, and showed him the note, and defendant said the words "after maturity" nad been erased since he signed the note; but that the agreement was that the note should draw interest; that the words "after maturity" were to be crossed out, and that the note was all right

and straight, and he would pay it. Testimony was given tending to prove these facts.

The defendant claimed that the erasure was made without his knowledge or consent, and the note was therefore void, and gave evidence tending to establish that fact.

The jury found against the defendant upon the facts.

It was the privilege of the plaintiff to show that the alteration of the note was made with the consent of the defendant, or that after it was made the alteration was fully approved of and ratified by him, and any testimony which would legitimately tend to establish either of those propositions was admissible. *Fitch v. Jones* 5 El. & Bl. 238; 2 Pars. Cont. 228; 1 Greenl. Ev. § 568*a*; 2 Daniell's Neg. Inst. § 1401, and cases cited; *Grimstead v. Briggs* 4 Iowa 559; *Wilson v. Jamieson* 7 Penn. St. 126; *National State Bank v. Rising* 11 N. Y. Sup. Ct. (4 Hun) 793; *Cariss v. Tattersall* 2 Man. & G. 890; *Morrison v. Smith* 13 Mo. 234; *Clute v. Small* 17 Wend. 238; *Bowers v. Jewell* 2 N. H. 543; *Stout v. Cloud* 5 Litt. 205.

No more than this was done in the testimony given which is made the subject of defendant's first assignment of error, and the same is true of that portion of the court's charge stated in defendant's thirteenth assignment of error. The charge gives the law upon the subject of ratification as applied to this case correctly. Such ratification, however, should have been limited by the charge to the sum for which the note was given, and the neglect so to do was error. Without the erasure the note did not draw interest until after maturity, and liability for interest could not be created by the parol ratification of the altered note. *Swift v. Barber* 28 Mich. 504.

The plaintiff's ninth request seeks to apply the rule that all conversations and parol treaties, occurring before and at the time the note was made and executed, were merged in the written instrument and were inadmissible as evidence; but this is a mistake. The defendant charged a deliberate fraud in making the alteration, and sought to avail himself,

on the trial, of the advantage it would give him against the plaintiff.

In all cases where the question of fraud is involved, the rule contended for has no application. *Mich. Cent. R. R. Co. v. Dunham* 30 Mich. 128; 1 Greenl. Ev. § 284; *Collins v. Blantern* 2 Wils. 374; 2 Stark. Ev. 768: 3 id. 1500; *Kain v. Old* 2 B. & C. 634; *Wright v. Crookes* 2 Scott N. R. 685.

No question seems to have been made before the justice or at the circuit upon the sufficiency of the pleadings in the case. The question is not raised under any assignment of error in this Court. Under the circumstances, I do not think the subject a proper one for our consideration upon this record.

For the error above stated the judgment should be reversed with costs and a new trial granted.

CAMPBELL, J. I concur in the result.

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THE PEOPLE v. ELLEN C. BEMIS.

Criminal prosecution—Associate counsel for prosecution—Means of committing murder—Circumstantial evidence—Amendment of judgment entry.

Counsel to assist the prosecuting attorney in a particular prosecution may properly be employed by the board of supervisors, with the sanction of the circuit court and the approval of the prosecuting attorney.

The prosecuting attorney is a quasi judicial officer, and he and any one associated with him represent public justice exclusively, and stand indifferent as between the accused and any private interest.

An information charging that the accused, at a time and place stated, "feloniously, willfully, and of her malice aforethought, did kill and murder," etc., without stating the means by which the murder was done, is sufficient, under the statutory system of procedure in Michigan, as the information is based on a full examination into the facts on a complaint before a justice, and this examination, unless waived, is returned into the circuit court, where the respondent can

avail himself of it to restrict the trial to the matters on which he has been examined.

A woman was prosecuted for killing her son-in-law with strychnine, and it was the theory of the prosecution that the victim's wife was accessory to the crime. *Held*, that it was not error to admit evidence that on the night after his death the two women slept together, and were heard whispering a long time after retiring.

It is not clearly error, in a murder case, to admit evidence of ill-feeling between the accused and the victim, extending back two years before his death, though such a showing would be certainly remote.

Entry of judgment in a murder case may properly be amended a month after it was made, to show that the verdict was for murder in the first degree and to give the sentence correctly.

Error to Ionia. (Hart, J.) June 19.—October 10.

MURDER. Respondent was convicted. Affirmed.

Attorney General *Jacob J. Van Riper* and *Vernon H. Smith* for the People. Murder by poison is covered by an information in ordinary form, without stating the means: *Templeton v. People* 27 Mich. 501; *State v. Verrill* 54 Me. 408; *Com. v. Webster* 5 Cush. 295; *People v. Potter* 5 Mich. 1; *People v. Doe* 1 Mich. 451.

Blanchard & Cagwin for respondent.

COOLEY, J. The respondent stands convicted of the murder of one Will. Henderson. The information is very general, and charges that respondent "heretofore, to-wit, on the 18th day of January, one thousand eight hundred and eighty, at the township of Easton in said county of Ionia, feloniously, willfully and unlawfully and of her malice aforethought, did kill and murder one Will. Henderson, contrary to the statute in such case made and provided, and against the peace and dignity of the State of Michigan."

On the trial F. H. Smith, Esq., appeared as counsel with the prosecuting attorney, and this being objected to by the defense, his authority was inquired into, and it appeared that he had been employed by a committee of the board of

supervisors, subsequently sanctioned by the circuit court with the approval of the prosecuting attorney. The court thereupon overruled the objection. The ruling was correct. We have held that the office of prosecuting attorney was quasi judicial, and that he and any one associated with him must be exclusively the representative of public justice, and stand indifferent as between the accused party and any private interest. *Meister v. People* 31 Mich. 99; *Sneed v. People* 38 Mich. 248; *People v. Hurst* 41 Mich. 328. But Mr. Smith's position does not appear to have been assailable. He was not employed by any private interest, or any interest hostile to the prisoner, and there was no showing that he had or was likely to have any feeling or desire that would lead him to seek an unjust conviction. The board of supervisors to some extent represents the people in criminal matters, and the power to determine the compensation of counsel employed to aid the prosecution, is vested in that board. It was not improper, therefore, for the board to have a voice in the selection of counsel, or that, with the approval of the prosecuting officer, they should make all the arrangements. It is not to be assumed that counsel of their selection will be subject to improper influences.

Objection was made to the introduction of any evidence under the information, on the ground that as it failed to allege the means used or the manner in which the alleged murder was committed, it failed to give the respondent the information respecting the nature of the charge against her, which was necessary to enable her to procure her evidence, and be secure against being taken by surprise on the trial. If the information were to be tested by common-law rules, this objection might be insurmountable. But in *Sneed v. People* 38 Mich. 248, a similar information was held sufficient under the system of procedure established by statute in this State; and indictments equally general have been sustained against the same objection in other states. *Cathcart v. Com.* 37 Penn. St. 109; *Campbell v. Com.* 84 Penn. St. 187; *State v. Shay* 30 La. Ann. 114; *People v. King* 27 Cal. 507; *Newcomb v. State* 37 Miss. 383; *State v. Morrissey* 70

Me. 401; *Williams v. State* 35 Ohio St. 175. Under our system the information has for its basis a full examination into the facts upon a complaint before a justice; and as the examination is returned to the circuit court, the defendant will be enabled to avail himself of it in that court if the prosecution were to attempt to depart from it, and convict him of something upon which no examination had been had. It is true, the respondent, when brought before the justice, may, in his discretion, waive an examination; but the arrest is always preceded by the complaint and if examination is waived, it must be supposed the defendant considered the disclosure of facts by the complaint as sufficient for his protection.

The record contains thirty-nine assignments of error, the majority of which relate to the admission and rejection of evidence. Most of the rulings appear to us so unmistakeably correct as to require no discussion. A few may be mentioned.

The theory of the prosecution was that the respondent murdered Henderson by administering strychnine to him while he was unwell at her house, and that his wife, who was her daughter, was accessory to the crime. Having put in evidence tending to prove this theory, they were allowed to show that the night following Henderson's death the respondent and her daughter slept together, and that they were heard whispering together a long time after retiring. This was objected to, and the defense justly contend that there was nothing very strange or suspicious about it. But this might be said, perhaps, of almost any isolated fact in the conduct of the accused contemporaneous, or substantially so, with the supposed crime, and if evidence of it can be rejected on that ground, it would be impossible to prove what the accompanying facts were. But this must generally be necessary where the crime is to be made out on circumstantial evidence, and the jury must be trusted to distinguish the significant facts from those which are unimportant. It is not likely that, standing alone, they would

look upon the whispering of two women in bed as a very suspicious circumstance.

The prosecution was permitted to show ill-feeling on the part of respondent towards Henderson, extending back two years before his death. This was objected to as too remote. It was certainly going back a good ways, but we cannot say that the trial judge exceeded the limits of a just discretion in receiving the evidence.

Some exceptions were made to the judge's charge, but as we think, without cause. It appears to have been altogether fair. Objection is also made to the action of the judge in amending the entry of the judgment a month after it was made. But if this was necessary to make the record correspond to the fact, there was certainly no want of power. It seems that the entry as made failed to show that the verdict was one of murder in the first degree, and also gave the sentence incorrectly. This misprision of the clerk it was entirely proper to correct, and there was nothing in the lapse of time which could constitute an impediment.

The judgment must be affirmed.

The other Justices concurred.

THE MCCORMICK HARVESTING MACHINE COMPANY v. JOHN MCKEE, JR. AND JOHN MCKEE, SR.

Promissory note—Proof of execution—Evidence—Delivery to third person—Remission of excess in judgment after review.

In an action on a note the signature thereto proves itself if delivery only is denied by the affidavit filed with the plea.

The agent of a manufacturing corporation was one of a firm organized for selling its goods. The firm owed money and the agent furnished it from funds of the corporation, taking as security the note of one of the partners on which the maker's father was surety. The note was payable to the corporation and was afterwards taken up and another given. In a suit on the last note defendants claimed that it

had never been intended that it should be delivered to the payee. *Held* proper to refuse to allow defendants to show that certain members of the firm had, with others, projected a partnership for selling the plaintiff's goods sometime before the note was given; or to show what funds were in the firm's hands and that the agent had charge of and used them; or what the surety's intention was, when he signed the first note, as to its delivery; or what property belonging to the firm the corporation had taken possession of on finding that their agent was short in his accounts.

Complaint cannot be made of the exclusion of evidence if it is afterwards admitted.

A note that is given to the payee's agent and is turned over to the payee before it is due and applied by him on an indebtedness of the maker, will sustain a recovery by the payee if he has no knowledge of any arrangement between the maker and the agent whereby the latter was to keep the note in his own hands and use it in his own business.

The amount of a judgment in excess of the ad damnum clause can be remitted even after review.

Error to Kalamazoo. (Mills, J.) June 22.—October 10.

ASSUMPSIT. Defendants bring error. Affirmed.

Oscar T. Tuthill for appellants.

Howard & Roos for appellees.

SHERWOOD, J. The plaintiff, a foreign corporation organized under the laws of the state of Illinois, on the 13th day of December, 1880, and for a long time previous thereto, was doing business in the village of Kalamazoo. During said period one Solomon L. Beardsley acted as general agent for, and conducted the business of, said plaintiff at Kalamazoo, which was selling agricultural implements and machinery manufactured by them; and during the same period said Beardsley, John C. Bloom and said defendant John McKee, Jr., entered into a copartnership for the purpose of selling agricultural implements in Kalamazoo county, under the name of John McKee, Jr. & Co., each to furnish to the firm five hundred dollars as capital stock. Said firm received and sold the goods of the plaintiff, and had an account with it. Beardsley had the principal charge and management of

the business of the firm, and particularly the financial department.

In the fall of 1879 J. McKee, Jr. & Co. owed a debt of five hundred dollars. Beardsley raised the money to pay it; did so by obtaining John McKee, Jr.'s, note for the amount, signed by his father, the other defendant, as surety, running to C. H. & L. J. McCormick or order, (the name under which the plaintiffs were then doing business,) due on the first day of March, 1880. This note was delivered to Beardsley who furnished the money thereon from the funds of the plaintiff then under his control, as was understood at the time by defendant J. McKee, Jr., and was by him regarded as representing his part of the capital stock of the company. On the 13th day of December, 1880, this note was renewed by the defendants, and the first note taken up. The business was done by Beardsley.

Suit is now brought by the plaintiff to recover the amount due on this last note. The declaration is on the common counts, with notice that plaintiff would introduce the note in evidence thereunder. Plea, general issue, with notice of set-off, accompanied by an affidavit of defendant John McKee, Jr., denying the delivery of the note to the plaintiff or to any person for it. Defendants also claim that when said note was made and delivered to said Beardsley, it was with the understanding and agreement upon his part that he should not deliver it to the plaintiff, but should himself hold the same till paid, and that when so paid it should be from the funds of the firm of John McKee, Jr. & Co., and that defendants should never have any trouble on account of the note. The plaintiff's counsel claim that at the time this new note was given, Beardsley had an account of his own as agent; and also one of John McKee, Jr. & Co. to settle with plaintiff; that John McKee, Jr. & Co. owed the plaintiff, and that this new note was taken in the then name of the plaintiff, at the request of said Beardsley, and the payment postponed a few months to enable him to use it with the plaintiff in making his settlements with the company; that in four days thereafter Beardsley went to the plaintiff in

Chicago, and in his settlement with its agent of the account of John McKee, Jr. & Co. he turned out the note in suit to plaintiff, it giving said firm credit therefor on plaintiff's books.

The case was tried at the circuit by jury, and upon the theory of the parties, as above stated. The jury, under the evidence and charge of the court, returned a verdict for the plaintiff for six hundred and twenty-two dollars and ninety-nine cents. The case comes before us on error, alleging exceptions to the rulings on the trial, and to the charge of the court.

The defendants objected to the introduction of the note in evidence on the ground that the proof of execution and delivery was insufficient. Under the previous decisions of this Court the objection is not well taken. *Burson v. Huntington* 21 Mich. 415.

Defendants' counsel proposed to show that a partnership was talked of between John McKee, Jr., John C. Bloom, Solomon Beardsley and one Hoffman, for the purpose of selling the plaintiff's machines and others, a few months before the first note was given. This was objected to as irrelevant, and the objection was sustained, and, as we think, very properly, as the proposed testimony had no connection with the note in suit or the dealings of the parties out of which the note originated.

The third alleged error is based upon the exclusion of testimony which does not appear in the record. The defendant sought to show what funds were in the hands of John McKee, Jr. & Co., and that Beardsley had charge of and used them. The court held the testimony irrelevant. This ruling was correct. It had no bearing upon the issue.

The court subsequently admitted the evidence objected to and ruled out, mentioned in the defendants' fifth assignment of error.

On the fifteenth day of December, 1881, Beardsley was short in his accounts with the plaintiffs, and they sent Mr. Everts to take charge of their business, then in the hands of

Beardsley and John McKee, Jr. & Co., and in doing so he took possession, as the testimony tended to show, of what effects he could find in the safe of John McKee, Jr. & Co., which were turned over to him by said Beardsley. Defendants' counsel proposed to show, as offset, what they took possession of. To this proposition objection was made that it was irrelevant and immaterial, and that it was not the property of the defendants. The court correctly sustained the objection. John McKee, Jr. & Co. were not parties to the suit, and had no interests therein to be adjudicated.

Under the seventh assignment of error the defendant obtained the testimony his question called for, and the error complained of under the eighth assignment* has already been considered, and is untenable.

Counsel for defendants offered to show by the surety, John McKee, Sr., what his intention was as to the delivery of the first note when he signed it, and the court ruled the testimony irrelevant and immaterial. His intentions, if of any materiality, when he signed the second note, certainly could have no bearing upon the issue when he signed the first. There was no error in this ruling.

Ten exceptions are taken to the charge of the court as given, and to his refusal to charge as requested. We do not think it necessary to consider them seriatim.

The defendants' principal ground of contest was that the note was to be held by Beardsley for his own benefit, and to be paid out of the firm funds, and was never delivered, and that if it was delivered to Beardsley it was his own private concern, and with the understanding that it should not be paid or be transferred by him; that no delivery was ever made of the note, or intended to be made, to the plaintiff by the defendants; and that the plaintiffs never owned said note, or received the same of Beardsley, but they took the same from the safe of the firm of John McKee, Jr. & Co. without the consent of defendants. Testimony was taken upon these several points before the jury. The ver-

* Error was assigned on the exclusion of a question as to the terms of the original partnership agreement.

dict was general, and against the defendants, and unless wrong through some error in the charge of the court under which the same was found, it must stand. We have carefully examined the charge given in this case, and have failed to discover any error therein which could prejudice the defendants.

The court refused to give the following request of the defendant, and exception is taken to the ruling: "If the jury find that the note was made to be held in fact by Beardsley in his separate affairs as regards the plaintiff, and not to be delivered or transferred by him, and when paid, to be paid out of a particular fund, to-wit, the profits of the firm of John McKee, Jr. & Co., then it could only be recovered out of such fund, and the plaintiff would be as much bound as Beardsley himself would be."

Beardsley was selling machines, collecting and doing business for plaintiff at the time the note was given, and was also at the same time engaged, as a member of the firm of John McKee, Jr. & Co., in selling machines for plaintiff. There is no pretense that the agents of the plaintiff, at the time they took the note, had any knowledge of the circumstances claimed by defendants as attending the making and giving of the same to Beardsley, and this request assumes that Beardsley took the note in his own individual business. The testimony also shows without dispute that the plaintiffs received the note of Beardsley before it was due, and applied the same on the account against John McKee, Jr. & Co. Under these facts the plaintiff would be a bona fide holder for value, and entitled to the protection of the law as such. The request ignores this right of the plaintiff, and was therefore correctly refused by the court. It is conceded that the defendants voluntarily gave the note to Beardsley. *Burson v. Huntington* 21 Mich. 433; *Putnam v. Sullivan* 4 Mass. 45.

The ninth request is subject to the same objection as defendants' seventh request. It fails to recognize the testimony tending to show the plaintiff a bona fide holder of the note, even though the note was taken by Beardsley upon

the conditions claimed by defendants. The defendants' tenth request was substantially given in the charge of the court.

The amount of the judgment was more than the sum claimed by plaintiff in the declaration. This appears to have escaped the notice of the court and counsel on both sides until after the judgment had been entered. It further appears that counsel for plaintiff, as soon as their attention was called to the subject, at once proposed to remit the amount in excess of the ad damnum.

This may yet be done, and the judgment thus modified must be affirmed with costs.

The other Justices concurred.

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EDWIN PRICHARD v. JAMES L. SHARP.

Duress.

A person arrested on capias could not get bail, and, on giving the plaintiff secured notes, the latter consented to his discharge. The arrest was caused in good faith for an injury which plaintiff supposed had been done by defendant, and the notes were taken in satisfaction of the injury, though they did not fully compensate it. *Held*, that a bill would not lie for the cancellation of the securities on the ground that they had been obtained by duress.

Courts cannot disturb a compromise between parties, unless on satisfactory evidence of mistake, fraud or unconscionable advantage.

Appeal from Missaukee. (Fallass, J.) June 22.—Oct. 10.

BILL to set aside mortgage. Complainant appeals. Affirmed.

Sawyer & Bishop for complainant. Contracts made while under imprisonment are closely watched: 1 Story's Eq. Jur. § 239; *Foshay v. Ferguson* 5 Hill 158; *Collins v. Westbury* 2 Bay 211; duress depends as well on the state of mind as on other facts: *Hatter v. Greenlee* 26 Am. Dec. 374; Broom's Legal Maxims 277; 1 Selw. N. P. 83; even

if the imprisonment is lawful, a contract influenced by it can be set aside for duress: *Watkins v. Baird* 6 Mass. 511; for Michigan cases see *Feller v. Green* 26 Mich. 70; *Pierce v. Pierce* 38 Mich. 417; *Vyne v. Glenn* 41 Mich. 112; *Bank v. Watkins* 21 Mich. 483; *Gebhart v. East Saginaw* 40 Mich. 336.

Fullass & McIntyre for appellee. Duress requires undue or illegal force, or the infliction of unnecessary and unlawful privation to escape which one is induced to execute the instrument: *Rood v. Winslow* 2 Doug. (Mich.) 68.

GRAVES, C. J. The defendant hired complainant to plow a small piece of ground on his premises, and distant a few rods from his house and barn. There were two or three log heaps in the field. The defendant left home in the forenoon of Tuesday, being the 18th of August, 1879, and continued absent until the 26th. Shortly after he left, and on the same day, the complainant repaired to defendant's place to perform the plowing. He set fire to one of the log heaps, and plowed a few furrows, and then quit and went away. When the defendant returned he found that his barn, together with the contents, had been destroyed by fire during his absence, and there were signs that the fire had passed to the barn from the log heap. He adopted the opinion that the firing of the log heap was the cause of the loss, and that the act was culpable negligence for which the complainant was responsible. The complainant claimed that the barn did not burn during his stay at the premises, and that he knew nothing of it; and further, that the fire which destroyed the barn did not proceed from the log heap.

The defendant sued him for the damage by capias, and obtained an order for bail in the sum of $1000. The writ was made returnable April 13, 1880, and complainant was arrested on it about March 5th, and, failing to give bail, was committed. The term of court next after the return-day was not to occur until October, and complainant, not succeeding in finding bail, was anxious to secure his enlarge-

ment in some other way, and avoid being confined until fall. He remained in custody until the return-day, and then entered into an agreement with the defendant to give him his notes, secured by mortgage, for $325.

The complainant claims that the giving of the securities was simply to obtain his enlargement, and for no other purpose, but the defendant swears, and he is corroborated, that the transaction was a settlement and compromise of the action and a release of complainant from all further liability. The parties communicated their understanding to the sheriff, and the defendant observed that he might let the complainant go out to enable him to execute the papers, and the sheriff complied, and all three went together to a Mr. Lewis, who prepared the writings, and complainant at once executed and delivered them.

The parties then separated. It appears that immediately before the making of this arrangement the complainant was in consultation with counsel, and that defendant waited to let it be concluded. This fact shows that complainant had legal advice, and it also bears on his motive in entering into the arrangement. In the course of a very few days he filed this bill to have these securities just given, and which amounted to much less than the loss, entirely set aside and canceled, on the ground that they were obtained by duress. The defendant answered, and the cause was heard upon evidence taken in open court, and decided adversely to complainant.

On a careful examination of the record we are not able to reach a different conclusion. The case is addressed to the protective equity which anticipates attempts to enforce unconscionable transactions, and applies a preventive remedy, and the claim for relief is based on the assumption that by his legal proceedings the defendant first got complainant under his power, and then obtained these papers by an oppressive and iniquitous use of it. There is no difficulty about the principle, but the trouble is that the facts do not support it. The record contains nothing tending to impeach the genuineness of the action at law, nothing to sug-

gest that the proceedings were not steps in due course of law, and no pretense even that there was any irregularity. Whatever hardship to complainant may have been involved, either because he was unwilling or unable to procure bail, could not be considered as a wrong or injury by defendant; and whether in truth the complainant was or was not guilty is beside the question. That the case was real, and not simulated; that the defendant prosecuted bona fide, and on ground which appeared to him reasonable,—cannot be denied. *Gates v. Shutts*, 7 Mich. 127.

It is no doubt true that, reasoning by the rules of predestination, the end was already what it only remained for the subsequent trial to evolve. But there was a true controversy, and the result of it, however certain in the latter sense, no one could predict, and in this state of uncertainty it was entirely competent for the parties to settle the dispute themselves, instead of trying it in court; and no tribunal would have a right to disturb their compromise, unless on satisfactory evidence of mistake, fraud or unconscionable advantage, and the complainant fails to establish either.

The decree should be affirmed with costs.

The other Justices concurred.

Isaac L. Lyon v. Donald A. McDonald, John C. McDonald and Bernard Rich.

Settlement of mortgage debt.

A foreclosure suit depending upon the question whether or not the mortgage debt had been settled, was determined in complainant's favor upon evidence that complainant had always claimed it as an existing obligation, and that defendant fully understood that this claim was made; that neither note nor mortgage had been surrendered, and no steps had ever been taken to procure their cancellation or release; that the mortgager had assured complainant that he had fully informed a second mortgagee of the existence of the prior

mortgage, and of the reasons why complainant insisted on his right to hold it; and that defendant had made an agreement with complainant in which he set out the existence of a debt, including the mortgage as securing part of it and as belonging to complainant.

The burden of showing that the amount due on a mortgage under foreclosure is less than complainant claims is on the defendant.

A foreclosure decree was given for the amount of a proposed compromise which had never amounted to more than an offer on either side, where the court considered the amount a sufficient approximation to the debt to fairly represent it at the time the compromise was proposed.

Appeal from Iosco. (Tuttle, J.) June 22.—October 10.

FORECLOSURE bill. Complainant appeals. Reversed.

Edw. W. Pendleton and *F. H. Canfield* for complainant.

C. S. Henry and *Hatch & Cooley* for defendants.

CAMPBELL, J. Complainant filed his bill to foreclose a mortgage dated July 25, 1873, for $5239, payable in one year with interest at 10 per cent. The bill was filed June 24, 1882, when the note had become outlawed, unless kept alive by payments, as there was no proof of such a new promise as would satisfy the statute. Complainant only relies on the land.

The answer, which was unsworn, sets up the statute of limitations as against personal liability, and averred payment, but without any particulars of time or manner. It also claimed, in the form of the common counts, a set-off, without particulars. The defense chiefly relied on was payment by a transaction in 1874.

On the same day when the note was given, July 25, 1873, an agreement was made between Donald A. McDonald and complainant whereby McDonald agreed to cut and deliver on or before July 18, 1874, 1500 thousand feet of white pine timber, cut the full length of the tree, and averaging not less than 650 feet to the stick, at nine dollars a thousand, to be properly marked and scaled by L. B. Wheeler at Detroit or Toledo,—the logs to be cut on lands of Lyon,

specified. The agreement set out that McDonald was indebted on two notes (of which one was the note in question) to the amount of $9000. It was agreed that if McDonald faithfully carried out the contract, and delivered the 1500 thousand feet of long pine timber on or before July 15, 1874, Lyon would cancel the debts, and assign to any one whom McDonald should select, the securities held for the same, and pay any further balance, if there should be any. In addition to the mortgage in suit, the remaining note was also secured by collaterals.

It is not claimed that this contract was carried out according to its terms. The lumber furnished was not all white pine, but partly Norway. It did not come up to the required average in size. It was also discovered that a part of it was cut on land in which McDonald was not interested, instead of on the specified lands in which he was equitably interested.

The contract, therefore, being unfulfilled, would not by the imperfect fulfillment operate as a payment, unless by some arrangement and settlement. Upon this the parties are at variance. McDonald claims that a certain deduction was agreed on and the matter closed so as at any rate to cancel the debts referred to. Complainant testifies to the contrary, and that the mortgage was never understood to be canceled, and was kept alive through their subsequent dealings, and that he never received such sums or payments as to either pay it or balance it by counter-claims or set-offs.

In this conflict we are obliged to consider the subsequent treatment of it between the parties. The record shows abundantly that complainant always claimed it as an existing obligation and that McDonald fully understood that this claim was made. It also appears that no surrender was made of either note or mortgage, and no steps were ever taken to procure a cancellation or release. It is not claimed, and there is nothing which goes to make it probable, that if not settled in 1874, under the timber contract, it was ever settled at all.

In November, 1874, after that transaction was ended, some controversy arose with a Mr. Morse, to whom Mc-

Donald had given a subsequent mortgage, and who claimed to have been ignorant of the mortgage in suit. On this occasion McDonald wrote two letters assuring complainant that he had fully informed Morse of the existence of the mortgage, and of the reasons why complainant insisted on his right to hold it. And on the 17th day of November, 1874, McDonald signed and delivered to complainant and E. G. Merrick a new agreement to cut and supply timber, in which he distinctly sets out the existence of a debt of $7500, including this mortgage as securing a part of it and as belonging to complainant. This document he disputes, but in our opinion the testimony establishes its genuineness, and his understanding of it, beyond serious question.

If this is so, it is very certain the mortgage was not paid, and the defense of payment is not made out. Complainant is entitled either to the whole amount secured, or to so much at any rate as remained unpaid on balance of accounts. And as the burden of reducing it is on defendants, we must allow it except as shown to require reduction.

The defendants have not in their case or argument thrown much light on any of the subsequent arrangements in such a way as to make out any specific balance or set-off. But in July, 1882, McDonald offered to close up a proposed compromise of $3500, offered in January, 1880. This was not done, and it was a mere offer on either side. But we are inclined to think that this amount may be fairly regarded as a sufficient approximation to represent the debt in January, 1880, and we think the decree below should be reversed with costs, and a decree entered for complainant with interest from January 7, 1880, at 10 per cent.

GRAVES, C. J. concurred.

SHERWOOD, J. The bill in this case is filed to foreclose a mortgage given on the 25th day of July, 1873, by the defendant Donald A. McDonald, to the plaintiff, to secure payment of the sum of $5239.09, with interest at ten per cent., in one year from the date thereof, according to the

condition of a certain note bearing same date, for same amount, and payable at the same time.

The bill alleges that the defendants John C. McDonald and Bernard Rich claim some interest in the premises as subsequent purchasers, tenants or incumbrancers, but claim no rights in opposition to the mortgage. The defendants made their joint and several answer, wherein they all say and aver that the said note and mortgage were fully paid and satisfied by the defendant Donald A. McDonald, and that the maker thereof did not owe anything thereon at the time the bill was filed. They further claim in their answer that said complainant was indebted to the defendant Donald A. McDonald, at the time this suit was commenced, under all the common counts in assumpsit, in an amount greater than the amount claimed to be due upon this note and mortgage, and ask that the same, or so much thereof as may be necessary for the purpose, be set off against any claim made to appear upon the note and mortgage against D. A. McDonald. The defendants also aver that the complainant's action for any claim upon the note is barred by the statute of limitations.

To this answer the complainant filed a general replication. The case was heard on pleadings and proofs, and a decree was rendered therein by the circuit judge dismissing the bill, with costs to the defendants, and complainant appeals.

The principal question in the case is, have the note and mortgage been paid?

At the time the note and mortgage were made, the defendant Donald A. McDonald was indebted to the plaintiff in the sum of about nine thousand dollars, and owned the property mentioned in the mortgage in this suit, and an interest in a large tract of pine lands, known as the Talbot lands, in township 25 north, of range 8 east, and also had a large amount of personal property, consisting of horses, sleds, harness and camp equipments for lumbering. And it appears that, up to that time, he had always had great confidence in the complainant, and, in return, enjoyed his confidence. In order to secure the payment of the balance of

his indebtedness to the plaintiff, not covered by the mortgage, he gave a bill of sale of his personal property to the complainant, and complainant thus having under his control all the defendant D. A. McDonald's property from which the money was to be made to satisfy the complainant's claims, the latter entered into the following contract with said defendant:

"An agreement made this twenty-fifth day of July, eighteen hundred and seventy-three.

For and in consideration of one dollar to me in hand paid by I. L. Lyon, I, Donald A. McDonald, of Au Sable, Michigan, do hereby agree to cut and deliver to tug, in chains, on or before July 18, 1874, one million and five hundred thousand feet of sound, merchantable white pine timber, cut full length of tree, averaging not less than six hundred and fifty feet to the stick; timber to be marked with mark designated by said Lyon, and to be scaled by L. B. Wheeler, of Port Huron, at point of delivery, Detroit, or Toledo, Ohio; said timber to be cut from land owned by said Lyon, in township 25, range N. 8 east; price to be nine dollars per thousand feet, board measure. Said McDonald is indebted to said Lyon in the sum of nine thousand dollars or thereabouts, as shown by two notes held by said Lyon for collateral security, and for the payment of those notes said Lyon holds a mortgage on certain real estate in Au Sable owned by said McDonald, known as lot 3, in block 2 of Pierce's subdivision of lot 6, in sec. 8, in township twenty-three N., R. 9 east. Also holds a bill of sale of the horses, sleds and camp equipments and appurtenances and harness, etc., used by said McDonald in lumbering. Also the right, title and interest on certain pine lands in town 25 N., R. 8 east, bought of H. G. Goddard and J. Talbot.

Said McDonald agrees to cut, skid and haul the above amount of timber to Pine river, and bank the same, so that it can be watered early in the spring, and before he cuts and hauls any timber for any other party or parties.

If said McDonald faithfully and truly carries out the above-mentioned agreement, and delivers to I. L. Lyon the one million five hundred thousand feet of long pine timber on or before July 15th, 1874, said Lyon agrees to cancel said McDonald's indebtedness, and pay him any balance that may be due, and assign to him, or to whom he may direct, whatever securities said Lyon may hold, as mentioned above,

and all right, title and interest in above-mentioned pine lands.

Detroit, July 25, 1873. D. A. McDonald.
I. L. Lyon."

Under this contract the defendant Donald A. McDonald proceeded to cut and deliver to the complainant the timber therein mentioned, and, as the testimony shows, did cut and deliver to the complainant 1,496,930 feet, which was only 3070 feet less than the amount contracted to be delivered. The complainant received this timber and sold the same to Toledo parties. At the price mentioned in the contract, it amounted to the sum of $13,472.37. The indebtedness of Donald A. McDonald, as claimed by him, to the complainant, was at this time $12,152.19.

The defendant D. A. McDonald claims that in the month of July, 1874, after he had delivered the timber above mentioned, he went to the office of complainant in Detroit, and there had an accounting with him under the contract, and that the accounts of the parties as kept by complainant were there consulted and the above footings ascertained. That complainant then found some fault with the timber delivered, because it did not measure out the size contracted for, and was not all of the qualities and kinds promised, and in consequence claimed a deduction of $2000 should be made. This McDonald says was not acceded to by him, but an agreement was finally reached whereby he was to deduct the excess of his claim over the complainant's, making it equal to that of complainant, and on those terms a settlement was had, and that the complainant thereupon agreed to discharge the mortgage, give up McDonald's note, release the bill of sale, and convey to defendant D. A. McDonald the pine lands mentioned in and as required by the contract.

Of course, if this statement is correct, then the complainant's note and mortgage are paid, and he must fail in his suit. This statement, however, is denied by the complainant, and upon the issue thus presented on the statements of the parties most of the testimony in the case was given. The issue is really one of fact, its decision depending mainly

upon the weight to be given to the testimony of the parties, and it has been decided by the circuit judge in favor of the defendants. His decision, usually, upon the facts in such cases, is regarded with much consideration, because of his supposed acquaintance with and nearness to the parties and their witnesses, which gives him better opportunities to judge of the credibility of their testimony, and when the evidence is close it is usually sufficient to determine the preponderance.

In any cases, however, where any of the reasons or elements should appear to be wanting, which are necessary to give to the decision at the circuit the significance generally accorded to it, then it becomes the duty of this Court, on reviewing the case, to consider the testimony in detail, without the aid furnished by the decision of the circuit judge. On this occasion, however, the question involved may be disposed of without resort to such aid, though it exists in the case. The record very clearly satisfies me that the conclusion arrived at by the court below is correct, and fully supported by a decided preponderance of the evidence.

By the terms of the contract made with complainant it appears the parties expected that, when it was completed, the complainant would have more than enough of defendant D. A. McDonald's property to satisfy his claims, and he promises to pay the balance to McDonald or to his order. It was also agreed between the parties in the contract that McDonald's indebtedness should be paid by the delivery of the timber, and the application was to be made by complainant. The complainant received the timber, appropriated and sold it; this is not denied by him. There is no testimony in the case showing that he received it in any other manner than under the contract. Neither does it appear that he had any authority from McDonald to receive it in any other way, or to apply it to any other purpose, than in payment of complainant's claims mentioned in the contract; and while the complainant denies the settlement claimed by McDonald, he does not deny the statement of the accounts as he had kept them. When he was upon the stand giving

his testimony, he was asked by counsel for defendant, in reference to the account due him from McDonald, the following question: "This Exhibit 3 finds a total of $12,-152.19, (with the exceptions you have named). Do you believe that to be a correct statement of the account of the indebtedness of McDonald to you at that time?" *Answer.* "As far as I can remember, sir, I should think it might be;" and referring to the number of feet of timber delivered by McDonald, he was asked: "Do you admit the accuracy of the number of feet (1,496,930) as measured in the scale bill?" *Ans.* "Yes, sir; I accept Mr. Wheeler's statement as correct." Mr. Wheeler was the complainant's scaler.

The exception referred to in the first question does not relate to the indebtedness on the mortgage or bill of sale mentioned in the contract. Now, if it be conceded that $3000 should have been deducted from McDonald's account for timber because of its not being of sufficient size,—and that is the most claimed in any of the complainant's figuring,—the complainant would still be owing him in July, 1874, $10,472.37, which was more than enough to satisfy the note and mortgage and discharge the bill of sale. From the premises conceded in the complainant's testimony it is difficult to make any figures warranted by the testimony which would not show the complainant's note and mortgage paid, provided the value of the timber delivered was to be applied to such payment; and that question, as we have already said, is settled by the contract under which the timber was received by the complainant.

The question is made, was the complainant bound to account for the timber at the price mentioned in the contract, it being not all of the particular kind of pine, and some of it smaller size than contracted for? The testimony shows that about one-seventh of the timber was Norway instead of white pine, and that the average of the timber delivered was smaller than mentioned in the contract, but there is no testimony showing that any of the timber before or when received by the complainant was objected to by him on account of quality or size; but it does show that he knew of the

discrepancy in quality and size when he received the same, sent it to a distant market in another state and sold it, and not until called upon to settle and account for it was any objection made of any kind by complainant.

I think, under such circumstances, he must be held to have waived the failure to comply with the contract in the respect now complained of, and held to account for it at the contract price. *Fisher v. Samuda* 1 Camp. 190; *Grimaldi v. White* 4 Esp. 95; *Milner v. Tucker* 1 C. & P. 15; *Leavenworth v. Packer* 52 Barb. 132; *Reed v. Randall* 29 N. Y. 358; *Sprague v. Blake* 20 Wend. 61; *Hargous v. Stone* 5 N. Y. 73; 2 Kent's Com. 480; 1 Pars. Cont. 475; *Hubbardston Lumber Co. v. Bates* 31 Mich. 158; *De Armand v. Phillips* Walk. Ch. 186; *Davis v. Downs* 4 Mich. 530; *Moore v. Detroit Locomotive Works* 14 Mich. 266; *Hall v. McEwen* 19 Mich. 95. This would entitle McDonald to quite a large sum in excess of his indebtedness to complainant; but the defendant's testimony shows he forgave this excess to complainant when he settled with him, on account of the deficiency in the size of the timber delivered. This settlement, however, is denied by the complainant. I have carefully examined the testimony upon this subject, and without going into a discussion of the evidence further, I am unable to avoid the conviction that it preponderates in favor of the position taken by defendants' counsel, viz., that the account was correctly stated at the complainant's office in Detroit and a settlement was there agreed upon.

The complainant does not deny but that his account, so far as it appears in the statement of the same then made, was correct, and concedes the correctness of the statement he then made of D. A. McDonald's account. The subsequent action of complainant in deeding the lands to McDonald agreed to be conveyed to him by the terms of the contract upon the completion thereof, together with his letter to Mr. Morse of July 28, 1874, in which he says: "You probably received my letter in reference to D. A. McDonald's settlement. My matters are arranged with him

satisfactorily,"—seem to me inconsistent with any other view that can be taken of the case.

The effort to show that the defendant D. A. McDonald, in cutting and delivering the timber which he did, was asking complainant to pay him for his own timber, and committed trespass by taking some of the same from lands of another where he was not privileged to go, was not successful, and I think it sufficiently appears that the lands from which the timber contracted to be delivered was taken, were at the time held by McDonald under contracts for purchase, either written or verbal, upon the performance of which he would have been, in equity, entitled to conveyances, and it is a significant fact in this case, in this connection, that these lands have all, since the execution of the contract, been deeded to the defendant D. A. McDonald by or through the instrumentality of the complainant.

Much is claimed for an admission of the existence of the note and mortgage in suit as unpaid, contained in what purports to be an agreement between the complainant and defendant D. A. McDonald, and signed by him, dated November 17, 1874; but this is sufficiently explained by McDonald, and the explanation is fully confirmed by the fact that no rights were ever claimed under the instrument by either party.

It is claimed by counsel for complainant, as a circumstance against defendants, that complainant has been suffered to retain possession of the note and mortgage until suit was brought. Under the circumstances of the case, this fact cannot be permitted to make against the defendants. Great confidence had always been reposed in complainant by McDonald, and when the settlement was made the parties were in Detroit, and the bill of sale was filed and the mortgage was recorded in a distant county; the defendant had the complainant's promise to discharge these claims; the debt was paid. He had for years trusted the complainant, not only with his papers, but with the title to his property. Certainly it was but reasonable to expect complainant to redeem his promise made to his friend to discharge these

securities; and the excuse complainant made for holding the note and mortgage afterwards was plausible and consistent with his retention of them; and ever since then the defendant has been trying to get up these securities.

The question of set-off and the note being barred by the statute of limitations it is unnecessary to consider.

I think the decree of the circuit court should be affirmed with costs.

COOLEY, J. did not sit in this case.

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THE TOWNSHIP OF CHURCHILL v. THE TOWNSHIP OF CUMMINGS.

Demurrer—Accounting between townships—Official laches.

Demurrer to a bill in equity does not admit the truth of matters that are not relevant or well-pleaded, nor the correctness of legal inferences, nor unreasonable deductions of facts, nor unreasonable or inequitable meanings or implications.

Where accounts between two townships are adjusted by their respective boards, one of the townships, in filing a bill to set aside the settlement, cannot distinguish itself from its board for the purpose of excusing laches, nor can it claim relief on the ground that its own board was inferior in ability or in knowledge of facts material to the settlement.

Where unsettled accounts between two townships are adjusted by their boards at a joint meeting, one of the townships cannot afterward maintain a bill against the other to set aside the settlement on the ground that its own board was inferior to the other in ability, experience or knowledge, or that it was misled by the other as to the true financial condition of its own township. And the complaining township cannot distinguish between itself and its board for the purpose of escaping the consequence of the latter's negligence.

Every township board is presumed competent to attend to the business it has to do, and in that respect to be equal in ability to any other board with which it deals.

The misrepresentation to a public board of facts which they can ascertain and are bound to know as pertaining to their own duties, but as to which they neglect to inform themselves, does not furnish any substantial ground for remedial equity.

A court cannot enter upon an original accounting on a bill which is so deficient in equities as to leave an existing settlement in force.

Appeal from Ogemaw. (Green, J.) June 22.—Oct. 10.

BILL to set aside a settlement and for an accounting. Complainant appeals. Dismissal affirmed.

A. V. Thomas and *Hatch & Cooley* for complainant.

A. McDonald for defendant.

GRAVES, C. J. This appeal was taken from a decree which dismissed the bill on demurrer.

March 12, 1878, the board of supervisors separated part of the territory of the township of Churchill and erected the township of Cummings. Shortly after the new township was organized, and in April, 1878, the boards of both townships convened pursuant to the statute, (Comp. L., ch. 13,) to apportion the assets and liabilities between the parent township and the new one, according to the rule laid down in said statute. The joint meeting elaborated an adjustment, to which all assented; and the agreement being written in duplicate and signed by each member, the boards adjourned and the meeting was dissolved.

About two years and a half later it was alleged on the part of the township of Churchill that errors to a large amount had been committed in the settlement against that township, and another meeting was demanded to effect their correction and effectuate a true adjustment. An attempt to secure such a meeting, in November, 1880, failed because Cummings refused to join. But in the summer of 1881 the two boards again came together and consulted. The state of things, however, was not changed. The township board of Cummings refused to take any new or further steps, and retired from the meeting.

Among the items mentioned in the agreement was a demand for $249.55 by school-district No. 2 against the township of Churchill, and although the township of Cummings assumed this obligation, it has failed to pay it, and

the district has commenced an action at law against the township of Churchill to enforce it, which is still pending.

In the fall of 1881 the latter township filed this bill to set aside the settlement and have an accounting in chancery. The reasons assigned for setting aside the existing settlement are fraud and mistake, and an original accounting is claimed in chancery under the statute of 1881 (Pub. Act No. 46) and on the alleged ground that, the boards having met, the board of Cummings refused to arrive at a settlement, and likewise because that board refuses to engage in a further meeting.

The record presents two general questions,—one of jurisdiction, and the other whether the bill on its own theory contains any case for relief. The question of jurisdiction covers two grounds: *First*, whether the general authority of the circuit court in chancery in matters of mistake and fraud extends to settlements transacted by township boards under ch. 13; *second*, whether the conditions of fact are the same as those on which the statute of 1881 makes the right of equitable intervention depend for the purpose of an accounting in the court of chancery. This subject of jurisdiction involves several points of considerable difficulty, and, as the case may be disposed of on the other ground, they will not be examined here.

The other general question relates to the case made by the bill, and it takes for granted that the circuit court in chancery possessed the power to set aside the settlement for fraud or mistake, and the point is whether what is stated concerning fraud and mistake exhibits a case of either on which a court of chancery can found any relief. As the particulars adduced to warrant the accusation of fraud are not discriminated from those intended to present a case of mistake, but the same facts are promiscuously employed for the most part to make out both, there will be no attempt to classify the facts with reference to the distinctions between these subjects of equitable cognizance.

1. The complaining township begins by dwelling on the comparative ability, experience and knowledge of the

members of the respective boards in regard to the management of township affairs and in regard to such settlements, and then represents the members of its own board as greatly inferior in these respects, and in the same connection alleges that the supervisor on defendant's board had been supervisor, for the three years next preceding, of complainant's board, and was well informed as to the financial standing and credit of complainant, and knew what its debts and liabilities were.

2. Having premised thus much, the bill goes on to charge that the members of defendant's board, intending to defraud complainant, falsely represented that the list of complainant's debts quoted in the bill was a correct statement of complainant's outstanding debts, obligations and liabilities; that complainant's net credits were $4301.51; that according to the roll of 1877 the taxable property of complainant was equal to that of defendant; that these representations were false, to the knowledge of defendant's board, but were believed and relied on by the members of complainant's board. For the purpose of refutation and explanation these allegations are followed by amounts said to be correct, and by items of debts and liabilities of complainant which are claimed to have been overlooked, and by certain other sums alleged to have been charged back to complainant by the county treasurer and Auditor General since the settlement.

To accurately estimate the statements of the bill it is requisite to bear in mind that the demurrer does not admit the truth of matters which are not relevant or well pleaded, nor the correctness of legal inferences, nor any deductions of fact which are not reasonable, nor any meanings or implications which are opposed to the principles of reasoning or the rules of equity.

The case, in its leading features, has no example; and among its striking peculiarities is the fact that the complaining township disparages the qualifications and vigilance of its own agents, and assumes that their comparative inferiority and their want of assiduity are sufficient to generate an equity in its favor to have the settlement set aside in chancery.

This theory is not valid. The members of these boards were selected by their respective townships, and the law required them to meet for the very purpose of effecting a settlement between the townships. It regarded the boards as equals, and considered each as fully able and qualified to perform the duty enjoined in a fitting manner. There is no principle on which the court may speculate on the varying degrees of actual capability of the members, or inquire into and pronounce upon their administrative or diplomatic strength for the exigencies of the occasion, and proceed to elevate the board of one township above that of the other, and apportion duty and responsibility accordingly; and the complainant can found no equity on any supposed distinction between the two boards in respect to actual intelligence and fitness for the duties of the occasion. Were the position alluded to maintainable, it would follow that the question would be the subject of an issue of fact to be decided on evidence, and the court of chancery would be occupied in the wild and absurd attempt to decide for itself upon the comparative intelligence and fitness of these township officers.

Where the law commissions these officers to act at such meetings, it requires no more of one board than of the other, and demands of neither anything beyond such ability as the township may secure, and as every township board is presumed to possess. This portion of the bill is therefore irrelevant and adds nothing to the case.

The matters which remain to support the assumed equity are in substance that the members of defendant's board in part misrepresented to the complainant's board, and in part concealed from them, the true financial condition of complainant in regard to its assets, debts, liabilities and taxable property.

Does this constitute a charge of fraud or mistake which a court of equity can regard? The question refers to the merits of the statements in the bill, and not to formalities. The means of information in relation to all these topics were in public records which were perfectly accessible to the members of complainant's board, and it was not only in the line of their ordinary duty as the administrative council of

the township, but was especially incumbent on them as members of the joint meeting, to consult these legitimate sources of knowledge and make themselves fully acquainted with all the facts.

It is material to mark the exact nature of the charge. The allegation is not that the defendant's agents misrepresented or concealed anything that the members of complainant's board were not bound to ascertain from the records; not that they misrepresented or concealed anything in regard to the condition of their *own* township, nor misrepresented or concealed anything which the members of complainant's board would not be presumed to know or be able by reasonable diligence to ascertain. The charge really comes to this: that the members of complainant's board were deceived in regard to their own concerns,—in respect to the affairs of their own township, and over which they were the exclusive guardians; that they were overreached, because, and only because, they neglected to see what the law required them to see, and what by the slightest attention to their own matters must have been obvious. Where knowledge is thus made a duty and the appointed means are conspicuously at hand, if the risk of being misled is preferred to any legitimate effort to get such information as would prevent it, the case is hardly one which commends itself to remedial equity. Where difficulties are caused by preferring supineness to vigilance, the principles of the court are against giving relief to the neglectful party. Story's Eq. Jur. §§ 199, 200*a*; Smith's Eq. Jur. 59; *Grymes v. Sanders* 93 U. S. 55.

No avoidance of the rule can be claimed on the narrow ground that complainant and its own board were distinct. In view of the facts as we have them we cannot make such a distinction. For the purpose of this case the proceedings by complainant's board must be regarded as complainant's proceedings. A further circumstance is not unworthy of notice. The want of due attention on the part of complainant did not terminate with the joint meeting. For two and a half years after the occurrence of the glaring faults with which the settlement is now charged, they seem to

have passed without challenge, and the case offers no explanation or excuse for this tardiness and inattention.

These considerations show that the bill makes no case on which a court of equity, adhering to its own principles, could rescind the settlement executed and recorded by the joint meeting. And it will be readily conceded that no theory can be imagined on which the court could undertake an original accounting with that settlement still in force.

It follows that the decree should be affirmed with costs.

SHERWOOD and CAMPBELL, JJ. concurred. COOLEY, J. did not sit in this case.

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SETH VROMAN v. SETH D. THOMPSON.

Justices' dockets—Indorsement of levy—Advice of counsel—Abandonment of levy—Stale levy—Sale by sheriff after leaving office—Venditioni exponas—Removal of execution from files—Defects in dates in certificate of sale—Proof of publication.

A justice's docket record must disclose jurisdiction and show everything which the statute requires to be entered upon it; but it must also be construed fairly and reasonably, and in view of the fact that the justice is not presumed to be a legal expert. Reasonable certainty, or perhaps "certainty to a common intent" is all that is necessary.

The fact of levy should be indorsed on the execution; but its absence does not invalidate the execution if notice of the levy is duly recorded according to statute (Comp. L § 4685; Act 5 of 1875) and its subsequent indorsement is unimportant.

A client buying land on which execution has been levied cannot, against objection, show that his attorney advised him that the execution was returned satisfied and the levy was no longer a lien, for this would be hearsay. And if the advice were sound it would be unnecessary for protection, while if it were not it could not affect rights depending on the levy.

Abandonment of a levy is not necessarily implied by the sheriff's indorsing on the writ of execution the fact of his levy and the words: "I hereby return the within execution to the clerk of the court for the county of Kalamazoo, as I am commanded by Seth D. Thompson, plaintiff."

It seems proper to allow the plaintiff in an execution to dispute the sheriff's indorsement thereon that the plaintiff had directed him to return the execution to the clerk.

A levy may be left to sleep till it becomes stale and an estoppel or some equity arises against the enforcement of the lien or the right to keep it uncancelled.

A sheriff who has made a levy in the life time of the writ of execution and during his own official term, can sell the property on the execution after his term expires; and the old writ is his sufficient authority.

It is not customary in Michigan to resort to the writ of venditioni exponas; it is usual to proceed on the old execution or take out another.

Executions ought not to be removed at pleasure from the files by the plaintiffs therein or their counsel, or by a sheriff who has gone out of office. Such a removal, however, is only an irregularity and does not of itself invalidate a sale on the execution.

In disposing of a bill to quiet title by setting aside an execution sale made on a transcript of a justice's judgment, the circuit court does not exercise an appellate jurisdiction as to the action in which the execution issued.

Where complainant in a bill to set aside an execution sale assumes, for the purposes of the case, that the sale itself is valid, such defects in the sheriff's certificate of sale as wrong dates for the issue of execution and of levy are immaterial as between complainant and the execution purchaser.

An execution sale is presumed regular and made on proper notice if the party attacking it does not make out a prima facie case to the contrary; he cannot, by merely alleging its validity, place upon the execution purchaser the burden of establishing it.

Publication of notice of execution sale is provable by the publisher's affidavit. Comp. L. § 5925. Whether it is provable by the affidavits of those who posted the notices—*Q.*

A decree which, on bill, answer and evidence and in the absence of any cross-bill, not only dismisses a bill to set aside a cloud on title, but affirmatively declares defendant's title, should be so modified, on affirmance, as to confine it to a mere dismissal.

Appeal from Kalamazoo. (Mills, J.) June 22.—Oct. 10.

BILL to remove cloud from title. Complainant appeals. Affirmed.

Dallas Boudeman for complainant.

Germain H. Mason for defendant.

GRAVES, C. J. This bill was filed under the statute to remove a cloud, and the circuit court dismissed it and affirmed the title of the defendant. Both parties claim from the same source. In April, 1875, complainant's brother, Charles H. Vroman, by the death of their father, inherited an undivided one-sixth part of forty acres of land in Kalamazoo county, and the controversy relates to this interest. The complainant relies on a conveyance from his brother Charles, on the 6th of August, 1877. The defendant sets up a purchase dated January 24, 1880, made by him under a sale on a transcript execution in his favor against said Charles H. Vroman.

The regularity of complainant's title is not in question. The dispute concerns the right of the defendant. Several exceptions are taken to the proceedings to get title under the execution. It will be conceded that the case rests on the bill, and that no objections are before the Court that are not pleaded. It will be further conceded that complainant has the affirmative, and can only entitle himself to relief by invalidating the defendant's title on some of the grounds laid.

First. The proceedings on which the transcript entry was founded began August 12th, 1876, and ended on the 13th of September following. They are relied on by defendant as showing a judgment in his favor against Charles H. Vroman, before a justice of the peace, for between two and three hundred dollars, a transcript thereof legally certified, and the affidavits required by the statute.

The bill charges that the judgment is void, but points out no defect. Mention of the supposed fatalities only appears in the brief, and we have no means of knowing that these criticisms were presented or urged to the court below. For aught that appears, they may be relied on now for the first time. But suppose this difficulty disregarded, are the special charges of error in the brief really justified?

They are that the record of the justice does not show that any process was either served on the defendant or issued against him; nor that the case was called at the proper time, or that the plaintiff then appeared, or within an hour, or at the place required; nor when the judgment was rendered. Now these are mere conclusions from the record, and whether they are well drawn or not must be ascertained by inspection. They are matters of construction. We are not now interested to inquire what would be the consequence in this suit if the state of the record were as supposed by complainant. The present inquiry is whether his conclusions as to what it shows are right.

The docket record of a justice must receive a fair and reasonable interpretation, and due allowance must be made for what is practically unavoidable. The officers who make these records are not expected to be legal experts or masters of legal forms. Our regulations presuppose that they may be, and generally will be, plain men, not versed in the niceties or in the degrees of precision which are required and practiced in the higher courts, and the law will exact nothing from them in these matters which is not presumably within the scope of their knowledge. Of course the record must disclose jurisdiction, and all docket matters which the law imperatively requires to be entered; but when the question is whether the language of the entries does or does not show these things, it is a subject of construction, and the court must see whether what is written does show or import them; and here the language and style and arrangement must be considered, but without requiring more than reasonable certainty, or perhaps, "certainty to a common intent." Applying this test to the transcript judgment, the result is that the objections of complainant are not tenable.

Second. September 13, 1876, the transcript was filed, and judgment entered and docketed in due form, and at the same time an execution was issued and delivered to Charles Gibbs, the sheriff, returnable the 5th of December following. The sheriff on the same day executed, and caused to

be recorded in the office of the register of deeds, a notice of levy in the form prescribed by the statute (Comp. L. § 4685, as amended by Pub. Act 5 of 1875, p. 3), the notice stating that on that day he had levied on the land in question. But on the 5th of December, the return-day, he delivered the execution to the clerk without any indorsement whatever of levy or return. The complainant contends upon these facts that there was no levy at all. He insists that no levy upon land is legally possible unless a memorandum of the fact is endorsed on the execution.

That the officer must attest the intellectual act of levying by a written memorial of some kind cannot be denied. So much is fairly implied. But it is not admitted that the visible evidence required can only exist in the form of an endorsement on the writ. The statute does not require it, and there is nothing in the nature of the thing demanding it. The object is to have some outward and permanent manifestation of the fact; something which is durable, intelligible and public, in the nature of a record, to which all may resort who are entitled to information and desire it. The necessity is for evidence which is plain and accessible, and this is well afforded by the recorded notice prescribed by the statute. We held in *Campau v. Barnard* 25 Mich. 381 that this notice is primary evidence of the levy; and when a levy is shown by primary evidence to exist, it is not perceived how it can be said not to exist. The supreme court of California have gone much further than *Campau v. Barnard*. *Blood v. Light* 38 Cal. 657. No doubt it is the better practice to endorse the fact of levy on the execution when it is feasible to do so, but the levy cannot be regarded as imperfect for the want of it, where the proper notice is regularly recorded.

Third. December 31, 1876, Gibbs' term as sheriff expired. Subsequently, and in the forepart of 1877, the execution is again found in his hands, but the case does not explain in what manner he regained it. It was evidently with the defendant's approbation. He then advertised the property for sale in June, but prior to the day of sale Thompson pur-

chased a certificate of sale on execution of the same property of one Annis, and then stopped publication on his own account. And on the 6th of August, 1877, the day on which complainant made his purchase, the clerk received from some one the execution of defendant, but from whom does not clearly appear, and filed it. It then bore an endorsement of levy corresponding to that described in the recorded notice. But it also bore this further endorsement: "I hereby return the within execution to the clerk of court for the county of Kalamazoo, as I am commanded by Seth D. Thompson, plaintiff. June 30, 1877. CHARLES GIBBS, Sheriff ex-officio."

Thompson swears, and the parol evidence corroborates him, that he did not order the return stated in this writing. The complainant insists that if in fact a levy had been effected by the prior proceedings it was discharged and abandoned by this return of the execution, and he denies the right to give parol evidence to dispute the statement in the certificate that Thompson ordered it. He also claims that he became purchaser on the 6th of August in reliance on this return as an abandonment of the levy. There is nothing in the bill to show that he had any knowledge on the 6th of August of the facts relating to the execution, or acted on any such knowledge. Moreover, there is no legal evidence on that subject. It is true, the complainant stated under objection that the late Dwight May, Esq., made examination of the matter for him, and advised him that the execution had been returned satisfied, and was all right; that the levy was no longer a lien. But this was mere hearsay and incompetent under the objection. Were it otherwise it would be matter of construction, and the defendant could not be affected by the fact of the complainant's reliance on the advice he obtained, unless the advice was true. But here, again, if the advice was correct the levy was absolutely destroyed, and it would not be necessary for the complainant to show that he relied on the advice.

It is not material to decide whether it was competent for the defendant to give parol evidence to impeach that part

of the endorsement of June 30th, 1877, which asserted that the return was commanded by the defendant, although it is my impression that it was. Taking the endorsement as it reads, it does not imply a relinquishment of the levy, nor an intent to relinquish it. A purpose of that kind, if one had been entertained, could have been distinctly expressed in less words, and, as there was no occasion for concealment or for equivocation, there is no warrant for imputing an effect or meaning so entirely foreign to the letter and spirit of the certificate. No doubt a levy may be allowed to slumber till it becomes stale or dormant, and parties may so manage as to let in the doctrine of estoppel or some other equity against the enforcement of the lien, or even against the right to have it remain uncanceled; but we have no such questions here.

Fourth. After defendant's obtainment of the Annis certificate of sale the complainant filed a bill to set that sale aside, and the court decreed in his favor. The case was appealed, and this Court, in October, 1879, affirmed the decree. *Vroman v. Thompson* 42 Mich. 145. The defect was that the transcript was taken before the expiration of five days next following the judgment. The defendant then caused his execution to be again placed in the hands of Gibbs, and directed him to advertise and sell pursuant to the levy, and Gibbs complied. The sale was advertised for January 24th, 1880, and took place accordingly. The defendant became the purchaser for $342.82, and some months later Gibbs returned the execution with an endorsement of the sale and certain other proceedings, under his hand and verified by his oath. January 24, 1880, being the day of sale, Gibbs executed a certificate of sale, and caused it to be recorded in the office of the register of deeds two days later. It was discovered to be inaccurate in stating the teste of the execution as August 6, 1877, when the true date was September 13, 1876, and also in reciting the time of the levy as September 13, 1877, when the actual time was September 13, 1876. September 23, 1880, Gibbs made and

caused to be recorded a second certificate, with correct dates, for the purpose of curing the errors in the first.

The bill alleges that the last removal of the execution was illegal, and further on it contains a sweeping charge that all the proceedings were invalid; but no new objections are pointed out. Some of the points mentioned in argument under this head have been already disposed of.

It has been shown that the facts were sufficient to constitute a levy on the 13th of September, 1876. Hence, the subsequent endorsement of a levy, whenever made, is of no importance. It has also been shown that there is no basis in the bill, and probably not in the case, for claiming that complainant purchased on the faith of a state of facts appearing in the records, and which precluded defendant from using the levy to get an overreaching title. The levy was made in the life-time of the writ and during Gibbs' term of office. He was accordingly competent to make the sale, notwithstanding that his term had expired, and the old writ was sufficient for the purpose. Comp. L. §§ 559, 6111; *Wood v. Colvin* 5 Hill 228; *Averill v. Wilson* 4 Barb. 180–183; *Remington v. Linthicum* 14 Pet. 84–92; *Wheaton v. Sexton's Lessee* 4 Wheat. 503; *Childs v. McChesney* 20 Iowa 431; *Stein v. Chambless* 18 Iowa 474; *Phillips v. Dana* 4 Ill. 551; *Stewart v. Severance* 43 Mo. 322.

It has not been customary in this State, in case of failure or inability to sell before the return-day, to resort to venditioni exponas. The usual course, certainly, has been either to proceed directly on the old execution or sue out a new one, by way of continuation, for the purpose of finishing the work commenced under the former. The practice which seems to have been followed in this instance, for the late sheriff or the plaintiff in the judgment, or his counsel, to take the execution from the files at pleasure, was very loose and ought not to be allowed. But there is no admissible view of what occurred in that respect which involved anything more serious than irregularities. There was nothing in the way of fault sufficiently vital to destroy the sale,

and this is not a case in which to review mere errors or irregularities.

In taking cognizance of this suit the circuit court did not exercise appellate jurisdiction, and we are not to proceed as though it did.

The defects in the certificates of sale are immaterial in this controversy; the complainant has no concern with them. The point taken assumes that the prior proceedings are good against his bill, and that the sale is to be deemed valid for the purpose of this case. It would then seem plain that the blunder of the acting sheriff, in making out his certificate for record, could not aid complainant or prejudice the sale as between him and the defendant. The supreme court of New York have held that the requirement to file a certificate is directory merely. *Jackson v. Young* 5 Cow. 269, 270; *Jackson v. Page* 4 Wend. 585–590. Whether this could be maintained as a universal proposition may be open to question; but I think it is entirely correct as regards these parties.

Fifth. In order to prove the notice given of the sale, the defendant submitted certain affidavits which were made at the time the sale took place. One was the affidavit of the publisher of the newspaper, and the others were affidavits of the persons who posted the notices. The complainant's counsel now argues that this was not legal evidence in this case; that complainant attacked the sale as void, and that it therefore devolved on the defendant to give legal evidence to prove that it was valid; and that the witnesses should have been placed on the stand where they could be cross-examined. This position can hardly be deemed serious. On what principle can it be said that by alleging that defendant's title was bad, the complainant compelled the defendant to prove that it was good? It was for complainant to maintain his allegation, and it devolved on him to make out a prima facie case of want of due notice. But he offered no evidence whatever to impeach the sale on that ground. As there was nothing to cast suspicion on that part of the proceeding, it is a reasonable presumption of fact that it

was regular and that proper notice was given. *Wood v. Morehouse* 45 N. Y 368.

The publication is expressly provable by the publisher's affidavit (Comp. L. § 5925), and whether, in view of the difficulties to follow an exaction of personal evidence on the stand, the law will admit proof of posting by the contemporary affidavits of the persons who did the posting, has not been decided, and this case calls for no decision on it.

The conclusion I am compelled to reach is that complainant has failed to make out a case for relief. Whether he might have found more favor on a motion in the court from whence the execution proceeded to set aside the sale, is uncertain.

The exact disposition of the case by the court below demands notice. The hearing was on bill, answer and evidence, there being no cross-bill, and the complainant's bill was dismissed. But the circuit judge did not stop on denying relief to complainant and dismissing his bill. He went on and made a full affirmative decree for the defendant, establishing his title in all its parts. There was no foundation whatever for so doing, and although the complainant's counsel does not allude to this feature, this Court is not willing to affirm more than the dismissal.

The residue of the decree being without any basis, ought not to remain, and as matter of form should be reversed.

The other Justices concurred.

Ludovic S. King v. Duncan McKenzie.

Justices' courts—Unauthorized appearance.

If a justice, whether properly or not, has erased his docket entry of the appearance of a defendant, he ought not to proceed in the case without giving notice of his purpose to the defendant, or the attorney who had assumed to appear for him.

Costs were withheld upon the affirmance of a judgment reversing the action of a justice in proceeding ex parte in a case in which he would have had a right to proceed if he had not previously erased his entry of defendant's appearance.

Error to St. Clair. (Stevens, J.) October 2.—October 10.

ATTACHMENT. Defendant brings error. Affirmed.

Atkinson & Stevenson for appellant.

Chas. K. Dodge for appellee.

COOLEY, J. McKenzie sued King by attachment in justice's court, but failed to obtain personal service. The writ was returnable on February 27, 1882. On that day McKenzie's attorney, understanding or supposing that Mr. Dodge, an attorney of this Court, was to appear for King, procured from him the following paper: "Case of McKenzie v. King adjourned without prejudice to 28, 9 A. M." This was signed by Dodge, and presented at the proper time to the justice, who, understanding it to be a request addressed to him for the continuance of the case, continued it accordingly. On the next day, at the hour named, the plaintiff appeared and also Dodge, and by consent the cause was held open until two o'clock. The proper entries were made on the justice's docket on both occasions to show an appearance for the defendant by Dodge, as his attorney. Before the hour of two had arrived, Dodge went again to the justice's office, and told that officer he was not authorized to appear for King, and insisted that the entry of his appearance should be erased; which was done. When the hour for calling the case arrived, the plaintiff appeared, but there was no appearance for defendant. When the plaintiff understood what had been done respecting the appearance by Dodge, he demanded that the entry be restored; and this was done, and the cause heard ex parte, and judgment given for the plaintiff. Defendant, by Dodge as his attorney, then removed the case by certiorari to the circuit court, where the judgment was reversed.

The justice had a right to act upon the appearance of Dodge, and proceed in the case; and if he had not erased his entries on the docket we should see no reason for disturbing his judgment; but striking those out was a concession that the case could not further proceed on the appearance which had previously been entered; and though the justice may have erred in this, we can see much reason for the view of the circuit judge that the plaintiff should not have proceeded further in the case without notifying the defendant, or the attorney who had assumed to act for him, of his intention so to do.

We shall therefore not disturb the judgment of reversal; but we do not think the case is one calling for any costs in this Court. No costs will therefore be awarded.

The other Justices concurred.

JOHN SUTTON ET AL. v. HENRY VAN AKIN.

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Malicious prosecution—Objection to declaration.

A declaration for malicious prosecution is defective if it does not aver the termination of the suit in the last court to which it was carried. But the defect is formal, and would be cured by a verdict for plaintiff on the merits.

Formal defects in pleadings, even if not amendable, should be brought to the court's attention at the earliest reasonable opportunity, if the opposite party means to rely on them; he cannot plead the general issue and then object to evidence on the ground that no cause of action is stated. And if the defect is one that would be cured by verdict, the trial judge should either disregard it or direct amendment to be made and the trial to proceed, and if this takes defendant by surprise he can continue the case on a proper showing.

Error to Shiawassee. (Newton, J.) Oct. 3.—Oct. 10.

MALICIOUS PROSECUTION. Plaintiffs bring error. Reversed.

A. R. McBride for appellants. The omission to aver in

the declaration the termination of the malicious attachment suit, is cured by verdict: *Feazle v. Simpson* 2 Ill. 30; *Nolle v. Thompson* 3 Metc. (Ky.) 121; *Rea v. Lewis* Minor (Ala.) 382; *Spaids v. Barrett* 57 Ill. 289: 11 Am. Rep. 10; 3 Steph. Nisi Prius 2279; *Skinner v. Gunton* 1 Saund. 228; *Young v. Gregorie* 3 Call 391; *Wine v. Ware* 1 Siderfin 15.

McKercher & Bush and *Hugh McCurdy* for appellee. To maintain suit for malicious prosecution, it is necessary to establish the fact of prosecution and also that it has legally terminated in favor of plaintiff therein: *Hamilton v. Smith* 39 Mich. 222; Cooley on Torts 186; Wood's Mayne on Damages 566; *Barber v. Lesiter* 7 C. B. (N. S.) 175; *Anderson v. Buchanan* Wright 725; *Davis v. Cook* 3 Greene 539; *Vanderbilt v. Mathis* 5 Duer 305; *Stewart v. Thompson* 51 Penn. St. 158; 4 Wait's A. & D. 347; *O' Brien v. Barry* 106 Mass. 300; *Wood v. Laycock* 3 Metc. (Ky.) 192; *Grant v. Moore* 29 Cal. 644; *Gillespie v. Hudson* 11 Kan. 163; *Hamilburgh v. Shepard* 119 Mass. 30; *Gorrell v. Snow* 31 Ind. 215; *Wheeler v. Nesbitt* 24 How. 544; 2 Chit. Pl. (11th Am. ed.) 602.

Cooley, J. The action in this case is for maliciously and without probable cause suing out a writ of attachment against the property of the plaintiffs, by virtue of which a crop of wheat belonging to the plaintiffs was seized and detained from them. The attachment was issued by a justice of the peace, and the declaration averred a trial in justice court of the suit begun by that writ, with judgment in favor of the present plaintiffs, and an appeal of the case to the circuit court. There was a failure to aver that the case in the circuit court had been brought to a conclusion.

Without an averment that the malicious suit had in some manner been terminated, the declaration was defective. *Stanton v. Hart* 27 Mich. 539; *Hamilton v. Smith* 39 Mich. 222, 225. But the defendant, instead of interposing a demurrer, which would have called the attention of the plaintiffs to the defect, and given them an opportunity to

amend, pleaded the general issue, and went to trial. But as soon as the plaintiffs called a witness, the defendant objected to any evidence, on the ground that the declaration, by reason of the defect mentioned, failed to set out a cause of action; and the circuit judge sustained the objection. The plaintiffs then asked leave to amend, but this was objected to, and the judge declined to permit it unless the plaintiffs would consent to withdraw a juror. The consent was not given, and the defendant took a verdict.

We think the court erred. The practice to which the defendant resorted in this case is not to be encouraged. It has a necessary tendency to defeat the ends of justice, and is probably resorted to sometimes for that very purpose. Formal defects in pleadings, upon which the opposite party expects to rely, should be called to the attention of the court at the earliest reasonable opportunity, that they may be corrected with as little embarrassment and expense as possible, if correction will be of any avail. To delay making complaint until the cause has reached a stage in which correction is impracticable, or could only be had at great expense, is to deprive the complaint of all claim to favorable consideration. If no amendment could then make the pleading sufficient, it is because it is impossible for the party, on the facts, to state a cause of action; and he must necessarily go out of court; but even in such cases the courts cannot look with indifference upon the practice of postponing the objection to the pleading until the trouble and expense of preparation for trial has been made, and parties and witnesses brought into court. *Barton v. Gray* 48 Mich. 164; *Burke v. Wilber* 42 Mich. 327; *Norton v. Colgrove* 41 Mich. 544.

In *Rowland v. Superintendents etc.* 49 Mich. 553, 555, the Court, speaking through Mr. Justice Marston, expressed the opinion that an objection should not be taken as it was in this case unless when the declaration would not support a judgment, should the plaintiff recover in a trial had upon the merits. In other words, if the defect was such as, after verdict, would be cured by the statute of jeofails, the trial

court should either disregard it altogether, or should direct amendment to be made forthwith and the trial to proceed. This is what ought to have been done in this case.

The failure to allege in the declaration that the attachment suit had been brought to a conclusion, was only a formal defect. The gist of the action was the malicious suing out of the writ without cause; and though the action could not regularly have been instituted until the malicious proceeding was determined, yet if the parties had gone to trial upon the merits, and the plaintiff had recovered the verdict, it must have been intended in support of the verdict that the condition precedent to the bringing of the suit, namely, the termination of the attachment suit, had been made to appear. Comp. L. § 6051. This being so, permitting the amendment was not a matter of discretion merely, but the plaintiffs were entitled to make it as of right. There is no reason whatever to suppose that the defendant would have been taken by surprise by the correction, or that any new or further preparation for the trial would have been required on his part; but if he had made a showing of surprise or inconvenience, the court could have made the proper order to prevent mischief, and might even have continued the case if there seemed to be sufficient ground for it.

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

The other Justices concurred.

Augusta Niemarck v. Maria Schwartz.

Amendment of declaration.

An amendment is not objectionable for changing the date of a transaction so as to make it cover a longer time than was at first averred in the declaration, if it does not in any way change the obligation sued on.

Error to Saginaw. (Gage, J.) October 4.—October 10.

ASSUMPSIT. Defendant brings error. Affirmed.

Michael Brennan for appellant.

Sweet & Flanders for appellee.

CAMPBELL, J. Plaintiff recovered judgment for the value of a return passage to Europe, under an alleged agreement by defendant that if she would come over to this country and become dissatisfied, defendant would provide for such return. There was also a small item of money paid out for gloves.

The only questions raised by the assignments are confined in effect to a claim that there was no evidence tending to prove any such agreement as was sued upon. The objection that an amendment was allowed concerning the date of the transaction, as running through a longer time than originally charged, has no force, as it did not in any way change the obligation sued on.

There certainly was evidence which, if believed,—as it was believed,—fully justified the jury in their finding. The court presented the whole subject very carefully and very fairly to the jury, and no complaint is made of the rulings except that there was no testimony to justify leaving the case to them at all.

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

The other Justices concurred.

ANDREW A. ANDERSON v. EDWARD KENNEDY.

Specific performance.

Suit for specific performance was brought against one who had agreed to convey, but refused to execute a deed on the ground that his title

was subject to a reservation of mineral rights of which complainant knew, but he himself did not, at the time of making the agreement, and that complainant had told him that it was not necessary to expressly except a certain easement that was appurtenant to his homestead. It was not shown that complainant had acted fraudulently. Complainant consented to accept performance in precise accordance with defendant's maximum claims, and to take a deed reserving the easement and excepting the right to minerals, and a decree was made accordingly, without costs to either party. *Held*, that defendant could not complain.

Appeal from Marquette. (Grant, J.) Oct. 4.—Oct. 10.

SPECIFIC PERFORMANCE. Defendant appeals. Affirmed.

E. E. Osborn for complainant.

W. P. Healy for defendant.

GRAVES, C. J. The defendant agreed in writing to convey a strip of land to the complainant for $350. The terms were unconditional. The complainant paid the consideration and demanded a conveyance. The defendant refused to give a deed, and complainant filed this bill to compel specific performance.

The defendant claimed in his answer that it was verbally understood at the time of the written contract that a certain passage-way appurtenant to his homestead should be excepted. He also claimed that his holding was subject to a reservation of minerals, and that he was not aware of this fact at the time of the agreement. He further contended that complainant represented that no mention was necessary, in the writing, of the reservation of the passage-way, and further, that he himself was ignorant that his title was subject to a reservation of minerals, although the complainant was aware of it and did not suggest it.

An argument is made to show that the complainant acted in bad faith and took a fraudulent advantage; but this is not borne out by the evidence. We discover no marks of fraud whatever. The complainant made no surrender in regard to the accuracy of his own version of the facts, but he consented to waive his rights under the contract as written

and to accept performance in precise accordance with the maximum claims of the defendant. He consented to take a deed with the fullest reservation in relation to the stairway and subject to an ample exception of the right to minerals, and the court made a decree in conformity with this offer of complainant and gave costs to neither party.

The defendant has no cause to complain. On the facts, as he admits them, the complainant was at least entitled to all the relief granted, and we are inclined to think he might have insisted on something more.

The decree is affirmed with costs.

The other Justices concurred.

ALEXANDER EMERY v. THE MUTUAL CITY AND VILLAGE FIRE INSURANCE COMPANY FOR THE COUNTIES OF BERRIEN, CASS AND VAN BUREN.

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Fire insurance—Answers of assured as to other insurance—Avoidance of policy by additional insurance.

A man insured property in a company whose policy provided that farther insurance, without the company's consent, would avoid it. He took a policy in another company, whose agent knew of the first, and in answer to a question as to what insurance there was already, he answered that there would be none after a particular date, being the time at which he supposed the first policy would run out, though it was, in fact, to be good for a year longer. *Held*, in an action on the later policy, and in view of the clause of avoidance in the former one, that the former became void on getting the policy in suit, and the latter was therefore not void as for an untruthful answer.

An insurance company will be considered satisfied with the answer to a question as to previous insurance, if the answer is substantially true and they issue the policy and enter into contract for insurance.

A policy that is to be void on a certain contingency cannot be regarded, where that occurs, as existing for any purpose; and whether ended by agreement or lapse of time or breach of condition is to be considered as no policy.

Error to Berrien. (A. J. Smith, J.) Oct. 5.—Oct. 10.

ASSUMPSIT. Plaintiff brings error. Reversed.

Edward Bacon for appellant. An insurance policy is not made void by the fact that the property is already insured, if the earlier insurance is invalidated by the latter: *Watertown Ins. Co. v. Sewing Machine Co.* 41 Mich. 137; and the insurer has the burden of showing that the earlier policy remains in force: *Hopkins Mfg. Co. v. Aurora Ins. Co.* 48 Mich. 150; but subsequent insurance, without consent of the first insurer, avoids the first policy: *Security Ins. Co. v. Fay* 22 Mich. 471; *N. Y. Ins. Co. v. Watson* 23 Mich. 487; *Allemania F. Ins. Co. v. Hurd* 37 Mich. 13; Wood on Insurance § 350; and the later insurer cannot escape liability unless the earlier insurance remains valid: *New Eng. Ins. Co. v. Schettler* 38 Ill. 166; *Obermeyer v. Globe &c. Ins. Co.* 43 Mo. 573; *Ins. Co. v. Coatsville Shoe Factory* 80 Penn. St. 407; *Mitchell v. Lycoming Ins. Co.* 51 Penn. St. 402.

J. J. Van Riper, O. W. Coolidge and *H. H. Coolidge* for appellee. The representation in an application for insurance that there is none outstanding, is a warranty of the fact stated, whether material or not: *Amer. Ins. Co. v. Gilbert* 27 Mich. 429; *Van Buren v. St. Joseph Ins. Co.* 28 Mich. 398; the policy, by special reference to the application, becomes incorporated therewith, to form one contract: *Brown v. Cattaraugus Ins. Co.* 18 N. Y. 385; *Philbrook v. N. E. Ins. Co.* 37 Me. 137; *Chase v. Hamilton Ins. Co.* 20 N. Y. 52; *Delaware Ins. Co. v. Hogan* 2 Wash. 4; the representation that no insurance exists is material to the risk, and it is therefore *immaterial* whether it is a warranty or not, as being false it avoids the policy: *Lycoming Ins. Co. v. Rubin* 79 Ill. 402; *Campbell v. N. E. Ins. Co.* 98 Mass. 381.

CAMPBELL, J. Plaintiff sued on a policy of fire insurance, and was defeated on the ground that he had not truly

answered a question referred to in his application concerning other insurance on the property. It was not claimed that this was done fraudulently or intentionally, and was allowed to have been inadvertently. The question was, "What insurance is there on it, and in whose favor?" The answer was "None after the dates above stated."

Those dates referred to the time when this policy was to become operative, the period being postponed until the supposed expiration of a previous policy in a Hartford company, which plaintiff supposed would shortly run out, but which in fact had another year to run. The agent of defendant knew of the policy, but not of its time of running.

This Hartford policy contained a clause whereby, in case of further insurance without the written consent of the company endorsed thereon, the policy should be void.

We have held in several cases that under such a clause the new insurance renders it at once null and void, without further action. See *New York Central Ins. Co. v. Watson* 23 Mich. 486, and cases cited, and notes.

Plaintiff claimed below that inasmuch as his application referred distinctly to the period when the policy was to become operative as the time when no other insurance would exist, there was no misstatement, because this policy avoided the Hartford policy. The court below held otherwise, and decided that he had no cause of action left.

We see no ground on which this decision can be sustained. Not only might it fairly be inferred that there was a present policy, but such, we think, was the almost necessary inference, as it was the fact known to defendant's agent. We see no reason why the inquiry should be made, except to learn whether there was double insurance. The objection suggested that the main reason, or an important reason, was to know whether a policy was existing at the time, without reference to its continuance, and that the failure to answer was itself a violation of duty, does not strike us as of any force. If defendants desired a more explicit answer instead of the one given, which really gave all necessary information for their protection, they should have declined

to issue the policy. By issuing it and entering into the contract they must be held to have been satisfied with it, if true in fact.

We think it was true in fact. A policy that becomes void on a certain contingency cannot be regarded as having existence for any purpose, and whether ended by agreement or lapse of time or breach of condition, it is to be regarded as no policy. It would be, in our opinion, an idle distinction to make its absolute nullity subject to different rules on account of the difference in its causes of extinction. If extinct at the time when the application said it would be, we think the representation was made good.

We see no reason why plaintiff is barred from recovery.

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

The other Justices concurred.

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The Township of Denver v. The White River Log and Booming Company.

Actions for injuries to highways and bridges.

Plea of the general issue is proper where the claim made is not well founded in fact; and after a verdict of no cause of action, for want of authority in the plaintiff to bring the suit, the defendant is not estopped from insisting upon such want of authority as a defense.

The Legislature has power to direct what officer shall bring any class of public actions, and what shall be done with sums collected therein.

Actions for injuries to highways and bridges cannot be brought by the township in which they are situated, but must be brought by the overseer of highways, or, if he is disqualified from suing, by the commissioner of highways. Acts 242 and 243 of 1881. And injuries to highways in different districts cannot be joined in one action.

Error to Newaygo. (Fuller, J.) October 5.—October 10.

CASE. Plaintiff brings error. Affirmed.

Albert G. Day for appellant.

Frank Bracelin and *Norris & Uhl* for appellee.

CAMPBELL, J. This is an action at law, brought by a township to recover for damages done to various highways and bridges at various times in several years. All are joined in a single count. When the case, after issue joined in the ordinary form, came on to be tried, the court directed a verdict of no cause of action, because the township could not sue for such injuries.

The ground is now taken by plaintiff that defendant, by pleading to the merits, is estopped from now insisting on any such want of power. But the general issue is certainly a proper answer to any claim not well founded in fact. If defendant owes nothing to the plaintiff, there can be no recovery.

The statutes of 1881, revising and consolidating the previous statutes on the subject of highways and bridges (Pub. Acts 1881, pp. 285, 288) save all existing causes of action, and provide for future ones on the same footing as before. By section 8 of chapter 10 persons committing such grievances as are here complained of are made liable to respond in an action to be brought by the overseer of highways, or in case of his neglect or refusal, or in case he is himself the offender, by the commissioner of highways; but in either case the money is to be expended in the road district in the repair of roads. There is no statute authorizing the township to interfere.

But it is claimed that since townships have been made responsible in certain cases for injuries arising from defective bridges and ways, and have been required to keep them in repair, this necessarily authorizes them to sue for injuries done to such ways and bridges. But it is to be observed that the same act which provides this duty and liability does not authorize it to be performed by the means of new or different officers, but makes the old officers for

these purposes township officers, and subject to the general, but not to any but the general, direction of the township authorities. Pub. Acts 1879, p. 224. No change is made by this act in the method of doing such work, and none is made in the powers and responsibilities of commissioners and overseers. And the act of 1881 would at any rate set this at rest, because it re-enacts the old laws with no substantial change.

The Legislature has full power to direct by what officers any class of suits shall be brought, and what disposition shall be made of sums collected. It has seen fit to place the control of this class of suits in the hands of the persons who have charge of the ways and bridges injured, and who will have charge of the repairs. And it has appropriated the fund in each case to the district injured. It would be contrary to the direct purpose of the law, and contrary to its terms, to allow such suits to be brought on several grievances in separate districts together, so as to make it impossible to get at the share of each district, and equally so to have the fund in any hands but those designated. This question was fully considered in *Highway Commissioners v. Stockman* 5 Mich. 528, and there has been no change since in the legal policy of the State. The ingenious suggestions made on the argument do not change the plain language of the law.

The judgment must be affirmed with costs.

The other Justices concurred.

THE HOPKINS MANUFACTURING CO., GEO. W. HOPKINS AND DAVID H. HOPKINS v. CHAS. F. RUGGLES.

Parties—Agreements for ten per cent. interest—Commissions for making collections—Vexatious appeals.

An appellate court will not feel bound to consider whether it was technically proper to implead a particular defendant, if the written

stipulations of the parties and their mode of conducting the litigation have been such as to practically waive the point, and no demurrer has been interposed.

Agreements to pay ten per cent. interest are invalid in Michigan, unless in writing.

In an accounting between the parties to a joint enterprise, a claim by one against the other for commissions for making collections in the joint business is properly disallowed, if there was no express agreement therefor.

An allowance made by a commissioner, in proceedings for an accounting, cannot be raised by an appellate court in favor of a party not appealing.

An agreement between the parties to a logging contract to share the expenses equally, covers not only the cost of property purchased for camp purposes, but also necessary payments of interest on such purchases.

Damages for vexatious appeals are not given unless the appeal is groundless or oppressive, or there is clear proof of intentional wrong on the part of the party taking it.

Courts will incline to charitable views in construing parol contracts and ascertaining therefrom the motives and intention of the parties, where the proofs rest upon imperfect recollection, and there is opportunity for misunderstanding.

Appeal from Manistee. (Judkins, J.) June 14.—Oct. 17.

BILL for accounting. Defendant appeals. Affirmed.

Ramsdell & Benedict and *Byron M. Cutcheon* for complainants.

Hughes & Smiley for defendant.

SHERWOOD, J. The bill in this case is filed for an accounting between the complainants, Hopkinses, and the defendant, they having been engaged for a number of years in lumbering together. The Hopkinses were partners under the firm name of Hopkins Brothers, and it is claimed by them that they were partners with Ruggles in the business they did with him, but this relation is denied by Ruggles. He admits, however, he owned a half interest in the business.

Some point is made by defendant's counsel as to the Hopkins Manufacturing Company being properly made a party to the suit. We do not think we are called upon at this time to consider or pass upon that question, especially as all technicalities upon the point seem to have been waived by the parties, both by their written stipulations and in their manner and conduct of the litigation, and no demurrer having been interposed to the complainants' amended bill upon any such ground.

The determination of the case required the investigation of a large number of complicated accounts, and it was referred to D. S. Harley, Esq., of the city of Manistee, as special commissioner, to take the testimony and make report of the situation of the account between the parties, and his findings upon the law and the facts. The testimony taken is quite voluminous, and the commissioner made his report in the premises on the 8th day of April, 1882, and finds a balance due from the defendant at that date of $2396.80. The report of the commissioner is faultless in form, and his conclusions of law and fact show very careful and critical examination of the testimony, and have furnished us much aid in reviewing the case. It was excepted to by both parties, and after a full hearing had before the circuit judge he overruled all the exceptions taken, and by decree confirmed the report of the commissioner. The defendant appeals to this Court.

Seven exceptions taken to the report by defendant's counsel are relied upon. No exception seems to have been taken to any of the footings made by the commissioner; we shall therefore assume the correctness of his figures and footings.

In 1871 the Hopkins Brothers and the defendant owned (each having an undivided half interest therein) about 1500 acres of pine lands, and about the 20th of September of that year a verbal agreement was entered into between the Hopkins Brothers and defendant to lumber these lands, convert the timber into logs, and sell the same. At the time this agreement was made the Hopkins Brothers had

built several shanties on the land and a supply road to the timber thereon. They had also a contract with Cushman, Calkins & Co. to put in the Manistee river from their lands several million feet of logs. They had also established two camps from which to conduct the business. By the terms of the contract, as the testimony tended to show, the Hopkins Brothers were to furnish and equip the camps with suitable teams and camp equipments, and interest was to be allowed them for their use, and the loss or depreciation, at the close of the business, was to be replaced, or the value thereof allowed to Hopkins Brothers in money. They were to supervise the camps, and for this service were to have fifty cents per thousand feet. They were to put the logs in the Manistee river. The parties were to share the expenses and profits of the business equally; the Hopkins Brothers were, however, to furnish all moneys necessary to carry on the business until it was completed.

The defendant lived in the city of Manistee, and was engaged in buying and selling lands and the banking business, and does not appear to have had much to do with the business except to assist in making contracts for the sale of logs and collecting the moneys on such sales.

After the contract was made by the parties above stated, Hopkins Brothers had a contract for putting in logs from what were called Neil Leitch lands. They also had a tract of pine lands of their own, called the canal lands, from which the parties took logs. By contracts between the Hopkins Brothers and defendant, the latter was to share in each of these contracts, and also in the proceeds of the logs taken from the canal lands. None of these contracts were reduced to writing, but the testimony tended to show that upon the contract with Cushman, Calkins & Co., and upon the Neil Leitch contract, the expenses were to be borne and the profits divided equally between Hopkins Brothers and defendant, except that the former were to have fifty cents extra per thousand feet for superintending the business, and that the same terms were to govern

for timber taken from the canal lands, except, in addition to the fifty cents extra, the Hopkins Brothers were to have $2.50 per thousand feet for stumpage.

The complainant also claimed, and the testimony tended to show, that there was an agreement on the part of defendant to pay the Hopkins Brothers ten per cent. on moneys advanced by them in carrying on the business. The commissioner properly disallowed this claim. The statute requires such a contract to be in writing in order to be of any validity.

The defendant charged the Hopkins Brothers commissions for making collections on account of the joint business. This was also disallowed by the commissioner, and correctly. The relation existing between these parties, (if not that of partnership, which is not necessary now to decide,) was one not authorizing, or in any manner implying, any such liability on the part of the Hopkins Brothers, and no express contract being shown to that effect, we think the commissioner's finding correct upon this point.

There is a great discrepancy between the amount of the logs as scaled at the rollway and that at the manufacturer's mill, the latter falling short nearly two million feet. The commissioner finds, upon the testimony, that the scale at the rollway should govern; that it was so intended by the parties when the contract was made, and that it was necessary in order to protect the rights of the Hopkins Brothers. A careful inspection of the evidence has led us to the same conclusion.

The commissioner allowed the complainants fifty cents per thousand feet for the logs put in from the Cushman & Co. lands, and from the Neil Leitch lands. The evidence supports this finding. It can hardly be supposed that the Hopkins Brothers would have given the defendant the benefit of a profitable contract, which had been partly filled by them, without some compensation, and if they did not get it in this way they certainly received nothing.

The arrangement claimed by Hopkins Brothers with defendant for the logs taken from the canal lands, is not only

reasonable, but supported by the testimony in the case. Indeed, we think the commissioner would have been well warranted in increasing the amount credited for logs taken from these lands, but as complainants have not appealed, we are not at liberty to change the commissioner's findings.

The defendant's fifteenth and sixteenth exceptions to the report are not well taken.

It clearly appears, from the testimony, the Hopkins Brothers charged no more to joint account for camp expenses than they paid out, and it can make no difference whether such expenses were in payment of interest, or for goods purchased in supplying the camps, if necessary for that purpose. The Hopkins Brothers were to furnish all these expenses in the first instance, and be reimbursed from the proceeds of the business when closed.

Upon a careful examination of this record we discover no error in the findings of the commissioner or the decree of the circuit court, of which the defendant can justly complain.

Counsel for complainants asks that damages may be allowed them, under the statute, for taking vexatious appeals. We do not think this a proper case for the application of that statute. The appeal must be groundless or oppressive, or there must be clear proof of intentional wrong on the part of the appellant, before the Court will feel at liberty to impose such damages.

The contract under which the complainants seek to recover, existed entirely in parol, and could be proved only by the parties, whose testimony on many important points was conflicting. There was opportunity for misunderstanding and imperfect recollection, and the charitable view is always the proper one in such cases, in ascertaining the motives and intention of parties.

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

The other Justices concurred.

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CHARLES DAVIS v. GEORGE W. MERRILL, WYNDHAM H. EASTWOOD AND WILLIAM MERRILL.

Remedy of partner against firm to which he belongs.

One cannot sue himself, and neither a partner nor his assignee can maintain an action at law against the firm, even after its dissolution, for the amount of a note made by the firm to the partner and afterwards accidentally destroyed without ever having been indorsed.

The remedy of a partner, or of his assignee, against the firm upon a note given by it to the partner, must lie in equity, if anywhere, after the dissolution of the partnership without an accounting or settlement.

Error to Saginaw. (Gage, J.) June 22.—October 17.

ASSUMPSIT. Plaintiff brings error. Affirmed.

D. W. Perkins for appellant.

Edget & Brooks for appellee.

SHERWOOD, J. The defendants were copartners on the 14th of October, 1874, and had been for sometime previous thereto, and as such the company on that day gave to the defendant Eastwood, a note due in one month after date, payable to his order, for $596.82, with interest at ten per cent.

The firm continued business until March 10, 1875, and was then dissolved, and by mutual consent the books and accounts of the company were placed in the defendant, George W. Merrill's hands, who collected the accounts and paid the debts, and was thus engaged when this suit was brought. There had been no settlement or accounting of the partnership dealings, and the amount of said note had been carried to the general credit of said Eastwood in his account upon the partnership books. The credit of George W. Merrill was greater than that of Eastwood, as shown by the accounts at that time. Testimony was also given tend-

ing to show that the note had never been presented or payment demanded, but that on the 8th day of May, 1875, $25 was paid by the company on the note. Also, that Eastwood, in January, 1881, resided at Binghamton, in the state of New York, and forwarded the note to D. W. Perkins, of East Saginaw, for collection, and on the 20th of the same month Perkins remitted the note at East Saginaw to Eastwood, at Binghamton, and that on the way the same was lost or destroyed by the burning of a mail car.

On the fifth day of May, 1881, Eastwood made a written assignment, selling and transferring all of his claims against the company, of every kind and description, to the plaintiff, for the purpose of enabling him to bring suit upon the note, and the next day this suit was commenced.

The declaration is special upon the note, with common counts added for money had and received. Plea,—general issue, with notice of statute of limitations. At the close of the trial the court instructed the jury that Eastwood could not have suit upon the note, for the reason that he could not sue himself; neither could the plaintiff, who is his assignee; that the enforcement of the plaintiff's claim involved the investigation of partnership matters, which could only be had in a court of equity, and directed a verdict for defendants, and plaintiff brings error.

We think the rulings and direction of the circuit court were right in the case. It clearly appears that the claim arose out of the partnership dealings of the firm of Merrill, Eastwood & Co., and consisted of a note given by the firm to one of its members, and in such case the payee cannot bring suit at law,—he cannot sue himself. Chitty on Contracts 239; Collyer on Partnership 642; 2 Lindley on Partnership 1030; *Eastman v. Wright* 6 Pick. 320; *Burley v. Harris* 8 N. H. 235; *Griffith v. Chew* 8 S. & R. 30; *Portland Bank v. Hyde* 11 Me. 196; *Mainwaring v. Newman* 2 Bos. & P. 124; *Bosanquet v. Wray* 6 Taunt. 597; *Hammond v. Teague* 6 Bing. 197. Neither can his assignee bring suit (*Learned v. Ayres* 41 Mich. 677) the note having been

transferred by assignment and not by endorsement. *Spinning v. Sullivan* 48 Mich. 5.

It further appears that there had been no partnership accounting or settlement between the partners, or between either of them and the firm; that the books of the firm, at the time this suit was brought, show different amounts to the credit of the several partners; and in the amount credited to the defendant, Eastwood, is the amount of the note in this suit. When, or at whose request, this credit was given, does not appear. Enough, however, is disclosed to show that the plaintiff's claim cannot be investigated in a court of law, and that his redress, if any, is in a court of equity.

These views render the consideration of the other points made by counsel unnecessary.

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

The other Justices concurred.

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HENRY W. MILLER v. CHARLES G. HAVENS.

Conversion by landlord of crop sold by the tenant.

A verdict and judgment enforcing a forfeiture cannot be supported by presuming anything that does not appear on the record.

Forfeiture clauses in a lease are not favored by the courts, and their effect will be restricted as far as possible; but when the lease explicitly provides that the landlord may treat it as void upon breach of condition by the tenant, his election to do so dissolves the relation between him and his tenant.

The rights of one who has bought a crop from a tenant will be protected as against a subsequent forfeiture of the lease and the landlord's re-entry.

In trover against a landlord, for seizing a crop which the tenant had previously sold in good faith to the plaintiff, the landlord cannot justify himself by producing the record of certain summary proceedings taken by himself to recover possession of the premises from the tenant, if there is nothing in them to show that the landlord had

ever claimed a forfeiture of the lease, or that the premises recovered were the same as those leased, or that the lease was in force at the time the proceedings were taken, or that the tenant had failed in any of his obligations, or that the plaintiff was in any way concerned in or had any notice of the proceedings.

Title to land cannot be put in issue or considered in summary proceedings before a circuit court commissioner to recover possession thereof.

Error to Eaton. (Hooker, J.) June 22.—October 17.

TROVER. Plaintiff brings error. Reversed.

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

Sagendorph & Powers for appellee.

SHERWOOD, J. Trover for a quantity of wheat of the value of $284. Plea, general issue. One Smith went into possession of the defendant's farm on the first day of May, 1879, under a written lease for the term of four years and eleven months, paying an annual rent therefor on the first day of April in each year, subject to sale by Havens, and with the privilege of plaintiff to purchase at any time within twenty days after he should offer the same for sale, and in case defendant should decide to sell the farm, he could end the term in thirty days by giving a written notice to that effect to Smith. The lease also contained a large number of conditions to be performed by the lessee, and also the following clause:

"If the yearly rent, or any part thereof, shall be behind or unpaid on any day whereon the same is to be paid as aforesaid, or if default be made in performance of any or either of the covenants herein contained, on the part or behalf of the party of the second part, to be paid, kept or performed, then and thenceforth it shall be lawful for the party of the first part, into and upon the demised premises, and every part thereof, wholly to re-enter, and to remove all persons therefrom, and the same to have again, repossess and enjoy as in his first and former estate."

While Smith was occupying this farm under this lease in the fall of 1881, he put in the wheat in question, and on the

twenty-third day of March, 1882, sold the same, then growing, to George B. Hamilton, giving him a bill of sale thereof, which Hamilton duly filed in the township clerk's office, April 1, 1882, and on the same day Hamilton sold and conveyed the wheat by bill of sale to the plaintiff.

During the months of July and August the defendant, who was fully notified of the plaintiff's claim thereto, took possession of, harvested, threshed and marketed said wheat against the objection and protest of plaintiff. The court below directed a verdict for the defendant, and plaintiff brings error. The case is before us on bill of exceptions, containing all the evidence given upon the trial, and the only error assigned is upon the exception of plaintiff's counsel to the instruction of the court to the jury directing them to return a verdict for the defendant.

Nothing can be presumed or intended which does not appear upon the record to support this verdict and judgment. On the trial the conversion of the wheat by defendant was conceded, and his only excuse for so doing was the presentation of a record of a suit in summary proceedings to recover possession of the farm, before a circuit court commissioner, wherein Havens was plaintiff and said Smith defendant, on the tenth day of May, 1882, and in which it appears that on that day a judgment of restitution in favor of the defendant was rendered, and an execution thereon issued, on the 12th day of July, 1882, (it being 10 days before said wheat was harvested,) and on the same day possession thereunder of the farm was given by the constable to Havens.

The complaint upon which the proceedings before the commissioner were based, was made by one Leonard, as agent of Havens, and simply states that Smith was then in possession of the farm, (describing it,) as tenant of Havens, and that Smith held the premises unlawfully and against the right of Havens who was entitled to the possession of the same. It does not appear in the proceedings that Smith was, at the time said proceedings were commenced, in possession under said lease, or under any other written lease.

And if he was in possession under this lease, it does not appear anywhere in said record that he had failed to perform any condition, covenant or agreement in said lease required on his part. Neither in the complaint, nor in any of the proceedings had before said commissioner, is there an allusion to the lease, or to any covenant, agreement or condition therein contained; and these proceedings, being the record in the case before said commissioner, consisting of the complaint, summons and the officer's return thereon, the judgment rendered by the commissioner and execution issued thereon, with the return of service of the same by the constable, were all the evidence produced by defendant at the circuit on the trial.

We have given the substance of the complaint and the charges therein contained, and the commissioner's record of his judgment merely states: "After hearing the evidence I found the defendant guilty in manner and form as alleged in said complaint." It is true, the relation of landlord and tenant will be dissolved when the tenant incurs a forfeiture of his lease by reason of some condition broken, when the landlord signifies his election to treat the lease as void in consequence, if the lease contains a provision to that effect. *Arnsby v. Woodward* 6 B. & C. 519; *Rede v. Farr* 6 M. & S. 121; *Reid v. Parsons* 2 Chit. 247.

The common-law doctrine of forfeiture, being founded on strict feudal principles, is now believed to be unjust in many respects, and not applicable to the present state of society, and an interpretation which creates a forfeiture is not to be favored (Tayl. Landl. & Ten. p. 421, § 489); and statutes creating penalties and forfeitures should receive a strict construction. *Hasbrook v. Paddock* 1 Barb. 635. Courts do not favor forfeitures, (*Kentucky Riv. Nav. Co. v. Com.* 13 Bush 435,) and equity will not assist the recovery of a penalty or forfeiture, or anything in the nature of a forfeiture. *Livingston v. Tompkins* 4 Johns. Ch. 415; *Linden v. Hepburn* 3 Sandf. 668. It has for a very long period been the policy of the law, and courts have felt it their duty in administering the law, so far as possible to

limit the effect of a clause or provision in a lease or statute by which a forfeiture is created. *Doe v. Stevens* 3 B. & Ad. 299; *Doe v. Hogg* 4 Dowl. & R. 226; *Doe v. Godwin* 4 M. & S. 265; *De Lancey v. Ganong* 9 N. Y. 9; *Doe v. Bond* 5 B. & C. 855; *Burnes v. McCubbin* 3 Kan. 221.

It nowhere appears in this record that the defendant ever declared this lease forfeited or void, nor that the premises in the complaint are those described in the lease. If the plaintiff is to be considered as a sub-lessee of the land where the wheat grew until the crop matured, (and certainly his rights were not less,) then the law would protect him and his interests against a forfeiture afterwards incurred by the first tenant and a re-entry by the landlord. Tayl. Landl. & Ten. p. 469, § 536; *Doe v. Witherwick* 3 Bing. 11; *Bevans v. Briscoe* 4 Har. & J. 139; *Oland v. Burdwick* Cro. Eliz. 460.*

But suppose the law to be as claimed by defendant, then he could not prevail. Applying the principles of construction to the present case, we do not find it necessary to consider the legal questions presented by counsel for defendant and discussed in their brief. They do not necessarily arise in the case, and are not applicable to the facts stated in the record.

Title to the demised premises is not put in issue by the pleadings in the case before the commissioner; and if it were, it would not be considered. *Waldby v. Callendar* 8 Mich. 430; *Case v. Dean* 16 Mich. 12; *Cassidy v. Clark* 62 Ga. 412; Sedg. & Wat. on Trial of Title, p. 217, § 349. The doctrine that the tenant's assignee of a crop is not entitled to the crop assigned in case the assignor forfeits the lease, and the landlord re-enters before the crop is harvested, is based upon the fact that the landlord is the owner of the land, and that the crop is part of the land, and defendant is not shown to be such in this case. The judgment offered in evidence might have been obtained upon other grounds than a failure to perform the conditions of the lease, or, even if it was obtained upon a failure to perform some of its conditions, it could not affect the title of the plaintiff to this wheat, the purchase of which, and the

good faith in which the purchase was made, not being questioned. (For instance, suppose the defendant had purchased the plaintiff's interest in the lease upon a sale under execution against plaintiff, and after that consented to the plaintiff's putting in the wheat.) But the great difficulty with the defense is, it seeks to bind the plaintiff by presumptions sought to be drawn from a record and judgment with which he is not shown in any sense to be in privity. All the proceedings claimed to establish the defense took place some time after the plaintiff made his purchase, and there is nothing in the case showing that plaintiff had any notice whatever of such proceedings, or that they in any way concerned him. It is not contended or shown that at the time Hamilton made his purchase of the wheat, Smith, the lessee, was in default in any manner, or that he had not the right to sell and convey the wheat; and the plaintiff cannot be deprived of his interest through a legal proceeding which, upon its face, does not involve his rights, and of which he never had any notice.

As the case is presented we think the cases heretofore decided in this Court apply. *Nye v. Patterson*, 35 Mich. 413; *Dayton v. Vandoozer* 39 Mich. 749; see also *Hodgson v. Gascoigne* 5 B. & Ald. 88; *Samson v. Rose* 65 N. Y. 411; *Bevans v. Briscoe* 4 Har. & J. 139; *Kenna v. Nugent* 7 Ir. C. L. 464; *Adams v. McKesson's Ex'x* 53 Penn. St. 81.

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

The other Justices concurred.

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Hiram B. Gilbert v. The Flint & Pere Marquette Railway Company.

Judicial knowledge—Highways.

Judicial notice will be taken that a box freight car standing still at a highway crossing is not of itself a frightful object to horses of ordinary gentleness; the question is not for the jury.

Error to Genesee. (Newton, J.) Oct. 3.—Oct. 17.

Case. Defendant brings error. Reversed.

William. L. Webber for appellant.

Long & Gold for appellee. Where a train was left on the highway, with scarcely room for a vehicle to pass, and a team became frightened thereby, the railway company was held liable: *Ogle v. Phila., Wil. & Balt. R. R.* 3 Houst. 267; *Great Western R. R. Co. v. Decatur* 33 Ill. 381.

Graves, C. J. The defendant has a main and side track which cross a common highway near the station building at the village of Grand Blanc. The traveled portion of the way at the place of crossing is planked to the width of about thirty-two feet. In the course of its business the company left an ordinary box freight car standing on the side track, and within the legal limits of the highway. It occupied about one-half of the traveled part, leaving ample room for the easy passage of teams. The plaintiff, in going to Mr. Stone's to dinner, rode in a buggy with Mr. Lyman past this car without any inconvenience. But when he returned in a buggy with Mr. Stone, the horse, on coming to the track, suddenly started to one side, and as a consequence the plaintiff lost his balance, and either fell or was thrown in contact with the wheel, and was injured. He brought this action for the injury, and was allowed to recover.

The record raises two or three questions, but only one need be noticed. It is important to fix attention upon the

exact ground of the action. As laid in the declaration, the essence of the plaintiff's case is that the horse, though one of ordinary gentleness, took fright at the car, which was a thing well calculated to and naturally would frighten horses of that character, and hence that its being left there was actionable negligence and a basis of liability to the plaintiff. We observe, then, that the act complained of is not the act of leaving a freight car standing on a part of the highway. The particular fault charged is the fact of leaving at that place a vehicle or article which would naturally frighten horses of ordinary gentleness. The mere presence of the car in a portion of the highway, and apart from its fitness or liability to produce that consequence, is not counted on as matter of grievance. The right of action was rested on the assumption that the car there standing was a thing which would naturally scare usually gentle horses. It was, therefore, a vital question whether it was really a cause of that kind of danger or not; because, if it was not dangerous in that way, there was no foundation for the action.

The defendant's counsel contended at the trial that the question was one for the court, but the learned judge overruled the point, and decided that it was a subject for the jury. We are unable to concur in this ruling. There are a vast variety of things which must be regarded as matters of common knowledge; things which every adult person of ordinary experience or intelligence must be presumed to know; things which do not require to be pleaded or to be made the subjects of specific proof; and it is not within the province of a court to leave it to a jury to find contrary to this knowledge. The question before us is subject to this principle. It is according to daily experience to see cars going or standing on the common highways while teams are variously employed near by, and pass and repass without taking fright. We have street-cars and steam fire-engines and steam threshing-machines, but horses readily become familiar with them, and serious frights are exceedingly rare and entirely excep-

tional. As objects calculated to alarm horses, the rule is in favor of their harmlessness.

If a standing freight car should be deemed as dangerous as here represented, it would be impossible to consider these machines and vehicles as fit to appear on the highway. Moreover, the reason would apply to a thousand customary and convenient modes of use of our ordinary highways, which have always been exempt from such doctrine, and which must remain exempt unless we are prepared to surrender a large and valuable portion of our rights connected with the public thoroughfares.

I think the principle is settled in *Macomber v. Nichols* 34 Mich. 212, and that the defendant was entitled to the ruling which was refused.

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

CAMPBELL and COOLEY, JJ. concurred.

SHERWOOD, J. (dissenting) In this case, under the facts and circumstances stated in the record, I think the defendant was guilty of actionable negligence in allowing its freight car to remain standing upon the public highway in the manner it is shown to have done at the time the injury occurred to the plaintiff; and I further think that an empty box car, or any other kind of railroad car, allowed to stand in the highway as this was permitted to, is naturally calculated to frighten horses of ordinary gentleness, not accustomed to go or be used about such cars.

The defendant did not demur to the plaintiff's declaration. It was sufficient to support the judgment given in this case after a trial upon the merits, and should not be reversed upon the grounds taken in this Court on this hearing. *Stoflet v. Marker* 34 Mich. 313; *Brown v. McHugh* 35 Mich. 50; *Aldrich v. Chubb* 35 Mich. 350; *Jackson v. Collins* 39 Mich. 559; *Briggs v. Milburn* 40 Mich. 513; *Rowland v. Kalamazoo Sup'ts of Poor* 49 Mich. 553.

I think the case was properly submitted to the jury, and should be affirmed with costs.

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MARY A. COLWELL v. FRANKLIN B. ADAMS.

Assumpsit for value of wheat harvested by defendant.

A woman brought assumpsit on a claim assigned to her by her husband for the value of wheat sown by him, but harvested by defendant. *Held* error to exclude any circumstances tending to show the relation sustained by the husband or the parties to the land on which the crop was grown; as, in this case, that the premises were sold under a mortgage, and the sale was confirmed and a deed given in the spring before the crop was harvested.

Error to Van Buren. (Mills, J.) Oct. 3.—Oct. 17.

ASSUMPSIT. Defendant brings error. Reversed.

Geo. W. Lawton for appellant.

Lester A. Tabor for appellee.

SHERWOOD, J. The plaintiff brings suit in assumpsit for board, and for a quantity of wheat. The claim for the wheat plaintiff received by assignment from her husband, James Colwell, in the year 1881.

James Colwell, in 1875, took certain land of the defendant by parol agreement to work on shares, giving defendant one-half of the crops raised. He went into possession of the property under the agreement, and remained thereon until the month of March, 1878, and then removed therefrom. In the fall of 1877, James Colwell sowed about 15 or 20 acres to wheat, and defendant testified when the wheat was ready for harvest the next year he harvested and threshed the same, and after deducting the expense of harvesting, he gave to said Colwell credit for one-half of the proceeds of the wheat, on an account which the firm of Kinney, Adams & Co. held against him, and of which firm defendant was a member; that he made arrangement to do this with Colwell when he commenced harvesting the wheat. Colwell, however, says the defendant agreed to take his half of the wheat and pay him for it.

It is claimed on the part of the defendant, and not denied by plaintiff, that in 1875 there was a valid outstanding mortgage on the farm; that this mortgage was foreclosed while Colwell lived upon the property, and that he was made a party defendant in the foreclosure proceedings; that the property was duly sold under the decree made in the foreclosure suit, and said sale duly confirmed and a deed given to the purchaser, who was the mortgagee, in April, 1878.

On the trial the defendant offered to show the facts thus claimed by him, and was not permitted so to do by the court. This was error. All the facts and circumstances showing, or tending to show, the relation James Colwell or the parties sustained to the property in question, were competent and should have been given to the jury. It is unnecessary to consider the other questions discussed by counsel in the case.

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

The other Justices concurred.

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ROBERT ANDERSON v. SAMUEL W. ODELL, GARNISHEE OF EDGERTON R. SMITH, FRANKLIN D. GALE AND DELL GALE.

Garnishment—Assignment of exempt property.

Garnishment process will not reach personal property assigned by the principal debtor, if in his hands it would have been exempt from execution.

Creditors cannot attack the transfer of property which the law would not have allowed them to apply on their claims, whether it be real or personal.

Error to Muskegon. (Russell, J.) Oct. 3.—Oct. 17.

GARNISHMENT. The garnishee brings error. Reversed.

Keating & Dickerman for appellant. A garnishee can be charged only for such property as is liable to execution: Drake on Attachments (6th ed.) §§ 463, 480; *Clark v. Averill* 31 Vt. 512; *Winterfield v. Mil. & St. P. Ry. Co.* 29 Wis. 589; if he allows judgment to be entered against him for exempt property, it will not protect him: *Lock v. Johnson* 36 Me. 464; *Pierce v. Chic. & N. W. Ry.* 36 Wis. 283; if a garnishee has a valid lien on the defendant's property in his possession the creditor cannot take it: Drake on Attachments § 533; *Nathan v. Giles* 5 Taunt. 558; *Kirkman v. Hamilton* 9 Mart. (O.S.) 297; *Nolen v. Crook* 5 Humph. 312; *Smith v. Clarke* 9 Ia. 241.

Campbell & Allen for appellee.

CAMPBELL, J. Defendant was sued as garnishee of defendants in the principal case, and the ground of liability was based on a claim that certain personal property which they had assigned to him was assigned in fraud of creditors. While some other questions may have had weight in the case, the principal one, which probably would have controlling influence, arises out of a claim of exemption. The property was of such a nature as to be subject to exemption if retained by the assignors, and the court below so held. But it was also held that the exempt quality was lost by the transfer, and creditors who could not reach it before, could do so after.

We do not think this doctrine is tenable. Creditors have no right to complain of dealings with property which the law does not allow them to apply on their claims. So long as the statutory amount of exemption is not exceeded, there can be no appreciable reason why the property cannot be converted or exchanged. There is difficulty in understanding how a creditor can first become entitled to reach his debtor's property the moment it ceases to be his property. In *Smith v. Rumsey* 33 Mich. 183, this very question arose concerning a sale of exempt homestead property, and we held creditors were not authorized to attack it. The same principle applies, as we think, to any exempt property. We

can see no ground for a distinction between realty and personalty.

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

The other Justices concurred.

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FREDERIKA CARMICHAEL v. THE NORTHWESTERN MUTUAL BENEFIT ASSOCIATION.

Benefit associations—What "family" comprises.

Comp. L. ch. 94, provides for the organization of mutual benefit associations, to secure "to the families or heirs of any member, upon his death, a certain sum of money." *Held*, that the term "family" will cover a case where the insured and the beneficiary were an old man and a young woman who were not related, but had lived for many years in the same household, and had treated each other as father and daughter.

Damages cannot be assessed by the Supreme Court in a case at law, but must be found by the court below; and, if not so found, or if the finding settles no basis of fact which will fix the amount, the Supreme Court has no means for entering judgment.

Error to Wayne. (Speed, J.) October 3.—October 17.

ASSUMPSIT. Plaintiff brings error. Reversed.

Keating & Dickerman for appellant. "Family" means a collective body of persons living together within the curtilage: *Wilson v. Cochran* 31 Tex. 677; *Spencer v. Spencer* 11 Paige 159; natural affection is a sufficient basis for an insurable interest in another's life: *Phœnix Mut. L. Ins. Co. v. Bailey* 13 Wall. 616; *Loomis v. Eagle L. & H. Ins. Co.* 6 Gray 396; pecuniary interest in the life of the insured is not necessary: *Lord v. Dall* 12 Mass. 115; *Leonard v. Eagle Ins. Co.* 4 Liv. U. S. Law Mag. 286; it is enough if the contrary is true: *Trenton Mut. Ins. Co.*

v. Johnson 4 Zab. 576; *Hoyt v. N. Y. L. Ins. Co.* 3 Bosw. 440; *Miller v. Eagle Ins. Co.* 2 E. D. Smith 268.

Ervin Palmer for appellee.

GRAVES, C. J. The defendant, a corporation under chapter 94 of the Compiled Laws, issued to Frederick Wagner, on the 26th of November, 1879, a certificate of insurance on his life in the sum of $2000, for the benefit of the plaintiff. May 9, 1881, Wagner died, and on the 14th of June the defendant's secretary paid the plaintiff $300 of the insurance. This payment was not authorized by the association.

At the time of the death of Wagner the association had 3472 members, and on the second day of August following it had 3259 certificates in force. Soon after the payment of the $300, the case of *Mutual Benefit Association of Michigan v. Hoyt* 46 Mich. 473 was decided in this Court adversely to the claimant, and the defendant, assuming that the decision there was applicable to the claim of the plaintiff, refused to pay her, and she brought this action to obtain payment. The case was heard by the circuit judge without a jury, and he came to the conclusion that the contract was against public policy, and was not enforceable. He evidently regarded *Hoyt's case* as directly in point.

There was no relationship by either blood or marriage between Wagner and the plaintiff. She is, therefore, not an heir. Were they of the same "family" within the meaning of the statute? The case depends on this question. Unless they were, no recovery is possible. The facts are that they resided under the same roof, and as constituents of the same social and domestic circle, from her early youth until his death, in old age, and when she had reached the age of 36 years. He was never married, so far as appears, and had no other home, and there is no finding that any relatives remained to him. He regarded the plaintiff very much as a daughter, and she treated him with much of the care which that relation would naturally call out.

These are the conspicuous facts reported by the judge on

this point. I forbear mentioning the changes in plaintiff's family. They do not alter the impression. Now this word "family," contained in the statute, is an expression of great flexibility. It is applied in many ways. It may mean the husband and wife having no children and living alone together, or it may mean children, or wife and children, or blood relatives, or any group constituting a distinct domestic or social body. It is often used to denote a small select corps attached to an army chief, and has even been extended to whole sects, as in the case of the Shakers.

We discover nothing in the statute implying a narrow sense, and we should not be inclined to attribute one where the result would cause injustice.

It seems to us that the circumstances constitute a case within the meaning of the Legislature.

In *Hoyt's case* the whole transaction was palpably colorable and fraudulent. A man already dying from dissipation was seized upon as a profitable subject for speculative insurance. His life, according to the ideas of insurance, was worth nothing. He was the merest clay in the hands of Hoyt. For a price the latter bargained with him to submit to insurance at Hoyt's expense and for Hoyt's benefit, and from the inception of the scheme to the death of the subject he was kept saturated with liquor. There was no relation by blood or marriage, and the only pretense of family connection was what was agreed upon at the very time in order to simulate a necessary condition.

Our examination of the records in the two actions enable us to emphasize the distinction between them. The cases are as far apart as good faith and deliberate fraud. We think the plaintiff ought to recover the proportion arising in her favor according to the contract, after deducting the payment of $300, but the means are wanting for the entry of such a judgment here. No amount is liquidated by the judge's finding, and there is no basis of fact settled by the finding to regulate and fix the amount. It is for the trial court to find the damages. This Court has no power to assess them.

The judgment must be reversed with the costs of both courts, and unless the parties agree, which they will no doubt do, there must be a new trial.

The other Justices concurred.

DANIEL F. COMSTOCK ET AL. v. CASPER M. SANGER ET AL.

Contract—Waiver of exact performance.

A contract was made for about 800,000 feet of lumber, including stated quantities of special sizes. The number of feet bargained for was delivered, but there was a great deficiency in the special sizes, and the purchaser's agent continued to receive lumber from the other parties, in the hope that the deficiency might be made up, until the amount received exceeded the amount bargained for by about 135,000 feet, and the deficiency, even then, was as much more. The agent made no objection to receiving the surplus quantity, but did object to paying for it at the rates agreed on, and the vendors offered to abate the price 50 cents a thousand, to which he made no answer. *Held*, that there was conclusive evidence of a compromise, and of a waiver of the right to the remainder of the special sizes; that, as to the contract quantity, the vendors were entitled to the contract price, and as to the excess, to what they had offered to take, if that was its value.

The act of a contract purchaser in receiving without protest what is delivered under the contract to the amount bargained for, amounts to a waiver of any difference in quality between what he had a right to demand and what he has actually received.

In an action to recover for goods sold, their value must govern, in the absence of any agreement as to price.

Error to Muskegon. (Russell, J.) Oct. 3–4.—Oct. 17.

ASSUMPSIT. Defendants bring error. Affirmed.

Keating & Dickerman and *Markham & Noyes* for appellants. Receipt of goods is different from acceptance (Benj. Sales § 703) which must be proved by unequivocal acts of the buyer: *Knight v. Mann* 118 Mass. 143; 2 Ad-

dison on Cont. § 1218; acceptance and appropriation do not waive damages for breach of contract of sale: *Trowbridge v. Barrett* 30 Wis. 661; *Allen v. McKibbin* 5 Mich. 449; *Henkel v. Welsh* 41 Mich. 664; *Hull v. Belknap* 37 Mich. 179.

Norris & Uhl for appellee.

COOLEY, J. Assumpsit to recover the price of lumber sold. On August 26, 1881, Mr. Chauncey Pettibone, as agent for the defendants, entered into a contract with the plaintiffs, of which they gave him the memorandum copied in the margin.*

The plaintiffs commenced making delivery on the contract, and prior to October 4, 1881, had delivered upwards of 400,000 feet of lumber in Milwaukee, and sufficient in Muskegon to make up a total of 759,623 feet. Mr. Pettibone had attended to the receipt of the lumber at Muskegon, and tally sheets had been given, showing the quantity of the several sizes. It will appear that only a fraction over 40,000 feet was then required to make up 800,000 when, on the day last named, a vessel, the R. P. Mason, was waiting at Muskegon to be loaded.

But though the whole quantity was so nearly supplied, it

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* MUSKEGON, August 26th, 1881.

Messrs. Sanger, Rockwell & Co., Milwaukee, Wis.—GENTLEMEN: Sold you to-day two cargoes of lumber, of about four hundred thousand feet each into which we will put 100 pcs. 8x8-14; 50 pcs. 8x8-16; 40 pcs. 8x10-18; 30 pcs. 8x10-16; 40 pcs. 8x10-18; 20 pcs. 10x10-12; 40 pcs. 10x10-14; 60 pcs. 10x10-16; 40 pcs. 10x10-18; 30 pcs. 10x10-20; 30 pcs. 10x10-22; 20 pcs. 12x12-12; 20 pcs. 12x12-14; 10 pcs. 12x12-16; 20 pcs. 12x12-18; 30 pcs. 12x12-20; 30 pcs. 12x12-22; 200 pcs. 2x12-18; 500 pcs. 2x12-22; 500 pcs. 2x12-24; 200 pcs. 2x12-26; 400 pcs. 2x6-22; 400 pcs. 2x16-26; 200 pcs. 2x16-28; 10 pcs. 10x12-12; 10 pcs. 10x12-14; 10 pcs. 10x12-16; 10 pcs. 10x12-18; 40 pcs. 10x12-20; 40 pcs. 10x12-22; 3500 pcs. 2x4-18; 1000 pcs. 2x4-20. Should we be unable to furnish the amount of 2x12-24 named, we will furnish you same amount cut to other sizes as you may wish. Will ship one cargo within ten days and the second within thirty days. Lumber to be sound merchantable lumber excluding lengths under ten feet. Lumber to be inspected and tallied by W. McCullum. The price of first cargo to be $11, delivered to you in Milwaukee, and of the second $9.50, on dock here. Terms of sale cash. Provided we are unable to furnish the exact number of pieces of lengths above 20 no damage shall accrue, but in any event we will furnish 75 per cent. of each kind named. D. F. COMSTOCK & Co.

We are to pay ½ tally on this lot. PETTIBONE.

is shown that of the special sizes mentioned in the contract much more than 40,000 feet had not been delivered. These sizes were of more value than the ordinary run of the lumber, and were not always readily obtainable; and much lumber of unusual sizes, but not corresponding to the sizes specified in the contract, appear to have been delivered from time to time without objection by either party, and without any expressed understanding respecting them.

When the R. P. Mason commenced to load, then, the situation was this: The whole quantity was delivered, with the exception of about 40,000 feet, and the delivery of special sizes was so far short that if the whole 40,000 should be of those sizes there would still be a large deficiency. It might be expected, therefore, that if defendants proposed to insist upon literal compliance with the contract, they would then decline to receive any lumber not of the special sizes. So far were they from doing this, that the R. P. Mason was loaded with lumber as it was convenient to take it from piles on the dock, and the load swelled the total receipts to 934,557 feet. This was done under the supervision of Pettibone, who appears to have endeavored to obtain what he could of the special sizes, but made no protest against receiving other lumber. The quantity of the special sizes then deficient was about 135,000 feet, according to Pettibone's estimate.

When the vessel was loaded, Pettibone called the attention of the plaintiffs to the fact that the quantity taken largely exceeded that which defendants had bargained for, and he claimed that for the excess over 800,000 feet the defendants ought not to pay the contract price. Plaintiffs, according to their evidence, then agreed with him that the price for this excess should be nine dollars a thousand feet, while, according to his evidence, plaintiffs proposed to take nine dollars and he made no response. Pettibone's evidence on the subject is as follows: "The captain fixed the loading himself. After the loading of the R. P. Mason on one of the docks,—I can't say whether it was before or after I received the tally sheets; I should say it was before,—I stated to Mr. Comstock, in substance, that if, in order to get in the

amount of those special sizes that he had contracted to furnish us, there was evidently a good deal of other lengths that got in, that would swell the total to a great deal more than the 800,000 feet, and that we didn't want them at the same price: that piece stuff was lower. Comstock admitted the fact that there would be more than 800,000 in order to secure the special sizes that we wished, and said that he would allow us half a dollar. That was his offer. I made no reply to that. I did not accept his proposition. I wouldn't swear that at that particular time it was spoken of about his furnishing the balance of the piece stuff named in the contract."

Plaintiffs claim that performance on their part was completed when the R. P. Mason was loaded, and that they were entitled to the contract prices for 800,000 feet, and nine dollars a thousand for the excess, under their agreement with Pettibone. Defendants denied that they had agreed through Pettibone upon the price for the excess, but insisted upon their right to receive the 135,000 feet of special sizes which were deficient. Evidence was put in of attempts by plaintiffs to obtain payment of the balance due them, according to their claims, and by defendants to secure the special sizes of lumber; all of which proved ineffectual. It was shown that plaintiffs made some effort afterwards to procure the special sizes for defendants without avail; but whether this was in recognition of a right in defendants to receive them, or merely to avoid litigation, was made a question. The circuit judge submitted the evidence on this subject to the jury, expressing his own opinion, however, that neither party was shown to have done anything after the R. P. Mason loaded which would constitute a waiver of rights. At the request of the plaintiffs he gave the following instructions:

"If the jury find that when the R. P. Mason was loaded it was discovered that her load, with what had before that been received by the defendants, exceeded the 800,000 feet mentioned in the contract by 135,536 feet, as per the tally sheets, and that thereupon the agent of the defendants, Mr. Pettibone, objected to paying the contract price of nine dollars and fifty cents upon such excess, as it exceeded the amount contemplated by the contract, and it was then

and there agreed between the said Pettibone and plaintiff Chester W. Comstock, as a compromise and adjustment touching the lumber received and agreed to be received under the contract, that such excess of 135,536 feet should be charged at nine dollars per thousand only, then, although the entire amount of 935,536 feet actually received by the defendants, and by them appropriated to their own use, was not, in every respect, sawed into the particular lengths and sizes specified in the contract, the defendants will not be allowed to recoup by reason thereof, but will be held to pay for the lumber so received and retained by them.

"The contract provided that out of the 800,000 feet contracted to be sold a certain portion should be cut into certain specified sizes and lengths, and it was the privilege of the defendants to insist upon strict compliance therewith or to waive the same. It was their privilege, as the lumber was delivered to them from time to time on the dock, to refuse to receive any portion that did not satisfy the contract; and if, with every opportunity afforded to inspect the same, and if, when the last cargo was loaded, they had full knowledge that the entire quantity contemplated by the contract would be thereby received, and that there was an excess of certain sizes and lengths and a shortage as to other sizes and lengths, and they saw fit to accept the same in satisfaction of the contract, they cannot recover on account of such shortage."

It is contended on the part of the defense that there was no evidence in the case which warranted submitting to the jury the question of compromise as the judge submitted it, and no evidence showing any waiver by defendants of their right to the remainder of the special sizes. We think there not only was such evidence, but that it was so conclusive in its nature that but one deduction could be made from it.

It is true that in the talk between Pettibone and the plaintiffs after the loading of the R. P. Mason, the word "compromise," or perhaps any equivalent word, is not shown to have been made use of; but what they were speaking of is seen to have been a delivered surplus above the contract quantity, and it is only in respect to this that there is any allusion to an open question. The 800,000 feet had been delivered and received; it did not in all respects comply with the contract, but it had nevertheless been taken

without, so far as appears, any protest or any reservation of a right to question afterwards its having been received under the contract. A large excess had also been received; and Pettibone claimed that this had happened because they would not otherwise get the special sizes the contract called for. For this reason, and also because, as he said, there had been a decline in prices, he insisted there should be an abatement. But it does not appear that any excess was in the mind of either party except the existing excess over 800,000 feet, nor did Pettibone at the time put forward a claim to the special sizes not yet delivered. If those special sizes were still to be received, the existing large excess would be doubled; and there would be the same reason for making a deduction for the added excess as for that already had. But nothing said by either party at this time gives any indication that either of them had in mind any increase to take place afterwards in the existing excess.

It appears, then, that the full contract quantity had been delivered by plaintiffs, and been received by defendants under the supervision of defendants; and though the special sizes did not correspond to those specified in the contract, there had been no protest against the receipt, and no reservation of a right to object afterwards to any of it. When the final load was taken, defendants, by their agent, did complain that an excess had been thrown upon them, in consequence of the practical difficulty in reaching the special sizes in any other way; and, in respect to this excess, an abatement in price was insisted upon as reasonable. No further claim was then made, and, so far as the evidence goes, there was nothing to then apprise the plaintiffs that defendants disputed having received any part of the 800,000 feet of lumber under the contract.

But even if defendants had then insisted, at that time, upon a right to further delivery of special sizes of lumber, we see no ground on which they could have been entitled to it. They had already received the full quantity, and any difference between what they had a right to demand and what they had actually received was waived by the recep-

tion without protest. This is a rule of justice as well as of law. *Parker v. Palmer* 4 B. & Ald. 387; *Chapman v. Morton* 11 M. & W. 534; *Reed v. Randall* 29 N. Y. 358; *Gaylord Manuf'g Co. v. Allen* 53 N. Y. 515; *Barton v. Kane* 17 Wis. 37: 18 Wis. 262; *Watkins v. Paine* 57 Ga. 50. The contract in law had been complied with; and though the performance was not exact, it had been accepted. If the jury had found otherwise, it would have been the duty of the court to set aside their verdict as unwarranted.

As to the excess over 800,000 feet, it is of no importance in this case whether Pettibone did or did not agree to the price the plaintiffs named, as it appears without dispute the lumber was worth that price; and, in the absence of any agreement upon price, the value must govern.

This view of the case disposes of it, and the judgment must be affirmed with costs.

The other Justices concurred.

JOHN W. WHALLON v. CIRCUIT JUDGE FOR INGHAM COUNTY.

Holding court elsewhere than at county seat.

The Constitution of Michigan forbids the removal of a county seat without a popular vote. *Held*, that a statute authorizing terms of the circuit court for Ingham county to be held at Lansing, the State capital, instead of at Mason, the county seat, both places being within the county, is not unconstitutional on the ground that it takes the clerk of the circuit court away from the county seat, where his office is established, since the same Constitution made the clerk of the circuit court the clerk also of the Supreme Court, which sits at the capital, and the circuit court itself has been given exceptional statutory powers as a forum for litigation to which the State is a party.

The Legislature, in empowering circuit judges to fix the time for holding terms of court, does not divest itself of power to change the times so fixed.

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There is nothing in the history of county institutions in England, nor in the course of Michigan legislation since the Ordinance of 1787, to establish so uniform a system with regard to the place of holding the circuit court for the county that holding it elsewhere than at the county seat should be in itself, and apart from any constitutional provision, a violation of constitutional principles.

Under the Michigan system, the sheriff and the county clerk are officers of the circuit court for the county while it is in session, and during that period are subject to the direction of the circuit judge in all matters pertaining to the administration of justice.

Mandamus. Submitted Oct. 4. Denied Oct. 5–17.

William P. Wells and *Austin Blair* for relator.

John C. Shields, Schuyler F. Seager and *Isaac Marston* for respondent.

SHERWOOD, J. The Legislature at its last session passed an act of which the following is a copy:

SECTION 1. *The People of the State of Michigan enact*, That two of the regular terms of the circuit court for the county of Ingham, heretofore appointed, shall be held during the remainder of the year A. D. eighteen hundred and eighty-three, within the city of Lansing, and during each year thereafter, two of the regular terms of said court shall be held within said city: *Provided*, That the common council of said city, or the citizens thereof, shall furnish and provide, free of expense to said county, a suitable place for holding said court, within said city, and transacting the business thereof, and also a suitable and sufficient jail, for the incarceration of prisoners during the sittings of said court, both to be inspected and approved by the judge of said court, or the prosecuting attorney of said county, which approval shall be in writing, and shall be filed with the clerk of said county.

SEC. 2. Within ten days after this bill shall take effect and become a law, and said approval be so filed, the circuit judge of the fourth judicial circuit shall designate which of the two regular terms of the circuit court for said county of Ingham, heretofore appointed for the year A. D. eighteen hundred and eighty-three, shall be so held within said city, which designation shall be in writing, and shall be immediately thereafter transmitted by him to the clerk of said county.

SEC. 3. The judge of said circuit shall thereafter, when fixing and appointing times of holding the several terms within his circuit, in such appointment determine and designate which of the regular terms, to be then fixed and appointed, shall be so held within said city of Lansing, for the two years then next ensuing.

Approved May 11, 1883.

In pursuance of said act, and in accordance with its requirements, the common council of the city of Lansing provided a suitable place for holding said circuit court and transacting the business thereof in the city; also a jail for the purposes stated in the act; and on the 15th day of September the presiding judge in said circuit, by proper order for the purpose, designated two of the regular terms of said court, one in October and the other in December, 1883, to be held in Barnes' block in said city.

On the 19th of September said circuit judge caused to be made and directed to the relator the following order:

"STATE OF MICHIGAN—CIRCUIT COURT FOR THE COUNTY OF INGHAM.

To John W. Whallon, Esq., Clerk of said County—SIR: You are hereby required and directed to be and appear at the said circuit court to be held at the city of Lansing, at the rooms of the building heretofore designated by me, which designation is on file in your office, for the purpose of holding such court therein, on the second Monday of October next, at the opening of the court on that day, and to act as clerk thereof during the sitting of the same; and also that you do bring with you, ready to be used in the business of said court, the law and chancery journals thereof, the common rule book and special motion book kept in your office, and all the files and papers in your office, in each and every case that has been, or may be hereafter, placed upon the calendar of said court, for hearing or trial at the next term thereof, to be holden at the city of Lansing on the day aforesaid.

G. T. GRIDLEY, Circuit Judge.

Dated September 19, 1883."

Upon the receipt and filing of this order by the relator, he presented to the circuit judge for said county of Ingham the following petition:

"*To Hon. G. T. Gridley, Circuit Judge in and for the Circuit Court for the County of Ingham:* The petition of John W. Whallon, county clerk for the said county of Ingham, respectfully shows that he has received and filed in the said clerk's office the three several orders made by the Hon. the circuit judge for said circuit court for the county of Ingham, copies of which are hereto attached.

That your petitioner is greatly embarrassed by the said orders, which seem to him in clear violation of the Constitution and laws of this State. Your petitioner, therefore, requests that the said orders, and each of them, may be vacated and set aside for the reasons following, to-wit:

1st. Because the said Act number 85 of the Session Laws of 1883, is null and void, the city of Mason being the county seat of said county of Ingham, and the said Legislature had no power to remove the same to the city of Lansing, such power being only in the Board of Supervisors of said county, in pursuance of section 8, of article 10 of the Constitution of this State.

2d. Because, by the Constitution of this State, (section 4 of article 10,) the sheriff and county clerk are required to hold their offices at the county seat, which is and has been at the city of Mason for many years, and not at the city of Lansing; and the statutes of this State also require the sheriff and clerk to hold their offices at the county seat.

3d. Because the said Act No. 85 has not conferred upon the said circuit judge any authority to make any order requiring the sheriff and clerk to remove their offices to the city of Lansing, or to attend courts at any other place than the county seat of said county.

4th. Because the said Legislature has no authority to require the holding of circuit courts in organized counties at any other place than at the county seat; that the said county of Ingham has a court-house and jail at Mason, and the said sheriff and clerk both hold their offices there, as they have always done, and great inconvenience and confusion would arise if they attempt to remove their offices, papers and records away from the said county seat.

And your petitioner will ever pray, etc.

JOHN W. WHALLON."

Which said petition was duly considered by said circuit judge, and on the 26th day of September was denied. And thereupon said relator filed his petition in this Court for a mandamus requiring said circuit judge to vacate and set aside said last-named order, for the following reasons:

1. Because the above-mentioned Act of the Legislature is inoperative and void, as being in violation of section eight of article ten of the Constitution of this State; the county seat of said county of Ingham having been established as aforesaid, and now being at said city of Mason, the Legislature could not lawfully provide for the removal of the same therefrom in whole or in part, except in the manner provided by said section.

2. Because said Act and the above-mentioned order upon your petitioner are in violation of section four of article ten of the Constitution of this State, by which your petitioner is required to keep his said office at the county seat of said county, which is, and for many years has been, at the city of Mason, and not at said city of Lansing. And because, also, your petitioner is required by the General Statutes of this State to hold and keep his said office at the county seat.

3. Because the Legislature were without power, and could not lawfully require the terms of said circuit court to be held at any place in said county other than the county seat therein.

4. Because said Act of the Legislature does not confer upon said circuit judge any power or right to require your petitioner to attend upon the session of said court at the city of Lansing, or to remove his said office or any part thereof, or the books, papers, records or files belonging thereto or kept therein to said city of Lansing, or away from said county seat.

5. Because the removal of such records, books, papers and files, in obedience to said order, would be contrary to the rights of your petitioner in the premises, as well as the public and individual persons interested in such records, books, papers and files, and would be attended with great inconvenience, confusion and hazard."

To this petition the respondent demurs.

It is urged in behalf of the relator that the Act under consideration does not, by its provisions, require or direct the clerk or sheriff to be present or attend the sessions of said circuit court to be held at Lansing. If the Legislature had the power to require any of the terms of the circuit court to be held at Lansing, sections 5620 and 6002 of the Compiled Laws sufficiently specify the duties of these officers; but, independently of these sections, we think it

within the power of the circuit judge to command the services of these officers at the regular terms of the court. They are officers of the court, and subject to its direction in all things necessary to a proper administration of the law during its sessions.

It is also claimed by relator that the Legislature has no power to change the regularly appointed terms of the court. The number of terms of the circuit court and the time of holding the same have always been discretionary with the Legislature, provided there shall be at least two in every county, and in counties of ten thousand inhabitants, or over, at least four terms held in each year, as required by the Constitution. Article 6 § 11; 2 Comp. L. §§ 4939, 4979; *People v. Northrup* 50 Barb. 147; also in 37 N. Y. 203; *Bouldin v. Ewart* 63 Mo. 330; *People v. Moneghan* 1 Park. Crim Rep. 570; *Northrup v. People* 4 Abb. Pr. (N. S.) 227. Under our statute the Legislature has conferred the power upon the circuit judge to fix the time for holding the several terms. 2 Comp. L. p. 1508, sec. 3, § 4939. In doing this, however, it has not divested itself of the power to change the times fixed by the circuit judge. *Ex parte Charles Shean* 25 Ohio St. 440. There is no limitation on the power of the Legislature in this regard, except as hereinbefore referred to. The Act in question does not change the number of terms fixed by the circuit judge before its passage, neither is it sought thereby to change the time appointed for holding the same, but to change the place in the county at which two of the terms shall be held.

The important question raised by the demurrer to the relator's petition is the constitutionality of the Act authorizing the change of the place at which two of the terms are to be held, from Mason to Lansing. The relator claims such change is in violation of art. 10, sec. 8 of the Constitution, which reads as follows:

"No county seat once established shall be removed until the place to which it is proposed to be removed shall be designated by two-thirds of the board of supervisors of the county, and a majority of the electors voting thereon

shall have voted in favor of the proposed location, in such manner as shall be prescribed by law."

Counsel for relator maintain that "county seat," as used in this section of the Constitution, means the same as "seat of justice;" that the terms are synonymous; that the holding of courts at the county seat must be taken for granted as being the chief object for which a county seat was established; and that when a county seat is established it draws to it, ex necessitate rei, the holding of courts there; and they make reference to the origin of counties in our political and judicial system, and their organization, and the action of the Legislature, territorial and State, in locating and establishing places for holding courts of record within State jurisdiction, to support their views.

A careful examination, however, shows that such action has not been sufficiently uniform to aid very much in solving the question presented. Under the Act of Congress organizing the Northwest Territory, for the purposes of government the entire territory consisted of one district. The laws were made by the governor and three judges, subject to the disapproval of Congress. These three judges constituted the Supreme Court. The laws were to have force in all parts of the district, and the governor was authorized, for the execution of process, civil and criminal, to make proper division of the district, and to lay out those parts, where the Indian title had become extinct, into townships and counties. 1 Comp. L., pp. 26, 27. No time or place seems to have been fixed or designated at which the courts were to be held. The courts were, however, invested with common-law jurisdiction. Ord. 1787, paragraph 4. Just what course was pursued by the Governor and Judges upon this subject, under this ordinance, within the territory included within this State, does not very clearly appear.

The territorial government of Michigan was organized in 1805, and the legislative power continued in the Governor and Judges of the territory until 1824. During this period many counties were established, and their bounda-

ries early defined, and it was customary, when it became necessary to hold courts of record therein, for the Governor and Judges to designate by their own action, or through commissioners appointed for that purpose, (whose action was subject to the governor's approval,) the seat of justice in such counties. 3 Terr. Laws 840; id. 1379, 899 and 908. The supreme court of the territory was the first court organized, and was required to be held at the seat of government, and its location has always been a subject of legislative discretion. 1 Terr. L. 9. In certain cases a change was permitted, as in case of war, pestilence or other public calamity. 1 Terr. L. 9, 15, 16.

On the organization of this court the territory was divided into three districts, and a district court was established in each. The number of terms to be held, and time of holding same, were fixed in the Act of organization. No particular place was mentioned at which the terms of the court were to be held, that being left entirely with the marshal of the territory. 1 Terr. L. 17, 18. The clerk of each of these courts was appointed by the judges thereof. id. 10, 18; 2 Terr. L. 60.

The county court was established in 1815, and under the territorial jurisdiction and until the territory contained more than one county, it was required to be held at Detroit. 1 Terr. L. 184. The Governor appointed the clerk of this court. 1 Terr. L. 716 § 9.

The circuit courts were organized under our territorial existence in 1825. 2 Terr. L. 265. Under the act creating the same they were required to be held in certain counties named in the act, and in *certain places specifically named* at the court-houses in said counties, and the clerks of the county courts were required to perform the duties of the office of clerks of such circuit courts.

In 1833 the circuit court of the territory was reorganized. One was established in each organized county. The clerks of the several counties were charged with the duties of the clerk of said court, and the county court was abolished. 3 Terr. L. 1022.

In none of these enactments is it assumed or taken for granted that the circuit court was to be held at the county seat, but the place was especially named or indicated when the designation thereof was not intrusted to the marshal or Governor. 1 Terr. L. 17; id. 183, 186, 326.

Previous to the adoption of the Constitution of 1835 the places of holding courts were almost invariably termed seats of justice. 1 Terr. L. 323, 324, 325, 328, 329, 330. In but few instances do we find the term "county seat" used in our territorial enactments in connection with holding the circuit court. We find it used in several instances after the office of supervisor was created for the several townships, and a place for their meetings was to be provided for and certain offices located there. 2 Terr. L. 317, 325; 3 Terr. L. 972.

The district or circuit court was the first court required to be held in the several counties, and the places of holding the same were, in several instances, changed.

I think the various acts of the Governors and Judges, and of the Legislative Council, under our territorial system, pretty clearly indicate that the place of holding the circuit court—or what is termed in those acts the "seat of justice"—and the county seat—did not necessarily mean the same thing. None of the county officers were required to have their offices at the county seat, until 1832. 3 Terr. L. 972. The clerk of the county was not charged with the duties of clerk of the circuit court until 1830. It was the clerk of the county whose office was required to be held at the county seat. Id. 972; 2 Terr. L. 759.

The county seat has always been the place designated for doing the county business; the place at which the public buildings were to be erected; the place where the probate and county courts were to be held, and the offices of the county clerk, county treasurer, and register of deeds were to be located; and the board of supervisors were to hold their several sessions there. Laws 1827, p. 379; 2 Terr. L. 270, 625; 3 Terr. L. 972 and 1010; Rev. St. 1838, p. 35.

The circuit court has general common-law jurisdiction,

and has always been a State court, held by judges paid by the State, and is in no sense a local court. Its judges may interchangeably perform the duties of the office in any part of the State. For the convenience of the people its terms are required to be held in the several counties. The place in the county where it is held has always been regarded as the seat of justice for that county. These places have, with an occasional exception, (when the county seat was first established,) been located at the county seat, but do not necessarily constitute a part thereof. The county seat exists without this court, and the location of the seat of justice has always been a subject of legislative discretion.

There has never been any express constitutional provision upon the subject in anywise limiting the power of the Legislature to establish or change the place for holding the circuit court when once located.

We now come to the constitutional provisions and the State legislation had thereunder. In the Constitution of 1835 there is no provision requiring any court or officer to have his office at the county seat or at the seat of justice. In fact, neither of these terms are to be found in that instrument, and it is silent upon the subject as to when the circuit court shall hold its sessions, or who shall designate the place of holding the same. See articles 6 and 7.

After the adoption of this Constitution the State was divided into four judicial circuits. The counties composing each, and the number of terms, and the time for holding the same in each, was by statute specifically designated. Rev. St. 1838, pp. 381, 382, 383. Each county was required to provide a suitable court-house, and it was also provided by statute: "If, by reason of war, pestilence or other calamity, it shall be deemed unsafe or inexpedient to hold any court at the time and place appointed therefor, whether it be a stated term or a session by adjournment, the justices or judges of the court, or any one of them, may appoint another place within the same county, and any other time for holding same." Also, by another section of the same statute, it is provided whenever the court-house

shall be destroyed, or from any cause shall be unsafe, inconvenient or unfit for the holding of the court, the circuit court may appoint some other convenient building in the vicinity as a temporary place for holding the court. Rev. St. 1838 p. 415 §§ 2 and 4.

In the Revision of the statutes in 1838 the court-house was erected for the use of the county, (id. p. 35 § 16,) and there was no general provision requiring the circuit court to be held at the county seat, and there never was any such requirement in either of our State Constitutions, or in any general enactment of the Legislature.

The Revised Statutes of 1846 p. 377, required the county court to be held at the county seat, and the circuit court was required to be held at the court-house, if there was one in the county, and if not the sheriff and county clerk were required to designate the place in the county where it should be held, (Rev. St. 1846 p. 353 § 6,) and the only provision we find, in Constitution or laws, requiring the court-house to be located at the county seat, was enacted more than 25 years after the adoption of our present Constitution. See Pub. Acts 1877 p. 50.

The whole subject was in the power of the Legislature previous to the adoption of the Constitution in 1835. The Legislature was not deprived of that power by that instrument.

Previous to the adoption of our present Constitution the Legislature had in some cases designated the seat of justice as the place of holding the circuit court; in others the county seat; in others at some place away from the county seat. In some instances it authorized the marshal to designate the place; and in others the Governor or commissioners located the place. I regard these facts as very significant upon the question as presented by the relator. Had the people of our State regarded the permanent location of the place of holding the circuit court essential to the establishment of the county seat, I can hardly think they would have failed to have incorporated it in the original act, or at least in some general legislative enactment.

It seems impossible, if the Constitutional Convention designed to permanently establish the holding of the circuit court at the county seat beyond the power of legislative removal, that it should not have inserted a clause in the Constitution of 1850 to that effect. Several minor offices were thus located, as we have already seen. The subject of the circuit court, its terms, the election of the circuit judges, changing the limits of the circuit, and the number of circuits, were repeatedly before the Convention, but no place for holding the circuit court was established by the proceedings of the Convention. Neither do we obtain any information from their proceedings as to the views of the Convention on the subject.

As already shown, under our territorial existence, and under the Constitution of 1835, the Legislature determined the places of holding the circuit court in the several counties, and an examination of the legislation upon this subject, after the adoption of the present Constitution, I think shows satisfactorily the intention to continue the power over this question, where it has always been exercised. See Sess. L. 1855 p. 12; id. pp. 48, 422; Sess. Laws 1851 p. 150; Sess. Laws 1857 p. 162; id. p. 438; Sess. Laws 1859 p. 4; Sess. Laws 1863 p. 297.

The legislation complained of in this petition is not new in this country. In several of the sister states similar action has been taken, and the courts required to be held in several different places in the county, and it has been held the power of the Legislature to make such changes was properly exercised. *Trimble v. State* 2 Iowa (Greene) 404; *Lee County v. Deming* 3 Iowa (Greene) 101; *Bouldin v. Ewart* 63 Mo. 330; *Herndon v. Hawkins* 65 Mo. 265; *Ex parte Shean* 25 Ohio St. 440.

The silence of the Constitution as to where the circuit court shall be held, and the action of the Legislature since its adoption upon this subject, if not sufficient to settle the question conclusively in favor of the power of the Legislature, is, I think, certainly sufficient to raise a reasonable doubt as to the unconstitutionality of the act in question,

and in such case the rule is well settled that the law must be sustained. Chief Justice Marshall, in stating this rule in *Ogden v. Saunders* 12 Wheat. 270 says: "It is but a decent respect due to the wisdom, the integrity, and the patriotism of the legislative body, by which any law is passed, to presume in favour of its validity, until its violation of the constitution is proved beyond all reasonable doubt." *Scott v. Smart's Ex'rs* 1 Mich. 295; *Sears v. Cottrell* 5 Mich. 251; *Tyler v. People* 8 Mich. 320; Cooley's Const. Lim., and cases cited at page 182.

It is not pretended in this case that the Constitution, in express words, forbids the legislation in question, but by necessary implication does so; that it was intended, when the Constitution was made, to limit the power of the Legislature as claimed; that such is the spirit of the provision in the section relied on.

"'When the fundamental law has not limited, either in terms or by necessary implication, the general powers conferred upon the legislature, we cannot declare a limitation under the notion of having discovered something in the *spirit* of the constitution which is not even mentioned in the instrument,'" "nor are the courts at liberty to declare an act *void*, because in their opinion it is opposed to a *spirit* supposed to pervade the constitution, but not expressed in words." "'It is difficult upon any general principles to limit the omnipotence of the sovereign legislative power by judicial interposition, except so far as the express words of a written constitution give that authority.'" Cooley Const. Lim. 169, 171, 172, 182, and cases cited.

This Court can only arrest the execution of a statute when it conflicts with the Constitution; and, after as careful an examination as I have been able to give to the question presented, I am compelled to say the relator has failed to point out in the Constitution the restriction claimed upon the legislative power to pass the act in question, and I think his petition should be denied, without costs. I will also add, I concur in what is said by Mr. Justice Campbell, that this county of Ingham is by the Constitution itself

made exceptional. The most important clause which is supposed by implication to locate the circuit court at the county seat, is that which requires the clerk, who is a constituent part of the court, to keep his office at that place; but the force of this, in the case of Ingham county, is wholly overthrown by another clause, which makes him clerk of the Supreme Court, which is located at Lansing.

The other Justices concurred.

CAMPBELL, J. The Legislature at its last session made provision whereby the circuit judge in whose circuit the county of Ingham lies, was required to designate two of his four terms in each year to be held at Lansing, the seat of government of the State, in said county, and respondent accordingly made an order for holding a term there on Monday, October 8th. The relator asked this court for a mandamus to compel the respondent to rescind that order, which, after consultation, we refused, the judges reserving further time to reduce their views to writing. Having concurred in that action of the Court, I therefore proceed to express such views as have occurred to me, concurring, however, with my brother Sherwood in his opinion.

It is not insisted that there is any provision of the State Constitution which prohibits the holding of circuit courts away from county seats directly, but the prohibition is supposed to rest in certain provisions requiring the county clerk, who is expressly made clerk of such courts, to keep his office at the county seat, as the sheriff, treasurer, register of deeds and judge of probate are required to keep theirs in the same place. This claim is made in connection with a further one, that such a change of terms amounts, as far as it goes, to a partial removal of the county seat to Lansing without the action of the supervisors and voters of the county, which must first be had in favor of it. It is insisted the clerk and sheriff cannot be taken away from their offices, and that the court itself is an inseparable incident to the county seat.

We are not called on to consider any special theories of

construction, because counsel do not and could not claim that anything can be regarded as prohibited to the Legislature, unless the Constitution stands in the way by the only reasonable interpretation that can be given to its provisions so as to fairly carry out its expressed purposes. Such implications as are necessary to avoid defeating its manifest purposes, and are required to satisfy its provisions, may be properly regarded as express, when they only interpret its expressions.

We may, therefore, consider the questions as they were considered on the argument, and determine as well as we can how far relator is right in his claims.

In my opinion there is no difficulty whatever arising out of the location of the clerk's and sheriff's offices. The Constitution, in express language, as originally enacted and until recently amended, made the clerk of the county, clerk of the Supreme Court, whenever it was held in the county, and it left the places of holding that court to be determined by the Legislature. Terms of the Supreme Court have been held at Lansing for over twenty-five years, and no inconvenience has come from it. There never has been any difficulty in having a clerk appear by deputy in the courts, and if, as has frequently happened, two courts and the board of supervisors or other county bodies have met simultaneously, neither of them has been compelled to give way to enable the others to act. Neither is there any difficulty about his office files. The law never required him to have his office either in or near the court-room, and our present legislation indicates a purpose to have the county offices built more solidly and safely than court-houses are usually, and expressly discriminates between the buildings. Pub. Acts 1877, p. 50. There is still less force in the argument as applied to the sheriff, for his duties are almost entirely outside of his office, and call him to all parts of the county.

The only question that requires attention is that relating to the supposed fixed location of circuit courts as ancient and inseparable adjuncts to county seats, which by their name are said to be seats of justice. And it is claimed that

when, as in the case of circuit courts, the law requires them to hold sittings in a county, the county seat, by not having them, is deprived of its essential quality and ceases to fulfil its necessary functions. And stress is laid on the fact, which is not denied, that our early legislation frequently, and perhaps generally, called them "seats of justice."

This argument is quite as forcible from the same ancient common-law analogies in favor of the seat of government within the same county. Our Constitution calls Lansing the "seat of government," and by the practice and theory of England and most other commonwealths, all departments of the government, of which the judicial department is co-ordinate in importance with the rest, are usually represented at its central seat. There are very strong reasons of general convenience in favor of having a tribunal of original jurisdiction at that point. It has been uniformly held in this State that the circuit courts are in no sense county agencies or instrumentalities. There are very few cases in which the county in its own right is even interested in litigation. On the other hand, the State has required special legislation to enable it to resort to this very circuit court not only as a forum of litigation, but also to review some action by State officers of an administrative and not judicial character. It has never been supposed that the Legislature was bound to put the sessions of the Ingham circuit court at Lansing, but we are somewhat at a loss to see why the implications in favor of permitting it are not as strong as those in favor of the county seat, if the grounds urged are valid at all.

The courts at Westminster, sitting in bank, had original jurisdiction, and were entirely independent of county considerations in their localization. And yet when it became necessary to summon juries from the proper venue, the courts did not seek the county, but the juries were brought up to the court, and its position at Westminster was considered as essential to the general theory of justice. The great charter itself protected this fixed position of the great courts. Their original jurisdiction was like that of our circuits.

It is natural to infer that at least the primary meaning of the terms "county seat" and "seat of government" is alike, in referring to the place where the respective county and State business must have locality in order to be carried on at all, and must, for the convenience of the public and the corporate body, be brought together. The county has a direct agency and control over many subjects, and the county officers perform very important functions. The board of supervisors are to the county what the Legislature is to the State, with administrative as well as legislative duties. The taxes are laid and collected through county machinery; moneys are raised and accounts liquidated, not only for county business, but to meet the county liability in court expenses and incidentals, laid on the county by the State. Deeds and land titles are recorded, and many other private documents are kept there for security and for general information. The county has as well-defined individuality, and as much need of local offices, as a city, or as the State at its capital. There can be no question about the immediate interest of the county in all these things, and the place where they are managed is properly the county seat, and can be nothing else.

To hold that the sitting of courts there is as necessary an incident, and their removal a destruction of its vital existence, must involve the recognition and perpetuation of what depends on inference. And relator has undertaken to establish this inferential necessity. And this is entirely based on what is claimed to be its incorporation into the fabric of our inherited and continued institutions.

It is not beyond the power of the people, in making constitutions, to reject what is not essential to republican government. It can hardly be claimed that the system of counties, however old and valuable, might not be replaced entirely, or essentially modified. An American county does not much resemble an English county; and a Michigan county differs in many things from counties elsewhere. And it strikes one forcibly, in reading our own Constitution, that when it requires several things to be done in

counties, and expressly requires some of them to be done at the county seat, the natural inference is that those not specified may be left to legislative discretion. That is the rule generally applied, and it must be applied here, unless there is such an organic connection between the circuit courts and the county seat as renders their separation mutually destructive, or at least perilous, to our system. As the argument is presented, it assumes that the presence of the court is as much an incident as the general quality of an office perpetuated in the Constitution is to that office.

It is true that we have long had courts meeting at county seats, and that our laws have generally required it in terms. But the fact of such legislation removes much of the force of the argument derived from usage. That which rests on law can be abrogated by law, and can hardly be treated as a recognition of perpetual obligation. But in looking over the history of our institutions it will appear that while the county has from great antiquity been respected as an important factor and locality in judicial matters, the superior sanctity of one place over another in the county is not so obvious. When the county first appears as the seat of justice, the county court was the court of general original jurisdiction, and therefore the most important court to the people. But that county court was purely a county institution, in which the county freeholders were judges of law and fact, and the sheriff a mere presiding officer. Com. Dig. "County" (C 2.) That court had a local habitation in the county in most cases, but there is much reason to believe it was the episcopal city, and not any mere county locality which fixed it.

It is claimed, and probably with truth, that when the king's judges executed their commissions in the county there was still a shire-town generally resorted to for judicial purposes. But there seems to be no foundation for the claim that this was ever deemed essential. The English respect for places having old associations would naturally lead to some uniformity, and the existence of commodious buildings would also be attractive. But, while the general usage

was to resort to these so-called chief towns, it is certain that this was not universal. Reliable authority declares that the county court itself might be held anywhere in the county, unless fixed by statute. Com. Dig. "County" (C 4). The form of the commission of oyer and terminer, found in Fitzherbert, authorizes the judges to appoint the place of sitting. F. N. B. 110*b*. Mr. Tomlyn (vide "Assize") says there are several statutes as to holding the assizes in different places in certain counties. Power was given in very early statutes to change the usual places of holding assizes by consent of the chancellor and judges. Com. Dig. "Assise" (B 23.) The present English statutes give power to hold them wherever the judges choose to appoint. 2 & 3 Vict. c. 72; Har. Dig. "Jurisdiction of Courts."

We can hardly be justified in finding any constitutional claim to immunity for county seats on English usage so varied and uncertain as this. It is certain that in some large counties, as in York, the Three Ridings were frequently, as they are now, distinct judicial seats, and other counties had different court towns, either fixed or varied. There are many American counties with more than one seat of justice. But our own history is no more settled on this matter than that of some other places. During the period after the Revolution, when Michigan was still held by Great Britain, the country west of Lower Canada was divided into districts for judicial purposes, as is well known, and Detroit was the place of holding court in the district of Hesse, afterwards the Western District. During the same period counties were also laid out, and Detroit was in one of those counties. But at no time were the counties put to any judicial use. They were election and military divisions, but it is not known that at that time they had any other purpose, and their existence has been somewhat obscure. After Michigan was made a separate territory, it was again divided into districts, one containing Detroit, one Michilimackinac, and others different parts of the territory. Courts had been held by the British authorities reg-

ularly at Detroit and Michilimackinac. But in the Act which provided for district courts, Detroit was the only place named, and in the other districts the marshal was allowed to select the court town. 1 Terr. L. 17.

It has also been usual for the Legislature to make provision not only for temporary seats of justice away from the county seat, but to allow changes in case of supposed necessity to be determined, not by the executive or judiciary, but by the ministerial officers of the court. This was fully illustrated on the argument.

If the usage has been, as it seems to have been, so largely open to variation, the only conclusion seems to be that, while it is deserving of great respect and ought not to be slighted, it cannot properly be regarded as having been deemed beyond legislative interference, or as essentially a part of the local existence of the county seat. It is not, therefore, so sacred a heritage as to be entitled to any implied protection under the Constitution.

I do not think the law invalid.

The other Justices concurred.

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HENRY A. KELLY v. ALBERTUS BOGARDUS AND SUSAN A. WINANS.

Foreclosure cannot precede maturity of debt.

A foreclosure bill will not lie until the debt secured by the mortgage under foreclosure falls due.

Appeal from Macomb. (Stevens, J.) Oct. 4.—Oct. 17.

BILL to compel defendant to foreclose a chattel mortgage and to satisfy a lien out of certain property before resorting to complainant's. Complainant appeals from dismissal of bill. Affirmed.

Crocker & Hutchins for complainant.

S. F. Seager and *Edgar Weeks* for defendant Winans.

COOLEY, J. The bill in this case sets forth the purchase by complainant, in October, 1879, of a valuable horse, and also a sulky, a harness, three blankets and a girth, which had at one time been owned by the defendant Bogardus; that on March 3, 1880, the defendants by their agents and servants took the horse from complainant's possession, and removed the same to the province of Ontario where they now secrete it; that defendant Winans claims to have a chattel mortgage on the property so purchased by the complainant, and also on other property, made by Bogardus while he was owner; that after giving the mortgage Bogardus sold the horse, sulky, harness, blankets and girth, but retained the other property, the value of which exceeds the amount of the lien claimed by Winans under her mortgage; that no steps have been taken by Winans to advertise and sell the property in foreclosure; and the bill prays that Winans "be decreed to satisfy her pretended lien, if any she has, from, upon and out of the said property set forth and described in said chattel mortgage under the order and decree of this honorable court, and that the said property be sold in the following order: *First*, all property described in said pretended mortgage remaining in the possession of said Bogardus at the time of the sale of the said property first above named, now owned by your orator, and that the said property first above described as belonging to your orator be not resorted to in satisfaction of said lien until all the residue of the said property has been sold and disposed of for the satisfaction of the said pretended claim."

The defendant Winans answered, and proofs were taken. It appeared that her mortgage was for the sum of $427.25, and contained a clause authorizing her to take possession whenever she should deem herself insecure. It was to become due May 14, 1880. The suit was begun March 8, 1880.

It will be seen that the relief prayed by the bill was a

foreclosure of the chattel mortgage by the defendant Winans, and a sale of the property mortgaged in such order as would protect complainant in his purchase if the other property should be sufficient for the satisfaction of the Winans lien. But no such foreclosure could be had until the mortgage debt was due; and this, as has been seen, was not the case.

The circuit judge ordered the bill dismissed. He had, we think, no alternative, and the decree must be affirmed with costs.

The other Justices concurred.

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EZRA A. ENGLE v. HIRAM L. CHIPMAN.

Services in aid of prosecuting attorney.

In an action against a prosecuting attorney for legal services rendered by plaintiff as his assistant, proof that defendant promised to tell the supervisors that the bill was right, and ought to be paid, is no evidence of a recognition of personal liability, or of the actual rendering of the services.

A general delegation of his powers by a prosecuting attorney is against public policy, and is illegal; and it can furnish no basis which a court will recognize for any action by the person to whom the powers were delegated for personal compensation for his services.

A prosecuting attorney is vested with a personal discretion as a minister of justice and not as a mere legal attorney, and he must act impartially, as well in refraining from prosecuting as in prosecuting. He must guard the real interests of public justice in behalf of all concerned, and he must not become entangled with private interests or grievances in any way connected with charges of crime.

A prosecuting attorney may, perhaps, employ assistants in ways not involving his official discretion or responsibility, but this discretion can only be delegated on special grounds, where an assistant has been provided for by law.

Error to Huron. (Wixson, J.) October 4.—October 17.

ASSUMPSIT. Plaintiff brings error. Affirmed.

Engle & Engle for appellant.

Chipman & Bope and *William T. Mitchell* for appellee.

CAMPBELL, J. Engle sued Chipman for legal services claimed to have been rendered as agent of Chipman in matters relating to his duty as prosecuting attorney of Huron county. His claim was in substance that having declined to act in certain cases specified, without general authority, this authority was given him, and he acted accordingly. His bill of particulars contained ten items of services in criminal proceedings. He testified that he showed his bill to Chipman, who, after examining it, told him to file it with the board of supervisors, and if they raised any question about allowing the bill he would tell the board the bill was right,—that plaintiff had rendered the services and should have his pay. This was denied by defendant.

The jury found a small verdict in plaintiff's favor, but rejected most of his claim. We do not think it necessary to go at length into the questions presented by plaintiff, because, as pointed out by counsel for defense, the record does not show any case made out at all. We find nothing to show that any services were rendered, nor their value if rendered. The fact, if true, that defendant promised to make certain representations to the supervisors is no evidence of any recognition of personal liability, and no evidence of the actual rendering of the services. And in the absence of any further showing—inasmuch as it devolves upon plaintiff to show error—we can see nothing to base objections upon.

But we are also of opinion that if the agency created was such as plaintiff claims it to have been, it was illegal. No doubt a prosecuting attorney may employ assistants in various ways not involving his official discretion or responsibility, and this is all that defendant admits he ever did. But the law has very carefully guarded the criminal interests of the State from any interested or unauthorized intermeddling. The prosecuting attorney is a very responsible officer, selected by the people and vested with personal discretion

intrusted to him as a minister of justice, and not as a mere legal attorney. He is disqualified from becoming in any way entangled with private interests or grievances in any way connected with charges of crime. He is expected to be impartial in abstaining from prosecuting as well as in prosecuting, and to guard the real interests of public justice in favor of all concerned. This discretion is official and personal, and our laws have only allowed its delegation on special grounds, where an assistant has been provided for by carefully guarded legislation. It is directly contrary to public policy to allow any general delegation of a prosecutor's powers, and the courts cannot recognize any such arrangement as forming a basis for personal compensation.

For all these reasons we must decline to disturb the verdict.

The judgment must be affirmed with costs.

The other Justices concurred.

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ANNA RAE v. THE MAYOR AND ALDERMEN OF THE CITY OF FLINT.

Public health—Nursing.

The charter of Flint requires the common council to take measures for the preservation of the public health. Act 145 of 1879 makes the council the board of health where no other board is appointed. *Held*, that a nurse employed by the council to care for small-pox patients was entitled to compensation from the city, even where the patient was of sufficient ability to pay for the service himself; and Comp. L., § 1706, making the cost of services rendered to such persons an individual liability, does not exempt the city from the immediate liability, if, indeed, it applies at all in cases of public emergency.

The obligation and the power of a city council to act as a board of health and prevent the spread of contagion is not lessened by their omission to create a separate board of health, and their power is a police power, and is commensurate with their duty.

Error to Genesee. (Newton, J.) Oct. 5.—Oct. 17.

ASSUMPSIT. Defendant brings error. Affirmed.

Long & Gold for appellant.

Howard & Thayer for appellee, cited as a similar case indicating that the city was primarily liable, *City of Clinton v. County of Clinton* (Ia.) 16 N. W. Rep. 87.

GRAVES, C. J. The plaintiff acted for many weeks as a nurse of small-pox patients in the city of Flint. The service was onerous, responsible and dangerous. She charged the city for it, and called for payment which was refused. She sued and obtained a verdict. The jury found, on satisfactory evidence, that her employment was by authority of the common council and that she rendered the service on the faith of that employment.

The only question open to discussion is whether the procurement of her assistance was within the power of the council. If it was, the city is liable and the judgment is regular.

In the course of the argument several statutes have been referred to. The citations need not be repeated. The power is not left to implication. The law is express. In the first place, the charter requires the common council to adopt measures for the preservation of the public health, and specifies as one of those measures the institution of a board of health. Act 372 of 1867 sec. 19. In the next place it is provided by a general act that in any city where no board of health is actually organized, the duties, powers and functions shall belong to the mayor and aldermen. Pub. Acts 1879, Act 145, amending the general law. The city of Flint did not see fit to create a board of health as a distinct agency, but elected the policy authorized by the statute of 1879. The whole duty and the whole authority remain, therefore, in the common council. No part of either was transferred. The duty to guard the public health and prevent the spread of contagion was imperative,

and the power of the common council was commensurate with the duty. Neither the power nor the obligation could be lessened by the failure to designate a sub-agency.

An objection is raised that the persons cared for were of sufficient ability to defray all the expense, and that the plaintiff should be required to obtain her compensation from them, and a provision in the general statute is cited. Comp. L. § 1706.

It is not admitted that this provision is operative in the city of Flint. But if it is, it will not sustain the point for which it is cited. In providing that what is done shall be at the charge of individuals, it is not intended to exempt the public from immediate liability. It would be impossible under such a regulation to effectuate the general object. Individuals would not be willing to provide necessaries and serve as nurses and assistants, at the instance of the public, if compelled to collect their pay of the patients or their relatives. The public is first and immediately responsible, and the intent of the statute is to enable the public to obtain reimbursement from those who ought to sustain the expense.

The plaintiff hired herself to the city. She trusted the city and no one else. The occasion was a public one. It was an emergency to which the duty and authority of the common council attached under the power of police, and the right and duty to act depended in no manner on the pecuniary ability of the persons who were sick or infected. The great object was to stay the contagion, and the proper and humane care of the individuals was a righteous incident. The question is not affected by any of the other provisions. We are satisfied that the council was fully authorized to employ the plaintiff, and that the city is liable.

The judgment should be affirmed with costs.

The other Justices concurred.

DAVID S. SHOULTERS v. DAVID ALLEN, IMPLEADED WITH JAMES INGALLS.

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Incompetency of signer of note.

One who in good faith takes a note signed by a person of whose incompetency to do business he has no notice, and in a transaction which is not likely to call his attention to it, can recover on the note.

A showing of business incapacity which consists of evidence of inability to learn to read beyond the alphabet, or to count more than twenty, and of a preference for large coins over small ones, regardless of value, is largely counterbalanced by proof of industrious habits, moral living, exercise of the franchise, and the occasional transaction of business in buying, selling, and giving security.

Where a man, who agreed to furnish a team for farm use, signed a note given for a horse, and afterwards, in a suit thereon, defended on the ground that he was incompetent to make the note, it was *held* that the question whether the purchase was necessary for his use did not arise where the horse was bought for farm use, and was actually taken on the farm and used.

Error to Genesee. (Newton, J.) Oct. 5.—Oct. 17.

ASSUMPSIT. Defendant brings error. Affirmed.

Long & Gold for appellant.

George M. Walker and *Howard & Thayer* for appellee. If one is so imbecile as to be incapable of understanding what he is contracting for, but receives benefit from the contract, he will be liable upon it if the other party acted in good faith, having no knowledge of his condition and taking no advantage of him: 2 Kent's Com. 451; *Mutual Life Ins. Co. v. Hunt* 79 N. Y. 541; *Riggs v. American Tract Society* 84 N. Y. 330; *Loomis v. Spencer* 2 Paige 153; *Wilder v. Weakley* 34 Ind. 181; *Lancaster County Bk. v. Moore* 78 Penn. St. 407; *State Bank v. McCoy* 69 Id. 204; *Eaton v. Eaton* 8 Vroom 108; *Matter of Beckwith* 3 Hun 443; *Behrens v. McKenzie* 23 Iowa 333; if a bona fide contract is made with a lunatic who is apparently sane, it

cannot be rescinded by him or his representatives unless the parties can be placed in statu quo: *Dane v. Kirkwall* 8 C. & P. 679; *Molton v. Camroux* 2 Exch. 487: 4 Exch. 17; *La Rue v. Gilkyson* 4 Penn. St. 375; *Scanlan v. Cobb* 85 Ill. 296.

Cooley, J. This action is upon a promissory note given by defendant Ingalls on the purchase of a horse, and signed by Allen as joint maker. Defense is made for Allen; the ground being that when he signed the note he was an imbecile, and had been from his infancy.

It appears that the note was given on a purchase of the horse by Ingalls of the plaintiff. Ingalls at the time was working a farm of fifty-eight acres owned by Brown, and Brown was with him when the purchase was made and the note given. The horse was purchased for use on the farm, and was taken upon it and used. It is not claimed that there was any fraud in the sale, or that the price was unreasonable. Plaintiff sold it in good faith, without any knowledge or notice of deficiency in intellect on the part of Allen, and nothing appears to have occurred at the time of the sale to put him on his guard.

The showing of mental incompetency on the part of the defense is apparently very strong. Witnesses testify that Allen attended school, but could not get beyond learning the alphabet. He could not count, some say five, others say twenty. He knew nothing of the value of money, and would take a silver piece in preference to one of gold if it were larger. He would eat whatever was put upon his plate, be it much or little. Whoever was confided in by him could do what he pleased with him, and he had no capacity whatever of self-protection against overreaching.

On the other hand, it was shown, mainly by defendant's witnesses, that he was industrious and had cleared up his farm by his own labor and by exchanging with others, and that until after this note was given no guardian had been appointed for him. His neighbors dealt with him in a small way, apparently without any sense of wrong. George E. Taylor, one of defendant's witnesses, had dealt with him

on fifteen or twenty occasions, and once, as agent for another person, had loaned him money and taken a mortgage for it. Ira Potter had bought timber of him. William E. Brown had traded oxen with him, agreeing upon the boot to be paid. David Richards had not only bought wood of him, but had performed the marriage ceremony for him, and Allen appears to be now living without, so far as we are informed, any reproach in the relations then established. Surely this evidence goes very far to overthrow the apparent case made for the plaintiff. It was also shown that Allen was registered as a voter and voted without objection.

It is not necessary, however, to find that Allen, when the note was given, had capacity sufficient for the transaction of ordinary business; it is enough to sustain the note that plaintiff dealt with him in good faith, and without notice of want of capacity in a transaction not calculated to put him on his guard. *Nace v. Boyer* 30 Penn. St. 99; *National Bank v. Moore* 78 Penn. St. 407; *Mutual Life Ins. Co. v. Hunt* 79 N. Y. 541; *Wilder v. Weakley* 34 Ind. 181; *Henderson v. McGregor* 30 Wis. 78; *Yauger v. Skinner* 1 McCarter 389; *Young v. Stevens* 48 N. H. 133.

It was contended for defendant that in order to entitle plaintiff to recover he should make it appear that the purchase was necessary for the defendant's use; but the judge ruled otherwise. But as it appears without contradiction that the horse was bought for the use of the farm, and was taken there and used, we do not think this question arises. Allen, according to the evidence, was to furnish a team for the farm; and though Ingalls subsequently took the horse and traded it off, we do not know that it was not in pursuance of some subsequent arrangement.

Complaint is made of some rulings on the admission of evidence, but we discover no clear error, and think the judgment should be affirmed with costs.

The other Justices concurred.

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Hiram K. Goodale v. Ansil R. Patterson

Married woman's absolute property—Record of assignment of mortgage—Notice, to purchaser of mortgager's interest, of assignment by mortgagee.

Where a man and wife unite in conveying property and the grantee gives back to each an individual mortgage thereon, the wife becomes absolute owner of her mortgage in her own right, and can dispose of it as she pleases and as if she were single.

Comp. L. § 4235, providing that recording the assignment of a mortgage shall not be such notice of the assignment as to invalidate payments made by the mortgager to the mortgagee, applies where the payment, though not actually made by the mortgager, is so made as to release him from liability, as by an arrangement between all parties that he should deed the land to the person making the payment.

Where it is understood between a mortgager and mortgagees that the mortgager shall convey to such person as one of the mortgagees shall designate, an assignment by the other mortgagee will not affect a purchaser who, in good faith, takes conveyance from the mortgager, without notice or knowledge of such assignment; the assignee is subject to the same equities as the assignor, and if the assignor afterwards gives a discharge of the mortgage to the purchaser the latter is entitled to regard it as a regular and valid release thereof.

Appeal from Eaton. (Hooker, J.) Oct. 5.—Oct. 17.

Bill to clear title. Defendant appeals. Affirmed.

Sagendorph & Powers for complainant.

McPeek & Tinkham for defendant.

Graves, C. J. In 1868 Norman Foster was the owner of forty acres of land in Eaton county, subject to a mortgage given to one Adams for $225. He was living on bad terms with his wife and they agreed to separate, and by advice of counsel they united in a conveyance of the land to John O'Neil, who executed to each a mortgage thereon, without covenants. The mortgage to Mrs. Foster was for $500, and that to her husband was for $725. It was orally

understood, as a part of the scheme, that O'Neil should be entitled to pay the mortgages and hold the land, or should convey to such person as Foster should designate, on the terms of having the mortgages satisfied. This arrangement did not bring peace. Proceedings for divorce were commenced, and a prosecution for bigamy. Neither was carried through. For a year or two there was much litigious strife, and different attorneys were concerned. During much of the contention the defendant acted for Mrs. Foster and Mr. Sagendorph for her husband. The land deeded to O'Neil was regarded as the fund on which counsel were to rely. The conveyance to him, and the mortgages back, were given on the 18th of March, 1869.

Mrs. Foster recorded her mortgage on the 16th of April. According to the verbal arrangement, and in point of substance, O'Neil was made the custodian of the title, in order to divide the interest between Mr. and Mrs. Foster. His actual position was rather that of a trustee than that of an absolute purchaser.

March 11, 1870, Mrs. Foster made an absolute assignment of her mortgage to the defendant, and the assignment was placed on record on the 3d day of May following. Just prior to that date Mr. Sagendorph, who had control of Foster's interests and also had interests of his own, negotiated a sale of the farm to complainant, but the agreement was not in writing. May 7th, being four days after the record of the assignment from Mrs. Foster to defendant, Mr. Sagendorph concerted with Mrs. Foster for a disposition of the mortgage. He paid her a sum of money, but how much is not explained, and agreed to give her certain professional assistance; and in return she gave him an assignment of the mortgage and also a discharge of it. His purpose was to be able to treat the mortgage as satisfied in case the oral trade to complainant should be carried out, and on the other hand, if that was not done, to regard the instrument as a purchased security remaining in full force. The money paid was his own; but he appeared to O'Neil as the representative of Foster. It is not intended to intimate, in saying this, that

he commited the least duplicity. There is no proof of any deception or unfairness towards O'Neil. The latter was ready and willing to convey as Foster might desire, on condition of getting rid of the mortgages, and Sagendorph requested him to convey to complainant and he complied. He quitclaimed to complainant, and the deed and discharge of the mortgage to Mrs. Foster were immediately recorded.

Complainant was not informed of the assignment to Sagendorph and the latter destroyed it; and neither complainant nor Sagendorph had any actual notice of the assignment to defendant. They both supposed that the discharge by Mrs. Foster was authorized and regular, and that the record of it would operate to cancel the mortgage.

After the lapse of some little time the complainant ascertained the existence of the assignment to the defendant, and a request was made upon him for a discharge, accompanied by a tender of five dollars, but he refused. A proceeding by petition was likewise instituted to enforce a discharge, but nothing seems to have been affected by it. Finally, in 1881, this bill was filed. It alleges that the mortgage title claimed by the defendant constitutes a cloud on the title of complainant, which equity requires to be removed. It also prefers a demand for damages under the provision relating to the compulsory discharge of mortgages.

The circuit judge decided that the mortgage should be discharged, but he based his decision wholly on the ground that as Mrs. Foster was a married woman, and her assignment to the defendant was in consideration of future legal services, it was a disposition she was not competent to make.

We are not able to uphold the decree on this ground. If the theory were sound, the bill would not authorize it. But the principle does not appear to be tenable. At the time she made her assignment to the defendant, Mrs. Foster was the absolute owner of the mortgage in her own right, and she had all the power of a feme sole to dispose of it as she pleased. She could grant it as she chose, or even give it away at her election.

Can the relief given be sustained on any other view? It is argued by complainant's counsel that Comp. L. § 4235, is sufficient. It is there provided that "the recording of an assignment of a mortgage shall not, in itself, be deemed notice of such assignment to the mortgagor, his heirs or personal representatives, so as to invalidate any payment made by them, or either of them, to the mortgagee."

It is objected that this provision cannot apply, because the payment here was not by O'Neil, the mortgagor. This is true; but it is true rather in form than in substance. When O'Neil received the title and executed the mortgage it was made, as we have seen, an alternative that he should thereafter convey as Foster should appoint, provided the mortgages should be satisfied; and that condition did not contemplate that he should pay the mortgages out of pocket. The arrangement meditated that the means to get rid of the mortgages, in that event, should proceed from some other source. But the effect as respected him was to be the same as though he paid the money. His mortgages were to be got rid of, but by means of his deeding the land on payment by another, and in lieu of such payment. His conveyance was to stand in the place of payment, so far as he was concerned, and a third party was to make the payment. This was only another way of payment by himself, and we think the transaction, as carried out, was within the spirit and equity of the statute.

The equities of Sagendorph are not in question. The inquiry relates to the rights of complainant and defendant. The complainant took his title from O'Neil, the mortgagor, who had no notice of any sort of the assignment to the defendant, and was not chargeable with any, and complainant had no notice and acted in good faith. He was not aware of the nature of the dealing between Sagendorph and Mrs. Foster. He was the privy of O'Neil, the mortgagor, and not of Mrs. Foster, the mortgagee. Mrs. Foster was a party to the original arrangement, and was in equity subject to its conditions. She knew in what way the property was held by O'Neil, and in what way and on what terms he was

authorized to convey. The defendant was in privity with her, and he was subject to the same equities in reference to that arrangement to which she was subject. He was not in a position to take higher ground than she could. In view of all the facts, the complainant was entitled to assume that the discharge in the hands of Sagendorph ready for record was entirely regular, and a valid satisfaction of the mortgage.

We think the decree should be affirmed with costs.

The other Justices concurred.

DOLLY STANSELL v. ALVAH E. LEAVITT AND GEORGE MACOMBER.

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Statute of frauds—Contract embracing realty and personalty—Agency—Admissions—Proof of existence of bargain.

Where a written contract for the sale of personalty includes real estate also, the contract for personalty is not necessarily vitiated by non-compliance with the statute of frauds in that portion which relates to realty.

It makes no difference whether an agent, in contracting for the sale of personalty, used his own name or that of his principal, so long as the bargain was carried out with the latter's consent and approval.

In an action involving a sale to a woman through her husband, the latter's admissions after his wife's title has vested, and when he is not acting in her business, are properly excluded; and his admissions as to past transactions cannot bind her if they are not part of the res gestæ.

Proof of an admission cannot be excluded merely on the ground that it does not cover a whole series of transactions.

A man agreed, for his wife, to sell property, and she afterwards brought trover for it, the question in issue not being the rescission of the bargain, but its existence. *Held* proper to exclude a question to the plaintiff as to whether she knew the relative value of the property traded when the trade was made. If important, this question requires the value of each piece of property to be ascertained and made a basis of the inquiry.

The exclusion of a question is not prejudicial error, if its substance is afterwards allowed to be fully inquired into.

The motives of a plaintiff, in an action at law, in bringing a suit in chancery, are not pertinent to the action at law, whether the chancery suit has or has not any bearing on the rights of the parties.

Error to Wayne. (Speed, J.) October 10.—October 17.

TROVER. Plaintiff brings error. Affirmed.

Fraser & Gates for appellant.

Henry M. Cheever for appellees.

CAMPBELL, J. This case, which has become somewhat familiar, does not present any features of importance beyond what appeared on former hearings in 44 Mich. 424 and 48 Mich. 225. It will not, therefore, be necessary to make any full statement of facts beyond the points needing attention.

The controversy in the record was whether or not plaintiff had sold certain personalty to Mrs. Sarah Warren, defendant's vendor. Evidence was introduced of a written contract in the name of her husband, Garrett Stansell, covering lands and chattels of plaintiff, and of subsequent acts of plaintiff claimed to have been done to carry this contract out. Objections were made to the introduction of this contract as not valid for want of authority. In our opinion a contract for personalty is not vitiated for want of a compliance with the statute of frauds relating to realty, merely because the two are within one paper. There was sufficient evidence of previous authority and of subsequent ratification, and we can see no reason why it was not proper to allow proof of all the facts and circumstances. It could make no difference in the result whether the agent used his name or her name, so long as the bargain was carried out by her consent and approval.

The court properly excluded testimony of John Warren's statements, made after his wife's title had vested, and when he was not acting in her business. His admissions concern-

ing past transactions could not bind her. We do not agree with counsel that the record shows them to have been part of the res gestæ.

It is no objection to proof of an admission that it does not cover a whole series of transactions. It is good as far as it goes, and may corroborate other proof, or form a part of the entire evidence.

We see no error in excluding the question whether plaintiff knew the relative value of the property traded at the time she made the trade. The question is both vague and immaterial. There was no question properly in issue concerning the rescission of a bad bargain. The issue related to the existence of a bargain. The form of the question assumed a trade to have been made, and asked the witness concerning the relative value of what was covered by that very trade. It could not be of any consequence in this suit. Moreover, if important, the relative value required the value of each to be ascertained, and made a basis of the inquiry. It is also to be observed that while this specific question was ruled out, the substance of it was fully inquired into from plaintiff and others, and had it been proper its exclusion was not the occasion of any difficulty.

We can see no pertinence in the inquiry, what motives led plaintiff to sue in chancery. If the chancery record had any bearing on the rights of the parties, it could be of no consequence why the suit was brought. And if not, it would be of still less consequence.

Without going minutely into the charge, we think all the points in question were fairly and sufficiently presented, without in any way interfering with plaintiff's rights. The objections taken are in our opinion overnice verbal criticism.

We find no error, and the judgment must be affirmed with costs.

The other Justices concurred.

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Robert Jones v. Graham & Morton Transportation Company.

Maritime contracts of employment—Discharge of employee.

State courts have jurisdiction at common law over actions on contracts for the employment by a vessel-owner of a captain or master for his vessel.

A vessel-captain can maintain assumpsit on common and special counts against his employer, the owner of the vessel, for a breach of the contract of employment by discharging him before the expiration of the period for which he was hired.

The words "I am very sorry to have to ask you to resign your position," in a letter from an employer to his employee are properly construed as a peremptory discharge.

Proof of the actual fitness of an employee who has been discharged is proper in an action by him on the contract of employment.

A vessel-captain who has been peremptorily discharged by the owner of the vessel for unfitness, is not bound to offer to resume command before leaving and beginning suit against the owner on the contract of employment between them. He owes defendant no further duty than to use reasonable diligence to obtain other employment.

Employers cannot assume to be final judges in their own behalf of the propriety of dismissing their employees during their term of employment, unless they also take the responsibility which attaches to dismissals without actual cause.

Error to Berrien. (A. J. Smith, J.) Oct. 10.—Oct. 17.

Assumpsit. Defendant brings error. Affirmed.

Potter & Potter for appellant.

Clapp & Fyfe for appellee.

Campbell, J. Plaintiff sued defendants for discharging him before the end of his term of employment as master of a steamboat running from St. Joseph across Lake Michigan to Chicago, averring his readiness to carry out his engagement, which was averred to be for the season of 1850. De-

fendants pleaded the general issue, with notice of cause for discharge, and of termination of the contract by consent.

Evidence was given both for and against the plaintiff's version of the contract, and his good conduct and capacity. The proof of his discharge was a letter from the manager, in the following terms:

"BENTON HARBOR, Mich., May 22d, 1880.

Captain Jones—DEAR SIR: I find you ran into the St. Joseph bridge last night. After all that has happened, or one continuation of mishaps, I am very sorry to have to ask you to resign your position. It pains me as much as it can you, but it will not do any longer.

Yours truly, J. H. GRAHAM."

On receiving this, plaintiff left.

The questions raised on the trial having been left to the jury, they found a verdict for so much of the season's wages as had not been paid to him, less some earnings in other work.

The points raised are all in a small range, and need not be dealt with one by one, as the rules governing the case can be stated quite as conveniently otherwise.

There can be no doubt of the common-law jurisdiction over such contracts, and the declaration shows a good cause of action. Had it been formally defective, (which we do not discover,) it was not demurred to.

We think the letter in question can only be regarded as a civil form of peremptory discharge, and that the ruling to that effect was right. As the testimony of Mr. Graham indicates very clearly that he so regarded it, there is no reason to think it was designed to mean anything different from its plain sense as construed by the court. The court, however, charged as requested, that parties could rescind such contracts if they saw fit; but we find no evidence of rescission by consent.

The testimony concerning plaintiff's fitness was not proof of reputation, as suggested, but proof of actual fitness, and as such was proper.

After such a discharge it cannot, we think, be incumbent

on the party discharged to make subsequent offers to resume command of the vessel, which he has been informed he is not considered fit to command. He was entitled to leave at once, and could have no further duty to defendants beyond using reasonable diligence to obtain other employment. The charges given on this subject covered all the ground which is requisite under the authorities as applicable to such a case.

We think there is neither reason nor law for making employers, in such cases, final judges in their own behalf of the propriety of dismissing their employees during their term of employment. They cannot avoid the responsibility which attaches to dismissals without actual cause.

We discover no other points requiring consideration.

The judgment must be affirmed with costs.

The other Justices concurred.

CHARLES RESKE v. HENRIETTA RESKE.

Homestead right

A city lot, purchased by a single man in contemplation of his marriage, and with the intention of making it a homestead, will be exempt as such from the levy of execution, even before any dwelling is erected on it, if the man and his wife have enclosed, improved and used it with the constant purpose of making it their home as soon as their means would permit.

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Appeal from the Superior Court of Detroit. (Chipman, J.) October 12.—October 17.

INJUNCTION bill to restrain enforcement of execution. Complainant appeals. Reversed.

John Atkinson and *Isaac Marston* for complainant.

C. J. Reilly for defendant. No premises can be a homestead without a dwelling-house thereon, and the actual resi-

dence of the family therein: Smyth on Homesteads § 68; *Cook v. McChristian* 4 Cal. 26; *Cary v. Tice* 6 Cal. 626; there is no such thing as a future contemplated homestead: *Wisner v. Farnham* 2 Mich. 472; *Dyson v. Sheley* 11 Mich. 527; *Coolidge v. Wells* 20 Mich. 79; *Hale v. Heaslip* 16 Ia. 451; *Campbell v. Ayres* 18 Ia. 252; *Christy v. Dyer* 14 Ia. 438; *Elston v. Robinson* 23 Ia. 208; *Benedict v. Burrill* 7 Cal. 246; *Tourville v. Pierson* 39 Ill. 447; *Spaulding v. Crane* 46 Vt. 292; subsequent user as a homestead does not destroy a prior levy or lien: *Avery v. Stephens* 48 Mich. 246; *Upman v. Second Ward Bank* 15 Wis. 449; *Kelly v. Dill* 23 Minn. 435.

Cooley, J. The bill in this case is filed to protect a homestead right, and to enjoin a threatened sale upon execution.

The facts appear to be that in January, 1880, complainant purchased a city lot on the corner of Chene and Mother streets, in Detroit, intending to make of it a homestead. He was then a single man, but was anticipating the arrival very shortly of a young woman from Germany whom he was to marry. The woman came on, and they were married immediately, according to the previous expectation. Neither of them seems to have had means, but they caused the lot to be fenced, and commenced making use of it in connection with the business of selling wood. A barn and a shed were built, a well was dug, complainant kept his horses on the lot, and also hogs and poultry. Mrs. Reske assisted her husband in his business, and received orders for wood, and wood, to some extent, was piled on the lot for sale. At first, complainant lived with his wife at some considerable distance from the lot, but soon took board across the way, and remained there while building. In the spring of 1881 complainant talked with a builder about the cost of a house, and obtained his figures, but not being able to go on then, the matter was left in abeyance. As complainant and his wife earned anything, they put it in improvements on the lot; to give his language: "I built every

day as soon as I got a little money ahead." It was towards the end of 1882 before they were able to put up a house, and they were not living in this until January, 1883.

Meantime defendant, on November 28, 1882, had obtained a judgment against complainant for $546.77 and costs, and by virtue of an execution on this judgment had caused levy to be made upon this lot before complainant had commenced building his house, and was proceeding to a sale when this bill was filed. The value of the lot, as now improved, is shown to be under fifteen hundred dollars. Defendant, by her answer to the bill, contests the fact of the lot having been purchased by complainant for a homestead, and gives evidence of statements made by him that he bought the lot for use in connection with his business. We are entirely satisfied, however, that his intention to make it a homestead existed from the time of purchase, and that he proceeded to do so as rapidly as he could earn the means.

The question now is whether, on the facts recited, the lot had become a homestead in a legal sense before the levy was made upon it. We are of opinion it had. The lot, as has been said, was procured for the purposes of a home, and complainant, aided by the industry and frugality of his wife, was proceeding to make it such as rapidly as their limited means would permit. They inclosed it; they had their domestic animals upon it; they came to live in the immediate vicinity; they made a well; and they put up outbuildings. Everything but the dwelling proper had been erected before the levy was made, and complainant was bargaining with a builder for a house. If anything was lacking to make the lot a homestead, it was because the poverty of complainant had precluded his advancing his improvements as rapidly as he desired. The lot, however, in the minds and hearts of complainant and his wife, had been appropriated as a home from before the day of their marriage: it was all the home they had; it represented all their scanty means, and was the center of their domestic hopes and aspirations. They did not as yet sleep upon it or take

their meals upon it; and probably if they had done this in some of the buildings already constructed, their right to claim a homestead would not have been disputed. But this is not an indispensable condition: the man who buys a home which is all ready for occupancy, cannot have it taken from him as he is attempting to move in his goods, because he has not yet eaten or slept within it. Any one might be deprived of a homestead if so narrow a construction of the privilege should prevail. It is people like this complainant and his wife, with very limited means, that the law encourages with its promise to save their home to them if they will but secure one; and it would be a deceptive promise if it were only made on conditions which any creditor might so easily defeat. We think it was meant to be effective in cases like the present, and that complainant is entitled to the relief he prays.

Decree will be entered for complainant with costs of both courts.

The other Justices concurred.

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The County of Bay v. John Bullock, Supervisor of Deep River Township.

Division of counties.

The constitutional prohibition against reducing any county to less than sixteen townships is meant to prevent its unreasonable reduction in size, and not to preclude the division of surveyed townships, if convenience requires, in organizing new counties. It was not violated where a county was left with fifteen whole and two half townships.

Where the Legislature, in setting off a new county from an old one, divided a township, but passed an act impliedly recognizing its continued existence in one of the counties and attaching the rest to a township in the other county, it was *held* that the township organization was not destroyed.

The division of the State into representative districts is not necessarily altered by an act so setting off a new county from an old one as to carve the new county out of one of the districts in the old one.

The Constitution provides that "Each apportionment and the division into representative districts by any board of supervisors shall remain unaltered until the return of another enumeration." *Held*, that the enumeration referred to is an enumeration of the population by either State or federal authority.

Motion for order to show cause. October 16.—October 18.

Hatch & Cooley for the motion.

Andrew C. Maxwell, amicus curiae, against.

COOLEY, J. The motion in this case involves the validity of the act passed at the last session of the Legislature, setting off the county of Arenac from the county of Bay. The purpose of the motion is to compel the supervisor of Deep River, which the act in question purports to set off from Bay county, to return his tax-roll to the board of supervisors of Bay county, and to attend the meetings of that board. If the act is valid there is no ground for the motion.

Three objections are made to the act, and they will be briefly noticed.

1. It is said that it violates section 2 of Art. ten of the Constitution, which provides that "No organized county shall ever be reduced by the organization of new counties to less than sixteen townships, as surveyed by the United States, unless in pursuance of law a majority of electors residing in each county to be affected thereby shall so decide." Bay county, with Arenac set off, will consist of fifteen townships, as surveyed by the United States, and of two half townships. If the two half townships can be regarded as a township within the intent of the Constitution, this objection must fail. We think they must be so regarded. There was no purpose in the clause of the Constitution which is quoted to preclude the division of surveyed townships if convenience in organizing counties should require it; the

object was to prevent the unreasonable reduction of counties in size, and the Legislature has not lost sight of that object in this instance.

2. It is further said that the organization of the township of Lincoln was destroyed by the Act, part of it being left in Bay county and the other part set off in Arenac with no provision whatever made for the continuance of the township government.

Whatever difficulty there may have been in this regard we think was obviated by the Act of May 10, 1883, which attached the part of the township of Lincoln that was left in Bay county to the township of Pinconning, and which, by implication, at least, recognized the continued existence of Lincoln township in the county of Arenac. The intention of the Legislature, being perfectly plain, must be given effect.

3. The last objection is that the Act violates the clause of the Constitution which provides that "each apportionment, and the division into representative districts by any board of supervisors, shall remain unaltered until the return of another enumeration." Art. 4, § 4. The enumeration here intended is an enumeration of population by either federal or State authority.

Bay county, when the act in question was passed, stood divided into two representative districts. Arenac county is carved out of one of these districts. The act does not undertake to change these districts in any manner, and the Constitution itself would have prevented, had the attempt been made. The representative districts, therefore, remain as before. When a new census shall be taken, the Legislature will be called upon to make a new apportionment of representatives between counties, and some change in the condition of things as they were left by the Act will then be called for. But in the mean time we do not perceive that the Act has introduced any legal difficulty or any confusion.

The motion must be denied.

The other Justices concurred.

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The People v. Charles Quick.

Criminal law—Testimony in one's own defence—Obligation to call witnesses named on information.

The purpose of permitting the respondent in a criminal prosecution to testify on his own behalf is to enable him to present his own defence.

The prosecution in a criminal case are not obliged to call all the witnesses that are named on the information.

Exceptions before judgment from Oakland. (Stickney, J.) Oct. 19.—Oct. 19. Opinion filed February 7, 1884.

Larceny. Respondent was convicted. Reversed.

Thos. L. Patterson, A. R. Tripp and *T. J. Davis* for appellant.

Attorney General *Jacob J. Van Riper* for the People.

Per Curiam. The defendant in this case was a witness on his own behalf. The charge was of larceny of a watch. The defendant did not deny taking the watch, and the question at issue was the felonious intent. The defendant had picked up the owner of the watch from the ground in the public street where, as he testified, he was lying partly on his face. He raised him up and tried to have him stand on his feet. He was then asked by his counsel "Why did you do that?" This was objected to "as permitting the defendant to make his own defence," and ruled out. This was error. The purpose in permitting the defendant to testify on his own behalf is precisely this: to permit him to make his own defence. Further explanations by him were cut off by the like objections.

Other questions are raised not likely to come up on another trial, and we do not consider them. One may be mentioned, however, namely, whether the prosecution is under obligation to produce on the trial every person named as a witness on the information. We think not.

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In the matter of William Roberts.

Detroit Central Station Police Court.

The Detroit charter of 1883 repeals all conflicting acts, and gives the Recorder's Court exclusive jurisdiction of all prosecutions for offences arising under it, or under any ordinance. All cases theretofore triable in the Central Station police court arose under the charter; and all breaches of the peace had to be defined by ordinance. *Held*, that in the absence of any provision for the continuance of the Central Station court, it was abolished.

Habeas corpus and certiorari. October 16.—October 23.

George H. Penniman for petitioner.

Police Justice *John Miner* and *James Caplis*, Prosecuting Attorney for Wayne County, against.

Campbell, J. The prisoner is confined in the Detroit House of Correction under a conviction which purports to be for conduct regarded by the police justice of Detroit as a breach of the peace. As the complaint and facts are not presented to us, we have no means of knowing whether they would come within the law or ordinances under which the conviction was had, and for the purposes of this hearing we may assume that there is no difficulty on that matter, inasmuch as counsel had treated the case as raising no such question. The ground of objection is that Roberts was convicted under the same statute construed in *Sarah Way's Case* 41 Mich. 299, at a session of the police court held at a police station. It is claimed that this statute is no longer in existence.

The Legislature of 1883, instead of inserting amendments in the city charter of Detroit, the multitude of which has caused some confusion, enacted an entirely new charter entitled "An act to provide a charter for the city of Detroit, and to repeal all acts and parts of acts in conflict therewith." This was passed June 7 and made to take effect July 1, 1883. [Act 326 of 1883.]

The principal contest, so far as any arose, was upon the effect of this charter upon certain sections of the original police law, retained when the present municipal system, known as "the metropolitan police system," was created. Those sections are the same that were considered in *Sarah Way's Case*, being sections 10 to 14, inclusive, of chapter 13 of the charter of 1857 as amended in 1861 and subsequently.

The city and county law officers having declined to appear in sustaining the present efficacy of these sections, the police justice came before us and gave us the aid of his views and experience in regard to the practice pursued, and we have, therefore, been satisfied that the merits are sufficiently presented to enable us to come to a conclusion. To understand the bearing of these various provisions, a brief reference will be necessary to the history of the police court and of the legislation bearing on it.

The police court was first created by "An act to establish a police court in the city of Detroit," approved April 2, 1850. Sess. L. 1850, p. 364. Its general purpose was to place in the hands of one magistrate the entire criminal jurisdiction of justices of the peace arising in the city of Detroit. The only special feature was the requirement that he should reside and keep an office in the city of Detroit, and attend to all complaints of a criminal nature which might be brought before him at all reasonable hours. Sec. 4. Beyond this requisite of constant attendance, his duties and powers were in no way different from those of any other justice in criminal matters, but he could do no civil business as justice. Sec. 8. He was paid out of the county funds, and was attended by the ordinary constables and city marshal.

By section 11 of the schedule of the Constitution of 1850 this court was allowed to retain its powers until otherwise provided by law. At this time the court was attended by the same officers as other justice's courts, and the population was not large enough to require special police arrangements.

In 1857, for the first time, the police justice was allowed

to appoint a clerk, to be paid by the county. Sess. L. 1857, p. 465. In that year the city received a new charter, and its limits were enlarged. A local criminal court superseding the jurisdiction of the circuit courts and known as the Recorder's Court, was also created, so as, with the police court, to deal with every class of crimes committed in Detroit.

In 1861 a police system was created as a part of the city government, the mayor and two persons chosen by the council being commissioners, and their powers being similar to those afterwards vested in the metropolitan police board. This statute it becomes necessary to examine with some care, because the validity of the present prosecution depends on whether it is abrogated or partially in force.

Up to its enactment the police justice and police court cannot be said to have had any connection with the city whatever beyond location. The common council appointed the clerk, and in certain cases might designate a justice of the peace to act provisionally, but the court was supported by the county, and had no duty of any kind to perform in which the city was interested.

By the Legislature of 1861 an Act was passed to amend the charter of 1857, and added a chapter to be known as chapter 13, containing sections numbered 1 to 15, but by some inadvertence section 6 was left out and no change made in the other numbers. By the laws of 1864 certain amendments were made, including one purporting to amend section 6, which probably assumed that the numbers were to be changed so as to make 7 stand as 6, and the remaining sections in like manner. At any rate they made the section which they numbered 6 include the old section 7. But this is the only change effected in that direction, and it is quite likely it came from the habit which seems to have prevailed in printing Acts relating to the city by the city officers, of attempting to correct supposed legislative mistakes, whereby a good deal of difficulty has arisen in using city publications. The amendment of 1864 was no doubt

drawn by some city functionary, and this error in numbering and renumbering has led to misapprehension.

The new chapter 13 was devoted entirely to securing to the city authorities the entire control of police affairs, taking them to a large extent away from the ancient common-law officers. Except as enlarging the jurisdiction of the city authorities the chapter had no important significance. That chapter provided for the organization of a board of police commissioners, the mayor being one, who were to have general charge of the appointment and discipline of a police force, with a chief nominated by the board and confirmed by the council. This chief was to have all of the power of the police justice in receiving complaints and issuing warrants for crimes, but they were to be returnable before the police justice at his office. § 4. This provision is significant in bearing upon the remaining sections which, without it, are obscure. It recognizes, as the Police Court Act did, the office of the police justice as the place where he was usually expected and required to be found, and to perform his functions as such.

Section 10, which the city compilers seemed to have regarded as section 9, (but by what authority we do not comprehend), is the key to the subsequent sections now under consideration. It provided that under proper regulations to be framed by the department, the police officers might arrest without warrant persons violating city ordinances relative to breaches of the peace, and take them before the chief of police and make complaint, and that officer was empowered to bail or commit them to appear before the police or Recorder's Court. As no misdemeanors except breaches of the peace can lawfully be made the subject of arrest without process, this section gave no new powers, but confined the power to a limited class of breaches of the peace, which came within some grant of power to the city as of municipal as well as public importance. Following this was section 11, which gave the police justice jurisdiction of such ordinance offenses as the common council should prescribe, and directed the penalties to be paid into the city treasury. The Record-

er's Court was the place where ordinance cases were usually triable. This enabled the council to use the police court also.

Section 5 had required the board to "provide suitable accommodations for the police, to be designated '*the police station.*'" It will be observed that the power of the police court to try ordinance cases generally, remained without special designation of locality and was presumably to be exercised where the court sat. Thus far, except as to the power of the chief of police to bind over and commit offenders, there is nothing which does not immediately concern the city and offenses against its ordinances.

Section 12, which next demands attention was, until in 1868, after the new Police Act had been in force some years, supposed to relate purely to city ordinance cases, and the city authorities had collected and kept the moneys paid for fines under it. In that year we held in two cases (*Wayne County v. City of Detroit* 17 Mich. 390, and the *People v. Controller of Detroit* 18 Mich. 445) that the specifically named offenses were purely State offenses, and the various breaches of the peace mentioned in city ordinances were not treated in that section as ordinance breaches, but only as a limited class of criminal breaches of the peace. See also *Fennell v. Common Council of Bay City* 36 Mich. 186, where the distinction is further explained.

This section requires the police justice to attend at the "*police station-house*" at such times as should be required by the common council, to "summarily examine into the case of every person confined in said station-house" and in cases of vagrancy, disorderly conduct and violations of the city ordinances concerning breaches of the peace, to inflict a specified punishment. It was the fact that the punishment was fixed by this law and not by the ordinances, that in the opinion of this Court required the cases of breaches of the peace to be dealt with as crimes and not violations of ordinance, while no reference was made at all to ordinances concerning vagrancy and disorderly conduct. The same section required him to reserve all other cases for examination

before the *police court*, recognizing it as a distinct institution. Moreover, by the same section it was provided that all of these station-house duties might be imposed on a separate justice to be designated by the common council, and in such case the police justice could only act in case of his disability. Compensation for these station-house services was to be made by the city, while the police court expenses belonged to the county.

It is impossible to read this chapter without seeing that it was designed to subserve what were supposed to be merely city purposes, all others being merely incidental. And until the dispute arose on the ownership of the fines, the city authorities and the police justice acted on the theory that it was a matter under the ordinances entirely.

In 1865 a law was passed "to establish a police government for the city of Detroit." Sess. L. 1865, p. 99. This put the whole police management of the city under a State board, and left the common council no further control over it, except in relation to ordinance matters, and the police were substituted for the municipal officers as to those. This statute did not re-enact or perpetuate any portion of the charter, but expressly abrogated sections 1 to 9 of the Act of 1861 as partly amended in 1864. Nothing was said as to the remaining sections, which therefore continued to form a part of the city charter so far as not affected by repugnant provisions. It is not important now to consider these questions of repugnancy as necessarily affecting the present inquiry. But it may not be useless to examine the changes with reference to the true character of the original Act.

In repealing the nine sections of 1861 that section was repealed which referred to the "police station" as required to be so established and named. The new board was required to divide the city into precincts and assign captains and sergeants to each precinct, and from time to time to establish stations or sub-stations in these precincts. Sec. 15. It was also required that arrested persons should only be detained in places provided for that purpose. And it was expressly required that *no trial or examination of any persons arrested*

should be held in the office of the Superintendent of the Police or of the board. Ib. Sec. 20.

Comparing these provisions with sections 10, 11 and 12 before referred to, it is manifest that as soon as the necessities for accommodation should become extended, so as to include more than one station-house, difficulty would at once arise concerning the attendance of the magistrate. The law of 1861 contemplated one locality as police headquarters, and summary examinations at that into cases of detention. The new law contemplates a separation of stations, and contains no directions for visiting them all, nor means for supplying either enough justices to visit them all, or relief to the police court itself during the absences at such stations, which, if all visited, would occupy much time, as the city is extensive, and it is designed the stations shall also be scattered. The practical inconsistencies between the two statutes are very considerable, but have been felt in their effects while not much noticed in their bearings. It appears that the police justice has been in the habit of holding morning sessions at the old central station. But it has already been pointed out that the law of 1861 did not require this duty to be exercised by him except in the failure of any other appointment, and that such appointment was among the powers of the common council, as well as was the power to require such visitations at all. Such powers were therefore appropriate to a city charter. And inasmuch as the repeal of the earlier sections of the chapter 13 of 1861 has taken out of it all except that which depended on the action of the common council, there is still more reason for regarding the subject as municipal.

It is under this state of things that we are called on to assume that the charter of 1883 is to be regarded as not affecting these residuary sections of 1861. This charter is entitled "An act to provide a charter for the city of Detroit, and to repeal all acts and parts of acts in conflict therewith." It does not purport to be partial or supplementary, but to be the only charter. There can be no doubt of this purpose, and there can be no doubt that, without very manifest obli-

gation, it cannot be admissible to select out of older charters matters omitted in this as still in force. If this could be done on one subject no one can see where the process would stop. There are many omitted provisions which no one would consider repugnant. We must assume that things omitted are designedly omitted. If we should go into conjectures concerning what the Legislature would probably have preserved expressly had their attention been called to it, we should be merely guessing, and undertaking judicially to mend legislation.

We have already referred to the manifest purpose of the sections in question to refer to city matters and subject the business of the station court to the discretion of the council, both as to times and occasions, and as to the magistrate to hold it. But the new charter has not left all of these sections untouched by express enactment. By chapter 12, section 22, the Recorder's Court is given exclusive jurisdiction of all prosecutions for offenses arising under that charter, or any ordinance or regulation of the common council. Every one of the station-house cases must arise under the charter and all breaches of the peace be defined by the ordinances. The old charter is certainly defunct for all purposes of passing ordinances, and if prosecutions are had under the old chapter 13, it would be difficult to say that it has any separate existence from the rest of the charter of which it formed a part. But the difficulty goes further. Section 11, which gave the police justice jurisdiction over ordinance cases, is repugnant to the new provisions giving exclusive jurisdiction to the Recorder. There are further incongruities between the provisions of 1861 and the present charter and the present police system, which would render it very difficult to say what is repugnant and what is not.

The only safe conclusion is the natural one—that the charter of 1883 has abrogated all of the charter of 1857 and its amendments which are not re-enacted in this or preserved in some other legislation. The purposes of the sections in controversy, although having some further indirect bear-

ings, were not foreign to the old charter, and they cannot now be distinguished.

We are not called on to devise remedies which belong to the Legislature. There are probably some inconveniences from lack of sufficient magisterial officers. There may be some difference of opinion concerning the policy of holding the station court. That is not for us to determine. It is plain, however, that a system which throws the entire labor and responsibility of criminal examinations and the trial of a large class of crimes upon one man, is unfit to provide for the necessities of a large city. The whole system was designed and shaped when one man could do it all adequately. But it is impossible now to live under such a state of things without deficiencies and troubles which are chiefly due to the law itself. From the facts appearing in *Way's Case* and others which we have had to deal with, we do not believe that the necessity of having arrests and complaints disposed of publicly, at a court likely to be habitually attended by others than the police force and the persons under arrest, will lead to any evil consequences. No doubt the deficiencies of the present laws will lead to some amendment, if not to radical changes. The subject is one requiring knowledge and good judgment, which it may be hoped will devise remedies.

We think the conviction was unlawful and the prisoner must be discharged.

The other Justices concurred.

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96 446

HOMER B. DUNNING v. CHARLES H. CALKINS.

Error—Tax warrant for drain taxes.

A judgment cannot be reversed, if right, whether the reasons on which it is placed are satisfactory or not; and counsel can rely on all the objections raised below.

A warrant for the collection of drain taxes is bad if the taxes are not so spread upon the assessment roll as to identify the drain for which each is levied, in order that each fund may be kept separate, and specific drain orders be paid from the proper fund.

Error to Shiawassee. (Newton, J.) Oct. 3.—Oct. 24

TROVER. Defendant brings error. Affirmed.

Hugh McCurdy for appellant. A tax collector need not look behind his process for authority to issue the same: *Foster v. Wiley* 27 Mich. 244; *Savacool v. Boughton* 5 Wend. 170; *Parker v. Walrod* 16 Wend. 514; *Fulton v. Heaton* 1 Barb. 552; *Cornell v. Barnes* 7 Hill 35.

A. R. McBride for appellee.

CAMPBELL, J. Plaintiff sued defendant for the wrongful seizure and conversion of personal property. Defendant undertook to justify under a tax warrant upon which plaintiff was charged with a drain assessment. When this warrant was presented it was objected to on several plainly expressed grounds, and the court below ruled it out, on the ground that the statute gave no authority to collect the tax from the personal property. Defendant brought error.

The plaintiff's counsel in this Court relied on all the objections raised below, as he had a right to do, as the judgment cannot be reversed if the decision was right, whether based on satisfactory reasons or not.

It appears from the roll that instead of placing the taxes on the roll in such a way as to identify the drain for which they were laid, by name or otherwise, so as to have each fund kept separate in the township treasurer's hands, and so as also to allow payment by drainage orders, as contemplated by sections 15, 21 and 22, the roll required the money for all drains in the township to be paid over in a gross sum to the town treasurer, and, as we must assume from the record, contained none of the substantial elements of a proper charging under the statutes. This being so, it was unimportant whether a regular tax could or could not be col-

lected against personalty, and we need not consider that question, which comes later in order than the objection already discussed. The warrant being bad on its face, was no defense.

The judgment must be affirmed with costs.

The other Justices concurred.

LOUIS BLITZ, SURVIVOR, ETC. v. THE UNION STEAMBOAT COMPANY.

Contract for transportation—Overcharges.

A contract must be construed as reasonably as its terms will allow; and where it permits an option, it is not to be supposed that the option can be arbitrarily exercised to the disadvantage of the other party.

Where a contract for the transportation of goods gives the carrier an option between modes of transportation, the option must be exercised with a view to the interest of the opposite party; and it is a breach of the contract to exercise it to his disadvantage unless it is done in good faith and under circumstances which seem to require it.

Assumpsit as for money overcharged will not lie where the contract on which it was paid was fully performed according to its terms, but was practically broken by the arbitrary exercise of an option permitted therein, to the disadvantage of the plaintiff; the remedy should be in an action for damages.

In an action for damages on a contract for the carriage of goods by steamer, the usual course of business in such transportation must be considered.

Error to Wayne. (Speed, J.) October 5.—October 24.

ASSUMPSIT. Plaintiff brings error. Affirmed.

Fraser & Gates for appellant.

Moore, Canfield & Warner for appellee.

COOLEY, J. Assumpsit to recover a sum of money equal

to eight cents per hundred pounds, paid under protest, as freight, for the carriage of a large amount of soda-ash from New York to Detroit.

The facts out of which the action arose are the following: The defendant, in August, 1879, was engaged in the business of transporting property between New York and the West, and owned and employed several steamers on Lake Erie and the other lakes. Some of these boats only ran between Buffalo and Detroit; others formed a Lake Superior line. On August 15, 1879, the firm of Israel Blitz & Son, of whom plaintiff is survivor, contracted with defendant for the transportation of a quantity of soda-ash from New York to Detroit, and received from defendant the following bill of lading:

"THE UNION STEAMBOAT COMPANY.

(*Canal Line.*)

VIA HUDSON RIVER & ERIE CANAL TO BUFFALO, AND THENCE VIA THE STEAMERS OF THE COMPANY TO LAKE PORTS.

Office, No. 120 Front Street.

Received, New York, *August* 15, 1879, from *Wing & Evans*, the following described property in apparent good order (contents, and condition of contents, unknown), on boat *Mary*, viz.:

Ninety-five (95) Cks. SODA-ASH.

Marks and address for delivery:

A. A. 60 Cks. *A. B. 35 Cks. for*

ISRAEL BLITZ & SON,

Detroit,

Mich.

Which the UNION STEAMBOAT COMPANY (Canal line) agree to forward by its own or other means of transportation, subject to all the conditions herein contained, to *Detroit*, there to be delivered upon payment of freight at the following rates, viz.: If fourth-class, at 20 cents per 100 lbs. According to the current west-bound classification, and by the trunk lines and rates, subject to classification of railroads west of lake ports."

Then followed certain conditions, among which was the following:

"Changes may be made in, and parts of the property

may be carried or forwarded by different means or routes of transportation. All property which, from its bulk or kind, is usually carried on open cars, may be so carried."

The bill of lading was properly signed.

Freights from New York to Detroit by sail on the lake, at this time, were twelve cents per hundred pounds for fourth-class goods. The consignees were anxious to receive the soda-ash as speedily as possible, and chose transportation by steamers, at the higher rate, in the expectation of a more expeditious delivery.

The goods did not reach Buffalo until August 29, which was several days later than was expected. Then, instead of being forwarded by steamer, they were put aboard a sailing vessel, which landed them in Detroit, September 3d. The consignees declined to pay freight beyond what it would have cost them to procure transportation by sail when the contract was made, namely, twelve cents per hundred pounds; but the agent of defendant refused to receive less than the rate specified in the bill of lading, and retained the goods until payment was made. This was done under protest, September 5th, and this suit afterwards instituted. In the circuit court defendant had judgment.

It is contended on behalf of defendant that under the bill of lading the shipment by sail was rightful; the option of choosing other means of transportation than by steam having been expressly given. It is true that an option was given, but we do not think it was one which might be exercised arbitrarily, and without regard to the circumstances. Every contract must have such reasonable construction as its terms will admit of; and nothing could well be farther from reasonable than a construction which would give to the carrier any such arbitrary option, if the terms of the contract will allow of any other, as we think they will.

The shippers bargained for the more desirable transportation, and agreed to pay for it a much higher rate than would have been charged for the other. To suppose, notwithstanding this, that they understood and intended to agree that the carrier might, at discretion, send by the less desir-

able mode, and still charge the higher rate, is as unreasonable as to suppose that a debtor would deliberately contract that his creditor might, at option, within certain limits, determine at pleasure how large or how small the debt should be. The one, in fact, would be substantially the same thing as the other; and the validity of an agreement to that effect would be more than questionable.

But there would be nothing either unreasonable or unbusiness-like in a contract, which, while providing for the more desirable carriage, should leave the carrier at liberty to adopt some other mode if unforeseen contingencies should seem to justify it, having regard to the interests of both parties; and it may readily be inferred that such contingencies will often arise in the transportation of goods from New York to Detroit, whatever mode of carriage is primarily selected. There would be nothing unjust, therefore, in upholding such a stipulation whenever it was shown to have been acted upon fairly and in good faith.

Such, we think, was the intent of the contract in this case. The carrier undertook to transport the goods by steam on the lake; but, to provide for contingencies, stipulated for the privilege of sending by other means of transportation when it should be reasonable to do so. But when he exercised that privilege he ought to show sufficient of the circumstances to make it apparent that it was not unreasonable he should do so, and that the contingency arose which he acted upon in good faith in deciding upon the change. There was scarcely any attempt at such a showing in this case; and therefore we agree with the plaintiff that apparently there has been a breach of the contract.

But the plaintiff does not count upon a breach of the contract: what he claims is that the defendant, having performed the contract in a mode not allowable, was en titled to demand only the compensation at which performance in that mode could have been bargained for when the contract was entered into, and that whatever more has been exacted has been taken without right. But it is clear that no action can be maintained on this theory. The

rights of the parties must be determined by the contract they made, and not by one they might have made but decided not to. The contract actually entered into stipulated that for the carriage of the goods the price exacted by defendant should be paid; and as they have been carried and received, the payment of the stipulated price, cannot be said, either in whole or in part, to have been an exaction which was without consideration. The plaintiff may, nevertheless, be entitled to damages if performance was not as agreed; and while these damages might equal, or even exceed, the difference between the cost of transportation by steam and by sail, so also they might fall greatly below that difference.

But the plaintiff has not brought suit for damages, and therefore is not entitled to any recovery in this case. As there has been a full argument, however, we deem it not improper to remark that, so far as the facts are disclosed by this record, no damages appear. Damage might have come from loss of the goods, or from injury in carriage, or from delay: if none of these consequences followed, it was of no importance to the plaintiff that the goods were not sent by steamer as he intended. There is no allegation of loss or injury to the goods, and there is no showing that they were not delivered in Detroit by sail as early as delivery by steam would have been practicable. In sending by steam the usual course of business must be considered: the boats may have their regular times of leaving port, or the course may be to leave when a reasonable cargo can be had: it is not likely it was the course of business that they should go at irregular times without reasonable loading. But, whatever was the course of business, the plaintiff has not shown that if defendant had taken the first opportunity to send by steam, the goods would have been likely to reach Detroit earlier than they were actually received. He has, therefore, failed to show that he was damnified.

The judgment must be affirmed with costs.

The other Justices concurred.

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79 525
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113 178
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143 225

DANIEL E. SOPER v. PETER PECK.

Promissory note—Fraud on maker—General issue.

Where the execution of a promissory note is denied on oath, the general issue in an action thereon will admit evidence tending to show that defendant made no such contract as was counted upon, and that he was fraudulently got to sign the note when he thought he was signing something else.

One who has been tricked into signing a promissory note will not be liable upon it, unless his own negligence was so gross as to preclude his defending against a bona fide purchaser of the paper.

Error to Newaygo. (Fuller, J.) Oct. 9.—Oct. 24.

ASSUMPSIT. Defendant brings error. Affirmed.

W. D. Leonardson and *A. G. Day* for appellant. In an action on a note the fact that it was void in its inception may be shown under the general issue (1 Ch. Pl. 476; *Young v. Rummell* 2 Hill 478; *Boyd v. Weeks* 5 Hill 393; *Gleason v. Clark* 9 Cow. 57; *Fleming v. Niagara* 12 Wend. 246; *Niles v. Totman* 3 Barb. 594; *Edson v. Weston* 7 Cow. 278; *Payne v. Cutler* 13 Wend. 605; *Hubbell v. Ames* 15 Wend. 372; *Runyan v. Nichols* 11 Johns. 547; *Sill v. Rood* 15 Johns. 231; *Gibbs v. Linabury* 22 Mich. 479; *Anderson v. Walter* 34 Mich. 113) without notice, unless the matter of defence arose after the execution of the note: *Gleason v. Clark* 9 Cow. 57.

George Luton for appellee, cited, as to the rights of one who has taken a note in good faith and for value without any notice as the facts and circumstances under which the note was given: *Goodman v. Simonds* 20 How. 343; *Chapman v. Rose* 56 N. Y. 137; *Shreeves v. Allen* 79 Ill. 553; *Moorehead v. Gilmore* 77 Penn. St. 118; *Comstock v. Hannah* 76 Ill. 530; *Murray v. Lardner* 2 Wall. 110; *Goodman v. Harvey* 4 Ad. & El. 870.

COOLEY, J. The plaintiff counts upon a promissory note

purporting to be made by defendant, April 2, 1881, for the sum of one hundred and fifteen dollars, payable to H. S. Hayes or bearer three months from date. The defendant pleaded the general issue and filed an affidavit denying the execution of the note.

On the trial, the plaintiff gave evidence tending to prove that the signature to the note was in defendant's handwriting. He also showed that he bought the note of the payee, who was a stranger to him, before it fell due, and that the purchase was in good faith and for value.

The defendant rebutted the evidence as to handwriting, and he also, against the objection of the plaintiff, was allowed to testify as follows: That on the 24th day of March, 1881, a stranger came to his house and said he wanted to make him an agent to sell wagon-tongue supporters; that defendant did not want to bother with it at all; that the man told him it would be no bother—that they would sell themselves; that he would send him twenty-four and defendant could have one for his own use; that as fast as he sold them he should send the company one-half of the money; that defendant then told him that under such consideration he didn't know but what he would do it; that the goods should be sent to Alleyton; that the man gave him the paper making him their agent, and that he signed an order for the goods; that was the conversation with that man; that on the second day of April another man came to his house and says, "Peck, I have come to finish up this agency business for them wagon-tongue supporters"; this was about noon; he said he wished he had nothing to do with it at all, for he hadn't got time; he said "It won't bother you at all," and said the goods were already at Alleyton; the man would not go into the house; he said he was in a hurry to go to Newaygo to take the train, for he had to go to Detroit that night; he took a little book, the same as a note-book, with purple paper—very light, thin paper—and says, "This is nothing more than just a statement that I want to send to the company to let them know that you are their lawful agent;" that it was a dark day and he could not see to read without glasses; that

he was a poor scholar and cannot read writing without great difficulty at any time, and he didn't have his glasses, and so he signed it; and then the man went away; that he only signed one paper on the 24th day of March, and that was the order for the goods; that he only signed one paper on the 2nd day of April, 1881, and he supposed that was the paper showing that he was the authorized agent for the sale of the supporters, and that the paper was simply to show the company that defendant had consented to act as their agent; that nothing was said about a note, or his signing any note; that he went to Alleyton on Tuesday following after the goods and found none there, and he went once or twice afterward and found none; that nothing was said on the 2nd day of April about giving a note; that he did not intend to sign or execute a note on that day.

On cross-examination his testimony tended to show that he ordered twenty-four wagon-tongue supporters; that the price of them was five dollars apiece; that on the 24th day of March the first man asked him to send an order to the company for 24 wagon-tongue supporters, and that he did it; that a different man came on the 2nd of April, whom he did not know; that day the man gave him his signature to the order for the supporters; that he signed the paper in an ordinary sized note-book; it was opened out like a note-book; that he sat down by the gate-post and signed it, and the man said nothing to him while he was signing it, and that he took the book in his own hands when he signed it; that he could have went to the house and got his spectacles and examined the paper if he wanted to; that he supposed it was just as the man represented, and not necessary; that there was more writing and printing on than a note; the man handed him the book like a note-book, and a pen, and then he went and wrote his name to the paper; that the man said he would come around in three months and take back all the supporters not sold.

The objection made to this evidence was that it was not warranted by the issue made; but this was a mistake. The general issue had been interposed, and whatever tended to

show that no such contract as was counted upon was made by the defendant was admissible under it. The exception of a denial of the signature is made by the statute [Comp. L. §§ 5310, 5363] but that was met by the defendant's affidavit. It cannot be disputed that defendant's evidence tended to show that he had had a fraud practiced upon him, and that very probably he had been made to put his name to a note when he supposed he was signing something different. If the jury believed this, he was entitled to their verdict, unless his negligence was so gross as to preclude his making the defense as against a bona fide purchaser of the paper. *Gibbs v. Linabury* 22 Mich. 479; *Anderson v. Walter* 34 Mich. 113. The judge submitted the question of negligence to the jury, as we think, with entire fairness.

The jury returned a verdict for defendant, and though several errors are assigned, we think we have spoken of all which require notice.

The judgment must be affirmed with costs.

The other Justices concurred.

AUGUST GUTSCH v. AUGUSTUS PITTSLEY AND FREDERICK STEVENSON.

Promissory note—Fraud on maker—Admission of evidence.

Where the defense to a promissory note is that it was obtained by fraud, and that the consideration was misrepresented, it is within the discretion of the trial judge to allow considerable latitude in receiving testimony.

Error to Huron. (Wixson, J.) October 9.—October 24.

ASSUMPSIT. Plaintiff brings error. Affirmed.

Elbridge T. Bacon for appellant.

Green & Murphy for appellees.

SHERWOOD, J. Plaintiff brings assumpsit on a note made by defendants, reading as follows:

"$155.63 SAND BEACH, May 9, 1882.

Sixty days from date we promise to pay to A. Gutsch, or order, the sum of one hundred and fifty-five doll. and sixty-three cents, at seven pr ct. per annum, payable at Huron County Bank, at Sand Beach.

A. PITTSLEY.

his
FREDERICK X STEVENSON.
mark.

In presence of
GEO. C. GREEN."

Defendants' plea, general issue; with notice that plaintiff obtained the note from defendants by fraudulent representations, and that they never received any consideration therefor.

The evidence shows the note was given as part of the purchase price of a quantity of liquors sold to defendant Pittsley by plaintiff. The defendants claim the liquors were represented to Pittsley to be worth $255, and he was to have them at cost price, and the same were to be measured by the parties; that Pittsley and plaintiff moved the liquors to Pittsley's saloon, and plaintiff then refused to measure the liquors or furnish the original bills thereof showing the amount; that the defendant Pittsley, after this refusal, caused the liquors to be measured, and that the amount fell short enough in value to amount to the sum for which the note was given. The jury found for the defendant and the plaintiff brings error.

Eighteen assignments of error are based upon the rulings of the circuit judge upon the admission and exclusion of testimony. Fraud was charged in obtaining the note, and misrepresentations as to the quantity of liquor delivered under the sale. A large latitude in receiving testimony in such a case is within the discretion of the trial judge; and a careful perusal of the testimony fails to disclose any abuse of that discretion, and we find no error under any of these assignments.

Several exceptions were taken to the charge as given, and

to the refusals to charge. None of these are well taken. We think plaintiff's case was fairly tried, and went to the jury under a charge, so far as the record gives the same, quite as favorable to the plaintiff as the case would warrant. There was no consideration for the note. Indeed, we think the testimony strongly tends to show that the shortage in the liquor amounted to more than the note sued upon calls for.

The judgment must be affirmed with costs.

The other Justices concurred.

NATHAN E. BENNER v. ERNEST FEIGE.

51 568
119 391

Agent's ex post facto admissions to strangers—Res gestæ.

An agent's talk with strangers concerning past transactions of his employer is not res gestæ either in point of time or in relation to parties, and, being of no account as proof, cannot affect his principal's rights under a contract on which the transactions were based.

Error to Saginaw. (Gage, J.) October 9.—October 24.

ASSUMPSIT. Defendant brings error. Reversed.

Sweet & Flanders and *Wm. A. Clark* for appellant.

Tarsney & Weadock for appellee.

CAMPBELL, J. Plaintiff recovered judgment below for services in running logs. He claimed to have done so under a contract made for defendant by an agent named McManus, for 75 cents a thousand feet, and one important question related to the amount of logs. Appended to the paper on which the agreement relied on was written, was a memorandum not signed, but containing several names, with figures opposite, footing up 298,706. It was claimed by plaintiff that these names represented persons who had fur-

nished logs, and that the figures signified their several amounts; and that this paper was intended to show what logs were to be moved and delivered. This was controverted by defendant.

The amount of logs actually run seems to have been got at by somewhat extraordinary methods of estimation. But reliance was partly had on alleged admissions of McManus, some of which were said to have been made to various third persons at times subsequent to the dealings out of which the contract is said to have arisen, and after it was settled upon.

No authority has been presented and we think there is none which would justify the reception of such ex post facto admissions, if they were made. They were in no sense acts forming part of the res gestæ, either in point of time, or in relation to the parties to whom they are said to have been made. An agent's talk with strangers concerning past transactions of his employer is of no account as proof, and cannot affect the rights of the principal.

The judgment was erroneous on this ground and must be reversed with costs and new trial granted.

The other Justices concurred.

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WILLIAM RIBBLE v. FRANK LAWRENCE.

Trover—Right to possession.

Plaintiff in trover must affirmatively show his ownership and right of immediate possession; and the defendant, especially if his claim is made peaceably and in good faith, is entitled to show, as a complete defense, that the title and right of possession was vested in a third person before suit was brought.

Error to Saginaw. (Gage, J.) October 9.—October 24.

TROVER. Defendant brings error. Reversed.

Tarsney & Weadock for appellant. Plaintiff in trover must rely on the strength of his own title and not on the weakness of defendant's: *Davidson v. Waldron* 31 Ill. 120; *Mulligan v. Bailey* 28 Ga. 507; and if he has no title he must be non-suited: *Raines v. Perryman* 29 Ga. 529; and plaintiff must have a right of immediate possession (*Ayres v. French* 41 Conn. 142; *Winship v. Neale* 10 Gray 382; *Clark v. Draper* 19 N. H. 419) existing when the action is brought: *Jones v. Sinclair* 2 N. H. 319; *Burton v. Tannehill* 6 Blackf. 470; *Fairbank v. Phelps* 22 Pick. 535; it is a good defense to show title in a third person: *Glenn v. Garrison* 17 N. J. L. 1; *Smoot v. Cook* 3 W. Va. 172; *Rose v. Coble* Phil. (N. C. L.) 517; *Stephenson v. Little* 10 Mich. 433; *Sexton v. McDowd* 38 Mich. 152; *Burdick v. Michael* 32 Mich. 246; *Stearns v. Vincent* 50 Mich. 209; one who confounds his own with another's property so that they cannot be distinguished, must show which is his or lose it: *Seavy v. Dearborn* 19 N. H. 351; *Smith v. Morrill* 56 Me. 566.

Eugene Wilbur for appellee. One always shows a right of property when he shows that he has gained an apparently rightful possession, and such possession is evidence of property, and whoever, by force or fraud, intercepts it, without being able to show any right in himself, is liable in trover; the possession gained is not only evidence of right as against such a person, but is conclusive evidence, unless he is able in some way to so connect himself with the right of the real owner, as to be able to defend in such owner's interest: Cooley on Torts 445; *Thorne v. Tilbury* 3 H. & N. 534; defendant in an action of trover cannot show title in a third person, unless he connects himself with that title: *Daniels v. Ball* 11 Wend. 57 note; *Duncan v. Spear* 11 Wend. 54; *Knapp v. Winchester* 11 Vt. 354; *Bartlett v. Hoyt* 29 N. H.

Graves, C. J. The plaintiff brought trover before a justice of the peace, and the cause being appealed he obtained a verdict and judgment in the circuit court, which

the defendant now asks to have reversed on writ of error and bill of exceptions. The charge made against the defendant was for the conversion of forty-five cords of fire-wood, cut on the south-east quarter of section three in the township of Buena Vista in Saginaw county.

The plaintiff's case was in substance that the wood in controversy was cut in January, 1882, by Richard Farmer and James Duffy; that about December, 1882, the plaintiff bought it of them in good faith, together with a few cords which the same persons had also cut on the north-east quarter of the adjoining section 10; that he had some other wood which Farmer and Duffy had previously cut for him from standing timber on said section 3; that on the 23d and 24th of December, 1882, he caused the wood to be drawn and piled in three piles on said north-east quarter of section 10; that the parcel cut on section 10 was first hauled and piled on the south end of the large pile, and the other was piled along from that beginning so as to form a continuous pile; that there was in all about 54 cords; that the whole quantity was of like quality and value, and that the plaintiff knew how much came from each section; that the defendant claimed that the entire bulk came from land which he owned on section 10, and insisted that it was his property; that plaintiff explained to defendant that he was able to state what quantity was taken from section 10, and would point it out, and that defendant might take away that portion; that the defendant insisted that if any part came from his land he was entitled to take the whole and did so; that this occurred in January, 1883, and prior to the 27th.

The defendant gave evidence tending to show that in October, 1882, and prior to the alleged purchase of the plaintiff, he bought the north-east quarter of section 10; that the land was unoccupied and wild; that he afterwards learned that before his purchase Farmer and Duffy had been on, cutting wood, without authority; and on the 27th of January, 1883, he obtained a bill of sale of the wood they had so cut; that the quantity was much larger than the whole quantity contained in the piles before mentioned;

that he had no other information, except the statement of the plaintiff, that any of the wood came from section 3, and that the plaintiff assured him that he did not know and could not ascertain how much came from the respective premises; that he told plaintiff that if he, the plaintiff, knew how much came from section 3, to point it out or give the quantity, and he would not take it; that although the plaintiff well knew how much had been cut from that land, he refused to disclose it, and he, the defendant, thereupon seized the whole quantity, less about seven cords.

The defendant then offered to show further that the title to the property in dispute and the right of possession had from a time in February, 1882, been vested in a third person; but he disclaimed the purpose of attempting to connect himself with such right and title, and observed, furthermore, that the sole object was to show, by means of the fact proposed, that the plaintiff, at the time of the commencement of the suit, was neither owner nor entitled to possession. The offer was refused by the circuit judge, on the ground that the defendant was not to be connected with the right and title proposed to be shown. We are not able to concur in this ruling.

The case is subject to be considered as it would be were the fact admitted which was offered to be proved. By bringing trover the plaintiff affirmed as the ground-work of his case that he had a property in the wood, and was entitled to the immediate possession. These points were involved in the issue, and he held the affirmative and the defendant the negative; and whilst the plaintiff was required to show his ownership and right of possession, the defendant was entitled to dispute both or either, and proof that a third person was the holder of the title and right of possession, would dispute them.

The qualification which the doctrine of some cases affirms, and on which the judge acted, whether consistent or inconsistent with the principles of the action of trover, was not applicable. The defendant was not a mere wanton trespasser interfering without any pretense of right with the

peaceable possession of the plaintiff. His conduct was open and peaceable, and his claim was asserted in good faith, and under color of right.

The true rule called for by the circumstances is stated and explained in *Stearns v. Vincent* 50 Mich. 209; see also *Stevenson v. Fitzgerald* 47 Mich. 166; *Parkhurst v. Jacobs* 17 Mich. 302.

According to the circumstances contained in the record the defendant would now be suable by the holder of the outstanding title, and recovery by the plaintiff in this action would be no protection, and the case presents no consideration to justify his being exposed to such a dilemma.

There is a further point in the record, but as no probability exists of its coming up again, it is needless to discuss it.

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

The other Justices concurred.

JOSEPH KERNS ET AL. v. MATTHEW FLYNN.

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Mechanic's lien—Parties in interest.

The objection that a petition for the enforcement of a mechanic's lien does not implead necessary parties, may be taken in the answer thereto, or at the hearing; and it is not lost by putting in an answer after demurring.

In proceedings by sub-contractors to enforce a mechanic's lien, the original contractors must be brought in as parties, since the contract relation and state of accounts between the defendant and the original contractors, and between the original and sub-contractors, must be adjudicated before the lien can be established, and the rights and liabilities of the parties be ascertained.

Appeal from Saginaw. (Gage, J.) Oct. 10.—Oct. 24.

MECHANIC'S LIEN. Petitioners appeal. Affirmed.

H. & C. E. Miller for petitioners appellant. The action on a mechanic's lien is purely statutory, and in enforcing the lien the statute must be strictly followed: *Willard v. Magoon* 30 Mich. 276; *Wagar v. Briscoe* 38 Mich. 592; *Clark v. Raymond* 26 Mich. 415; the action is not personal, for a personal judgment against any one, but is an action quasi in rem: Act 258 of 1879 § 13; Houck on Liens, sec. 47; the demurrer in this case goes to the whole action, and is overruled by the general answer (1 Barb. Ch. 107; *Ingraham v. Baldwin* 12 Barb. 9; *Clark v. Phelps* 6 Johns. Ch. 214; *Struver v. Ocean Ins. Co.* 16 How. Pr. 422) unless the old rule is changed by chancery rule 42.

W. S. Tennant for appellee.

GRAVES, C. J. This petition was filed to enforce a mechanic's lien, and the circuit court in chancery dismissed it for want of necessary parties, and the petitioners, refusing to amend, appealed to this Court.

They allege in their petition an agreement made on the 2d of October, 1882, with the defendant by Charles Witham and Frank Demire, by which the latter agreed to build him a dwelling-house and furnish the materials for $520, and they, the petitioners, count upon a claim arising out of a sub-contract with Witham and Demire.

The objection in the court below was that the original contractors, Witham and Demire, were necessary parties.

The reply given to the petition was by demurrer and answer. It is now argued that the answer overruled the demurrer. The latter, we are told, being for want of parties, applied to the whole bill and hence could not possibly co-exist with an answer.

It is needless to inquire in regard to the accuracy of defendant's practice in following his demurrer by the answer. The matter is devoid of practical importance here, and we are not called on to discuss the effect of our rules. The exception in question may be taken in the answer or at the hearing. The requirement of necessary parties cannot be

annulled by putting in an answer which trips up a demurrer. Upon the main question there is no doubt.

The case of sub-contractors involves inquiry into the contract relations and state of accounts existing between the defendant and the original contractors, and into the contract relations and state of accounts existing between said original contractors and the sub-contractors. Both kinds of inquiry are indispensable. It is a fundamental implication of the remedy that an indebtedness from the defendant and in favor of the original contractors must be found and adjudicated. Without it there can be no basis for relief to the sub-contractors. The right of lien must be ascertained, and the rights and liabilities of the different parties, so far as they pertain to the subject, must be inquired into and liquidated. The fact of a lien and the fact of liability or indebtedness may actually exist, but they must be adjudged to exist as a preliminary to their enforcement. They can never be taken for granted. So long as a claim is unadjudged it cannot be enforced, and there is no law for making such investigations and decisions in the absence of the parties. They must have an opportunity to be heard, and if they do not have it they will not be bound. The doctrine is elementary and citations are unnecessary.

The decree is right and must be affirmed with costs.

The other Justices concurred.

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Hores Griffin v. Nichols, Shepard & Co.

Homestead—Abandonment by wife.

The homestead right of an execution defendant is not forfeited by his omission to select his homestead, if, being within reach, he is not actually notified of the levy or of the proceedings thereunder, and therefore does not know that any occasion has arisen to make a selection.

Estoppel does not generally arise from one's silence or inaction, unless he knows that there is occasion to speak or act.

The opinion of a trial court in chancery upon questions of fact ought not to be hastily rejected on review, if the showing itself rested upon the testimony of only one party and was not very decisive.

A man's homestead exemption is not necessarily destroyed by the act of his wife in abandoning him, or in beginning proceedings against him for a divorce, if he continues to treat the place as his home, working upon it from time to time, and sometimes eating or sleeping there, even though he parts with his furniture, and admits other occupants.

Appeal from Eaton. (Hooker, J.) Oct. 10–11.—Oct. 24.

BILL to remove cloud from title. Defendant appeals Affirmed.

Wood & Maynard for complainant. The owner of a homestead can dispose of it even as against creditors: *Rhead v. Hounson* 46 Mich. 244; and if, while living with his wife upon a farm which includes it, he sells the whole without the concurrence of his wife, the deed would be void so far as the homestead itself is concerned, and with no more notice to the purchaser than the fact that it was the home and dwelling place of the family: *Dye v. Mann* 10 Mich. 291; *Eldridge v. Pierce* 90 Ill. 474; *Watertown Ins. Co. v. Sewing Machine Co.* 41 Mich. 131; *Shoemaker v. Collins* 49 Mich. 595; and the husband could take advantage of its being void, or his wife, after his death, or his heirs at law; and the fact that his wife had left him and was living apart from him would not give any validity to such conveyance: *Sherrid v. Southwick* 43 Mich. 515; *Barker v. Dayton* 28 Wis. 383; the owner would retain his right to his homestead until he had selected another: *High, appellant*, 2 Doug. (Mich.) 522; and if he left it temporarily with the *intention* of returning to dwell there, he would not thereby lose his acquired homestead: Thompson on Homesteads § 273; *Bunker v. Paquette* 37 Mich. 79; *Pardo v. Bittorf* 48 Mich. 275; *Showers v. Robinson* 43 Mich. 513.

Corbin & Cobb for defendant. Removal from premises

appropriated as a homestead is prima facie evidence of its abandonment: *Harper v. Forbes* 15 Cal. 202; *Anderson v. Kent* 14 Kan. 207; *Vasey v. Trustees* 59 Ill. 188; when a homestead right depends on a selection it is waived by failure to make it at the proper time: Thompson on Homesteads § 546; *Frost v. Shaw* 3 Ohio St. 270.

GRAVES, C. J. July 31st, 1879, the defendants sued the plaintiff by declaration as surety for one Hollister on a promissory note, and judgment was taken by default in the month of January, 1880, for $687.05 damages and costs. February 7, 1881, an execution was taken on the judgment, returnable on the 3d of May, and on the day it issued, the sheriff, by virtue of it, levied on a parcel of forty acres and also on another parcel of about twenty acres adjoining and occupied with it. June 21st, 1881, the sheriff sold all the premises levied on to the defendants, except a small part of the second parcel, for $775. This excepted portion was sold afterwards to defendants on a new execution. November 21st, 1881, the complainant filed this bill to liberate the said forty-acre parcel from the execution proceedings, on the ground that it was his homestead. The circuit court granted the relief, and the defendants appealed.

As they offered no evidence, the case stands on the showing of complainant.

As we have seen, the territory levied on was larger than the law allows for a homestead, and yet no selection was claimed prior to the sale. On this ground the defendants' counsel contends that the complainant lost his right under the Constitution.

To this we cannot assent. He was in the neighborhood and might have been personally notified, but was not. He had no actual knowledge of the levy, or of the proceedings under it; and being wholly ignorant that there was any occasion for him to intervene, it would be going far to regard his omission as a forfeiture of his right. If he had been fairly put upon his guard,—if he had been actually notified,

and had then refrained from acting,—there would be room for other considerations.

It may be taken as true in general that unless a person knows there is occasion for him to speak or act, his silence or passivity will not conclude him. No doubt cases may occur of unreasonable delay, or in which circumstances exist which serve to express or imply that the right has been waived or abandoned, and these facts may be contemporary with the sale, or they may be such as occur wholly or in part after it has taken place.

The case before us must rest on its own circumstances, and we are of opinion that they exclude the objection.

That the premises claimed and allowed as a homestead have all the legal requisites is necessarily conceded. The quantity and value are within the limits, and the proper buildings are included. From the fall of 1878 to the fall of 1879 the place was occupied by complainant and his wife. It was their home. That it constituted his homestead during that interval is certain. The argument that it subsequently became lost to him as a homestead virtually admits it. The main contention is that he had abandoned the privilege and wholly given up the right prior to the levy and sale; and in view of this record the question seems to be one of fact, and it must be admitted that the showing is not very decisive. In such a case the opinion of the court of first instance ought not to be hastily rejected.

A rehearsal of all the facts would not be profitable; a brief reference to a few incidents must suffice.

The complainant was married in 1874, and in the fall of 1878 he built the dwelling-house on the property, and they proceeded to occupy it and continued until the fall of 1879 at which time his wife separated from him and left him. They had no children and there was no one to occupy the house with him. His wife subsequently instituted proceedings for a divorce, and the case was still pending when the evidence was taken in this cause. The parties have never lived together since the separation. At the time his wife went away from him he had no other abode, and he has not

owned any other land than this forty acres and the small parcel adjoining. Late in 1879 he admitted a man by the name of Allen, and received board from him. Complainant supplied his own bed, but retained no other of his household goods. After Allen left, which was in the course of a few months, the place was without a family until the fall of 1880, at which time complainant let in a man by the name of Mead. At this time complainant removed his bed. Mead occupied until the spring of 1881, and then went out. During the whole period subsequent to his wife's departure the complainant regarded the place as his home. His stopping elsewhere was transient. He divided his time between laboring for others about the neighborhood and working for himself on this farm, and from time to time he continued to repair to it for work, and sometimes to sleep or rest, and sometimes to eat. As we have seen, the property bore the stamp of a homestead during the wife's continuance with complainant. He had gained the privilege, and the wife's abandonment was not a fact in itself sufficient to destroy it. His right did not lie at her mercy. It did not necessarily depend on her staying or going.

The change would be a circumstance to be considered with others on the question of waiver or abandonment, but it could have no imperative and conclusive effect by itself. That the right did not immediately terminate is certain. It continued longer. *Showers v. Robinson* 43 Mich. 502; *Pardo v. Bittorf* 48 Mich. 275; *Bunker v. Paquette* 37 Mich. 79; *Kenley v. Hudelson* 99 Ill. 493; *Kessler v. Drumb* 52 Tex. 575; *Kimbrel v. Willis* 97 Ill. 495; *Silloway v. Brown* 12 Allen 30.

Can any point of time be specified when it did cease? Is it possible to say that the sort of connection with the property which entitled the complainant, after his wife's departure, to still hold it as a homestead has since been severed? The circuit judge maintains the negative. It is his opinion that, taking all the circumstances into account, they fall short of proving that the homestead right which was vested in complainant at the time his wife left him has in any

manner come to an end. And this Court, upon full consideration, is not able to discover any ground in the record which would justify it in overruling that opinion. The case calls for nothing further.

The result is that the decree must be affirmed with costs.

The other Justices concurred.

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JOHN FLYNN v. PATRICK GLENNY.

Boundaries between owners of lots—Re-survey.

Re-surveys cannot be allowed to unsettle the lines of town lots after the lot-owners have established such lines in accordance with the stakes which they have found planted or recognized by authority, and in reliance on which they have purchased.

Appeal from Marquette. (Grant, J.) Oct. 11.—Oct. 24.

INJUNCTION bill. Defendant appeals. Affirmed.

W. P. Healy for complainant. If two proprietors verbally settle by implied agreement among themselves the dividing line of their respective lands and for some time act accordingly, neither can depart from the arrangement: *O'Donnell v. Kelsey* 10 N. Y. 419; especially if they took such reasonable measures to ascertain and establish the line between their lots that prudent persons would do: *Smith v. Hamilton* 20 Mich. 433; *Kellogg v. Smith* 7 Cush. 379.

F. O. Clark for defendant. Monuments control courses and distances, and the question in case of a boundary between lots is not how an accurate survey would locate them, but how the original stakes did: *Moore v. People* 2 Doug. (Mich.) 424; where parties occupy premises under mutual mistake as to the boundary lines, improvements not interfered with work no estoppel: *Cronin v. Gore* 38 Mich.

385; the mere building of a division fence by adjacent land owners does not preclude their contesting the boundaries so fixed, nor does their occupancy to the line of the fence unless it is adverse for the full period required by the statute of limitations: *Chapman v. Crooks* 41 Mich. 595, 598; *Van Den Brooks v. Correon* 48 Mich. 287, 288; where streets were staked at the time of the original survey, and monuments fixed, courts will leave the excess or shortage in each block to be dealt with by itself: *Twogood v. Hoyt* 42 Mich. 612; the question is one of location of the premises described which may be proved by any kind of evidence which is competent to prove any fact: 3 Washb. R. P. 348; *Purkiss v. Benson* 28 Mich. 540; if parties occupied up to an erroneous line for more than twenty years, supposing it to be the true line, and relying upon it, the line could not be then disturbed though wrong, but if they did not rely upon the first survey, but expected to settle the line by another when convenient, then twenty years' mere possession would not bar: *Bunce v. Bidwell* 43 Mich. 543.

Cooley, J. The bill in this case is filed to quiet the title of complainant to a small strip of land which defendant is endeavoring to recover from him. The parties own and occupy adjoining lots in the city of Marquette, and the dispute concerns the location of the boundary line.

It appears that the original plat of the village of Marquette was laid out by the Cleveland Iron Company in the year 1854. It was crossed by Front, Third and Fourth streets running east and west, and by Fisher, Rock, Superior and Spring streets crossing the others at right angles. Each block was divided into lots, which were intended to be parallelograms, of equal size. Subsequently at several different times adjoining territory was platted into blocks and lots, and the streets on the original plat, with the exception of Spring street, were extended by direct lines through the new plats.

In 1872 defendant purchased lot nine fronting on Fisher street between Third and Fourth, and complainant pur-

chased the adjoining lot numbered eight. Moriarty had previously become owner of lot ten, which was on the corner of Fisher and Fourth. The lots, according to the plat, were all fifty feet in width, and Moriarty had fenced off his lot of that width, beginning at the line of Fourth street where he and those who had previously bought lots upon it supposed it to be. When complainant purchased, he measured off one hundred feet from the supposed line of Fourth street, and took that as the point of beginning. That left fifty feet between himself and Moriarty, and this was taken possession of by defendant as being lot nine. Complainant and defendant, immediately after their purchases, built upon their lots respectively, and joined in building a fence on what they supposed was the dividing line between their lots. The line of this fence is the one which complainant now insists upon and seeks to maintain. The other lots fronting on Fisher street in the same block were numbered from one to seven inclusive, and these had all been sold off by the original proprietor. Lot five was purchased by one Steele in 1867, who was told by Peter White, the agent of the proprietor, that he would find stakes to indicate the boundary, and he did find stakes which located the lot with one hundred feet for lots six and seven between it and the premises now occupied and claimed by complainant as lot eight. One Neddeau purchased lot four the next year, and found it staked out in the same way as a fifty foot lot adjoining that of Steele. It is probable that these stakes were not the stakes planted at the time of the original platting, but there is nothing in the evidence to raise any suspicion that they had been planted without authority, or for any other purpose than to indicate the lot boundaries; and it is reasonable to infer that they were either the original stakes or others which had been planted in the same places when the original stakes had gone to decay. It seems very plain on the evidence that they were recognized by the original proprietor and its general agent as stakes which correctly designated the lot boundaries until all the lots fronting on

Fisher street, on the block now in question, had been sold and taken possession of by purchasers.

Recently, and after these parties had been in possession of their respective lots for nearly ten years, occupying with practical recognition of the fence they had jointly constructed as the dividing line, doubt has been thrown upon it by a survey which has been made of this part of the town, and which has led to the present litigation. A surveyor whose skill and competency is not questioned, taking for starting points certain monuments planted at the intersection of Front street with Spring street and Superior street, and also another at an intersection on one of the new plats, has demonstrated to his entire satisfaction, and by tests which in his opinion make his conclusions correct to a mathematical certainty, that the lot lines on this block are all wrongly located; that Moriarty is some two feet over the line of Fourth street; that defendant encroaches on Moriarty to the same extent, and complainant upon defendant. Defendant insists upon locating the dividing lines in accordance with this survey, and complainant contends for the correctness of the practical location.

If it were certain that the monuments which are now found at the intersection of Front with Spring and Superior streets were planted at the time the original plat was laid out, and that the survey of the plat was made with those monuments as the guides, and was itself mathematically correct, the conclusions which have been reached on the survey just made would no doubt be reliable and accurate. But we have no evidence that the monuments were planted when the platting was done: we are only told that they are monuments which are generally accepted and relied upon. In the absence of any evidence of the time when or the person by whom they were located, it is quite as supposable that there may have been an error in locating Front street when the monuments were planted, as that there was an error in locating Fourth street when the lots upon it were were purchased and taken possession of. It is pure assumption that there must necessarily be an error on Fourth street because

the line as located does not conform to the line as it should be measuring from the actual location of Front street.

It is also pure assumption that the original survey was mathematically correct. It is seldom or never that a town plat in a new country is made with perfect accuracy; and it is familiar knowledge in this State, if not elsewhere, that any attempt to make street lines and lot lines correspond with mathematical accuracy to the recorded plat after the lots have been occupied and improved, would disturb possessions in the most serious manner, and lead to infinite difficulty and litigation. Fortunately the rules of law do not admit of this. Purchasers of town lots have a right to locate them according to the stakes which they find planted and recognized, and no subsequent survey can be allowed to unsettle their lines. The question afterwards is not whether the stakes were where they should have been in order to make them correspond with the lot lines as they should be if the platting were done with absolute accuracy, but it is whether they were planted by authority, and the lots were purchased and taken possession of in reliance upon them. If such was the case they must govern, notwithstanding any errors in locating them.

We have said on this general subject in prior cases all that we deem necessary, and shall content ourselves with a reference to those cases. *Joyce v. Williams* 26 Mich. 332; *Stewart v. Carleton* 31 Mich. 270; *Cronin v. Gore* 38 Mich. 381; *Diehl v. Zanger* 39 Mich. 601; *Dupont v. Starring* 42 Mich. 492. The evidence is very strong that the parties to this litigation located the lines of their lots at the time they bought where they had been located in the original platting; and the evidence of the recent survey scarcely tends to cast a doubt upon it.

The decree of the circuit court was very clearly right and must be affirmed with costs.

The other Justices concurred.

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JOHN HATZENBUHLER v. THOMAS LEWIS.

Error—Action by individual for debt to firm.

A judgment cannot be reversed upon an instruction to the jury which in itself was correct, whether the reason for it did or did not involve an opinion on facts.

A declaration on the common counts alone is insufficient in an action by an individual for the price of goods purporting to be sold by a firm in which he was a partner, if there is no showing of any assignment of the claim by the firm to the plaintiff, or of any notice to defendant of the firm's dissolution.

The issue made before a justice cannot be substantially changed in the circuit court on appeal.

Error to Wayne. (Jennison, J.) Oct. 11.—Oct. 24.

ASSUMPSIT. Plaintiff brings error. Affirmed.

George S. Hosmer for appellant. A parol assignment of an account is good: *Draper v. Fletcher* 26 Mich. 154; *Hooker v. Eagle Bank* 30 N. Y. 83; the common counts are sufficient to sustain a suit in justice's court on an assigned account: *Kelly v. Waters* 31 Mich. 404; *Snell v. Gregory* 37 Mich. 500; and pleadings in justices' courts are to be liberally construed: *Wilcox v. Tol. & A. A. R. R. Co.* 43 Mich. 584.

Henry F. Chipman for appellee.

CAMPBELL, J. Plaintiff sued defendant on the common counts, and recovered before a justice. Defendant appealed. On the trial at the circuit plaintiff undertook to recover for goods sold defendant by a firm of Robinson & Hatzenbuhler. Plaintiff's claim was that the firm had become dissolved, and that it was understood he was to have all the assets. No assignment was ever made, and it does not appear that any entries were made, or anything done beyond the arrangement or understanding in question. No notice was shown of any dissolution as given to defendant,

who produced a receipt in full from Robinson, which was given in settling up some old dealings about which there was some question how far they entered into firm dealings. The court below directed a verdict for defendant, giving as a reason that no such dissolution was shown as would authorize the suit.

We cannot reverse the judgment if this direction was right, whether the precise reason did or did not involve an opinion on facts. We do not feel quite sure that the conclusion of the judge was not warranted as applicable to the case as it stood. But there can be no doubt of the insufficiency of the declaration in regard to the assignment, and this may have caused some difficulty. The plaintiff declared simply on the common counts, the effect of which, on such a cause of action as the peculiar one relied on upon the trial, was to assert that the goods were sold and delivered by plaintiff, and not by the firm. There is no reference to any assignment in any paper returned by the justice. The evidence, therefore, did not tend to prove the cause declared on, and the verdict could not have been sustained on error if given for plaintiff and properly complained of.

The judgment must be affirmed with costs.

The other Justices concurred.

Afterwards at the same term a motion was made for a rehearing. Submitted October 30. Denied October 31.

Hosmer, for the motion, cited *Kelly v. Waters* 31 Mich. 404; *Gregory v. Snell* 37 Mich. 500; *Soper v. Mills* 50 Mich. 75, and *Wilcox v. Railroad Co.* 43 Mich. 584.

CAMPBELL, J. A motion for a rehearing being made on the ground that this case comes within some prior decisions, on which reliance was allowed on the common counts, we do not see their applicability. In those cases there was an assignment in fact to a third person, and not to a co-partner, and there was a proper claim informing the defendant

brought directly to his notice. In this case there was no express assignment, and without notice of dissolution the defendant had a right to deal with either partner. The declaration practically alleged a sole transaction, and the plaintiff sued as an original creditor of Lewis, who would have been a proper co-plaintiff with Robinson, but who could not sue as one of the firm and deprive Lewis of any of his privileges as a debtor of the firm. When sued in this way we do not think he was bound to meet such a peculiar claim as that relied on in the testimony, and the circuit court could not substantially aid plaintiff to change the issue as made before the justice.

The motion is denied without costs.

The other Justices concurred.

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HELEN B. BATES v. DETROIT MUTUAL BENEFIT ASSOCIATION.

Insurance—Forfeiture for non-payment of assessments.

Forfeitures for breach of condition cannot be established except for the violation of the precise condition made.

The articles and by-laws of a Mutual Benefit Association required that assessments be made by the secretary; and the certificates of membership provided that assessments be payable within thirty days after notice from the secretary. *Held* that the notice contemplated was notice of the assessment; and that insurance was not forfeited by neglect to pay assessments that were not imposed by the secretary or by the trustees, but only, if at all, by persons claiming to be managers, and where the only notice from the secretary was a notice of forfeiture.

Error to the Superior Court of Detroit. (Chipman, J.) October 16.—October 24.

ASSUMPSIT. Defendant brings error. Affirmed.

Wilkinson, Post & Wilkinson for appellant.

John Atkinson and *Isaac Marston* for appellee.

CAMPBELL, J. Plaintiff recovered judgment against defendant upon a life policy issued to Fort Henry Bates, her husband. The only defense relied on was a forfeiture or termination of the policy by failure to pay assessments. The court directed a verdict for plaintiff, and the only question is whether there was any testimony tending to prove such forfeiture.

The assessments insisted on were amounts of one dollar payable by each person insured, on the death of any other person insured. The certificate of membership provided that "the holder of this certificate agrees to pay the sum of one dollar at the death of each member whom he shall survive, or at the maturity of any certificate, if deemed necessary by the trustees." This was to be payable "within thirty days after the date of a written or printed notice from the secretary making such assessments," etc. A failure to pay was to terminate the membership, unless reinstated.

The articles of association provided not only for death payments but for payments during life on certain contingencies, and they provided for raising money to pay both classes of risks by assessment, if deemed necessary for the latter class, and defendant claims by assessment at all events for the death risks. Upon this there is a controversy.

It appeared that the trustees, as a body, ordered no assessments in the present case, and had no direct knowledge or action in the matter; and that two persons who were associated as McCloud & Herring, claiming to be managers, conducted all the business involved in the present controversy. None of the notices of assessment, except one less than 30 days before his death, were issued by the secretary. The rest came from McCloud & Herring.

We find nothing to indicate that any assessment whatever was made, unless the notice itself constituted an assessment. But under the articles and by-laws all assessments, when made, were to be made by the secretary, and the notice to be given was notice of such assessments.

It is well settled that no forfeiture can be established except for a violation of the precise conditions laid down. While we have not discovered anything to authorize the secretary to make assessments until somebody has at least ascertained and determined that the facts exist which make them necessary, and in the absence of other regulations the trustees seem to be the proper judges, yet we need not consider this fully, because assessments made and notices coming from others than the secretary could not satisfy the conditions of forfeiture. And although it is claimed certain notices did emanate from the secretary, they were not notices for future payment, but of default on past obligations, and therefore did not serve the purpose referred to.

We think there was no error in the direction given to the jury.

The judgment must be affirmed with costs.

The other Justices concurred.

WILLIAM PETER v. JAMES C. THICKSTUN.

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139 4165

Claim for goods sold—Cross-examination—Newspaper quotations—"Reasonable time"—Constructive receipt in full—Objections to payment tendered—Financial duress.

Where the plaintiff in an action for the price of merchandise has been examined as to the details of the transactions between the parties to the suit, it is not error to allow him to be cross-examined as to the extent, kind and localities of his business if it tends to show his opportunity to know the facts he has testified to, and the probability as to the correctness of his statements.

Local newspaper quotations as to the price of merchandise at the point of consignment are admissible where its value is a material fact in the case; as where a claim for the price charged was met by the defence that the value had declined. But evidence of the rate at which the claimant sold other such merchandise at the time when that in suit arrived at its destination, is not admissible.

"Reasonable time" within which to object to an account rendered is a question for a jury and to be considered in connection with the circumstances of the case.

If a vendor accepts, negotiates and cashes a cheque which purports on its face to be in full payment for the merchandise sold, he, in effect, receipts in full for the price.

If one who contracts for goods to be delivered at a given time receives them as the goods bargained for, without objection, though not delivered until long afterwards, he is liable for the contract price.

An objection to payment tendered for not being as much as was due, or not what the goods cost, is enough to entitle the vendor to contest the correctness of the account.

Where one who contracts to furnish goods within a week does not do so for more than a month, and the goods, when finally furnished, are neither delivered nor accepted under the contract, the purchaser cannot be held for the contract price but only for the market value at the time of delivery.

The purchaser of goods sent a draft for less than the price demanded, and the vendor accepted it, but afterwards claimed that it was not in full payment. *Held* error to permit the jury to consider whether the acceptance was not made under financial duress, there being no evidence as to the vendor's financial condition.

Error to Lapeer. (Stickney, J.) Oct. 16.—Oct. 24.

ASSUMPSIT. Plaintiff brings error. Reversed.

Geer & Williams for appellant, cited as to acceptance of a draft offered in full payment, *McGlynn v. Billings* 16 Vt. 329 and *Davenport v. Wheeler* 7 Cow. 231.

Moore & Bentley for appellee, cited in support of the admission of testimony as to the scope of plaintiff's business, *Wilbur v. Flood* 16 Mich. 43; Starkie's Ev. (9th ed.) 34; a memorandum on the face of a cheque to the effect that it is in full payment is not a part of the cheque, but may be treated as made for the purchaser's convenience: *Buhl v. Trowbridge* 42 Mich. 44; if one of the parties has derived any advantage from a partial performance by the other, he cannot hold the benefit of this and rescind as to the residue on the ground of the other's non-performance: 2 Pars. Conts. (5th ed.) 679; *Hunt v. Silk* 5 East 449; *Hub-*

Bardston Lumber Co. v. Bates 31 Mich. 168–9; *Curran v. Rogers* 35 Mich. 226; *Gillett v. Bowman* 43 Mich. 480; 3 Wait's A. & D. 483.

SHERWOOD, J. The plaintiff sued the defendant in assumpsit to recover for a quantity of mill-feed sold and delivered. Plea, general issue, and notice of set-off.

On the trial, the account of the plaintiff, amounting to $43.54, was admitted by the defendant to be correct, but he claimed that on the 9th day of May, 1881, he sold to the plaintiff two car-loads of shingles, to be delivered on the cars at Toledo, at $3.50 per thousand, as soon as he could get the cars for that purpose; and that on the 11th day of June following he forwarded the two car-loads of shingles, and when they arrived in Toledo caused the same to be delivered to the plaintiff, and that defendant owed him a balance of $30 therefor, which constituted the claim set off. The plaintiff, however, insisted that, by the terms of the contract made in May, the defendant was to deliver the two car-loads of shingles to him on the cars in Toledo within a week, and he neglected to make such delivery; that between the date of the making of the contract and the time the shingles arrived in Toledo the price depreciated twenty cents per thousand, and that he did not receive the shingles upon the contract, but their receipt and purchase by him was an independent transaction, and that he accounted to the defendant for the same as such.

Thus it will be seen the parties fail to agree as to the time when the shingles were to be shipped or delivered under the contract, Thickstun claiming he was to forward them as soon as he could get cars for the purpose, and Peter says they were to be delivered to him within a week from the time of making the contract.

The jury found with the defendant, allowed the set-off of $30 and returned their verdict for the balance, and plaintiff brings error.

The evidence shows that the shingles were shipped from Welsh station, in Michigan, about the 11th of June, direct-

ed to the defendant as consignee, and that they arrived in Toledo some time between the 20th and 26th days of June. The defendant claims, and his testimony tended to show, that on or about the 14th day of June he sent an invoice of the shingles, dated June 11th, to Mr. Peter, enclosed in a letter directing the freight agent at Toledo to deliver the shingles to Mr. Peter. The invoice is as follows:

"June 11, '81.

Wm. Peter:

75 M. shingles, @ 3.50, car 1997,	- - -	262 50
75 " " " " D 324	- -	262 50
		525 00

Billed J. C. Thickstun, Toledo, Ohio; order enclosed."

And that he sent these shingles as soon as he could obtain the cars to transport them.

The plaintiff denies ever having received this letter inclosing the invoice, and says that the first information he received of the shingles being on the cars for him came from the freight agent at Toledo, and after unloading the cars he sent the defendant a letter, dated June 27th, informing him of the fact, and that he was then paying $3.30 for shingles, with 2 per cent. off for cash, which left them at $3.24 per thousand, and inclosed a check for the amount they came to at that price. The check was as follows:

"$407.35. TOLEDO, O., June 27th, 1881.

Second National Bank of Detroit, Mich.:

Pay to J. C. Thickstun or order four hundred and seven and 35-100ths dollars. Payment in full for shingles shipped to me in cars 1997 D and 324 D and finished unloading June 27th, '81.

WILLIAM PETER."

This check was endorsed by the defendant, and the money was received by him thereon.

The defendant testifies that upon the receipt of this letter and check he sent the plaintiff a letter saying that the statement of account and check were not right; that he was dissatisfied; also that he saw the plaintiff about ten days after this, and stated to him the same he had written in the

letter. Plaintiff denies ever having received the letter, and further says, in the conversation had afterwards with defendant, and also the defendant swore on the trial before the justice, that he was by the contract to deliver the shingles within a week, but failed because he could not get the cars.

The first six assignments of error relate to the testimony given by plaintiff upon his cross-examination, showing the extent, kind and places of plaintiff's business. This testimony was properly received. Upon his direct examination he had given to some extent the details of the transactions between the parties. The testimony objected to tended to show his opportunities to know the facts he had testified to, and the probabilities of the correctness of his statements. *Sager v. Tupper* 38 Mich. 258.

The seventh and eighth assignments relate to the admissibility of the newspaper quotation of the market value of the shingles in the city of Toledo on the 27th of June and the 27th of July, 1881. Toledo was the market to which the shingles were consigned, and their value there was a material fact in the case. We think the testimony was properly received under the previous rulings of this Court. *Sisson v. C. & T. R. R. Co.* 14 Mich. 497; *Cleveland & Toledo R. R. Co. v. Perkins* 17 Mich. 301.

The 20th assignment of error must be sustained. What the defendant sold other shingles for at the time these arrived in Toledo, was not proper evidence of the value of the latter.

The remaining exceptions relate to the charge as given, and to the court's refusal to charge. The substance of the plaintiff's first three requests were given in the charge. They relate to the effect of defendant's failing to make timely objection to the statement of account of the shingles as rendered by the plaintiff, but this effect was completely controlled by the statements of the court that the defendant made proper and timely objection. This was erroneous. Whether he did so or not within a reasonable time, under

the circumstances of this case, should have been submitted to the jury. *Druse v. Wheeler* 26 Mich. 189.

The plaintiff's 4th and 6th requests, and the 16th and 18th assignments of error are untenable, and the rulings of the circuit judge were correct.

The plaintiff's 5th request should have been given. There were in the testimony sufficient facts upon which to base the same; and upon the facts assumed in the request it states the law correctly, and the refusal to charge the request was error.

That part of the charge included in the plaintiff's 19th assignment of error was erroneously given.* The record

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*The plaintiff requested the court to charge the jury in writing as follows:

First. If the jury find from the evidence in this case that the plaintiff, Peter, on the twenty-seventh day of June, 1881, made and rendered a statement of an account for two car-loads of shingles, containing 149½ thousand, to the defendant, James C. Thickstun, at $3.30 per thousand, and at the same time sent him his check or draft on the Second National Bank of Detroit for $407.35, in full payment for the same, and the said defendant kept and obtained the payment on the said check, and made no objection to the correctness of the account rendered and the payment therefor for an unreasonable [within a reasonable] length of time, then it became an account stated.

Second. If the jury shall find from the evidence in this case that the plaintiff rendered to the defendant an account showing the number of thousand shingles received, and the price paid therefor, inclosed him a check or draft as and for full payment and settlement for said shingles, then it became and was the duty of the defendant to make objection to the correctness of the account within a reasonable length of time; and if the jury find that the defendant failed or neglected to make such objection within a reasonable time, under all the circumstances of the case, then the jury should consider such neglect or omission to notify, an admission upon the part of the defendant that he had assented to, and was satisfied with, the correctness of the account as rendered.

Third. If the jury find that the defendant received the account and check in payment for the shingles on the twenty-eighth day of June, 1881, and made no objection to the correctness of the account until November following, then, under the proofs in this case, it was an admission on his part that it was correct.

Fourth. If the jury find that Peter sent to Thickstun, June 27th, 1881, a check for $407.35, on which was written "payment in full for shingles shipped to me in cars 1997 D and 324 D," and finished unloading June 27th, 1881 and that Thickstun negotiated said check and drew the $407.35, this would have the same effect as a receipt in full given by Thickstun to Peter.

Fifth. If the jury find from the evidence in this case that Thickstun, on the ninth day of May, 1881, sold to Peter two car-loads of shingles, at $3.50 per thousand, to be shipped within one week, and that said shingles were not shipped by Thickstun for more than a month after the contract was made, and were not delivered to Peter, and were not accepted

does not disclose evidence sufficient to support the charge. There was no evidence in the case showing the financial

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by him under a contract, then Peter would not be chargeable for the contract price of the shingles, but for their market value at the time they were delivered to him.

Sixth. That, under the proofs in this case, the plaintiff is entitled to recover the amount of his account, $43.54, and interest at seven per cent. on the same since the rendition thereof to the defendant.

The circuit judge charged the jury as follows, error being assigned upon the portions enclosed in brackets, the accompanying number indicating the assignment.

Gentlemen of the Jury: This is an action, termed in the law, assumpsit, brought by the plaintiff against the defendant for the purpose of recovering the value of a certain quantity of bran and middlings sold by the plaintiff to the defendant, under date of November 23, '81, or thereabouts. If there were no other items in the case, the plaintiff would be entitled to a verdict at your hands for the $43.54, the amount of the bran and middlings. On the part of the defendant, he insists that there is a matter due him from Mr. Peter, growing out of a prior deal in reference to the shipping of a couple of car-loads of shingles from his place in Otsego, or north, to Toledo, to the plaintiff in this suit. And it is necessary in this case, under the proofs, for you to investigate somewhat the facts growing out of that transaction to determine whether, under the law as I shall give it to you, there is an offset to be applied to this $43.54 or not.

It appears that some time in May, 1881, the parties got together and negotiated, the one with the other, for two car-loads of shingles, at the price of $3.50 per thousand delivered on board the cars at Toledo, the residence of the plaintiff in this suit. On the part of the plaintiff it is contended, and some proof has been offered upon that branch of the case showing, that the shingles were to be delivered to the plaintiff in this suit, Mr. Peter, within a week at the outside. On the part of the defendant it is claimed, and some proof has been offered upon that point, that he was to ship the two car-loads of shingles whenever he could get cars to ship them,—whenever he could get the necessary facilities to ship the plaintiff in this suit the two car-loads of shingles, at the price of $3.50 a thousand. That is the claim on the part of the plaintiff, and the claim on the part of defendant in reference to the shingle contract. Afterwards, it is claimed on the part of the defendant that he sent this order for the two car-loads of shingles north to his mill, on the ninth of May, to be filled as soon as he could get cars to ship them from that place to Toledo; that nothing was said, no communication was made between the parties in reference to the shingles, from that time until the shingles were shipped by the defendant to the plaintiff and received at Toledo, which was some time in June,—the tenth or eleventh of June, I think, from the proofs in the case. There is no dispute between the parties in reference to that date, and that you will find from the proofs. That as soon as the shingles were shipped, or as soon as the defendant in this suit was notified by his foreman that the shingles were shipped, he sent an invoice of the shingles to the plaintiff, a statement of the account existing between them in consequence of the shipping of the shingles, and also an order on the agent,—the railroad agent at Toledo,—directing him to deliver the shingles over to Mr. Peter, the plaintiff in this suit, the shingles having been shipped in the name of the defendant, as consignor and consignee; that as soon as Mr. Peter was notified of the receipt of the shingles at Toledo, he received them and took them into his possession and placed them upon his yard, and, of course, eventually to go into the

condition of the defendant. His pecuniary situation at the time the plaintiff received the shingles seems to be the prin-

market; (15) [that as soon as that was done, having this bill of Mr. Thickstun's before him at $3.50 per thousand, he sat down and made out an account of his own in reference to the two car-loads of shingles,] crediting the defendant in this suit with the receipt of the shingles at 149½ thousand shingles, and giving him credit at $3.30 per thousand, making a difference, as claimed, of something like thirty dollars, and sent that statement of the account and a draft for the amount to Mr. Thickstun, the defendant in this case, and that account and draft were received by Mr. Thickstun, and after its receipt was indorsed and used by him. Now, there are two propositions of law contended for in this case in reference to the shingles. On the part of the plaintiff it is contended that he did receive two car-loads of shingles on account of the defendant in this suit, but they were not received under any contract; second, that he having rendered to the defendant in this suit an account of that transaction, fixing the price at $3.30 a thousand, and more than a reasonable time having elapsed after the sending of that account and after using the avails of that draft, and the defendant not objecting to the account as rendered, he is now estopped from claiming or insisting that the shingles were delivered on his part to the plaintiff in this suit under a contract of $3.50 a thousand; and having received the money it operates as a settlement between the parties, and the party defendant is concluded from urging or insisting upon the terms of the contract as first agreed upon between the parties. Now, if you find, gentlemen of the jury, that the parties contracted in reference to the shingles in May, (and you find on the part of the defendant,) or if you find that the parties had a conversation, and entered into a contract in reference to the delivery of the shingles, and that the party defendant was to ship the shingles when he could get rolling stock or cars with which to ship the shingles, and he shipped the shingles within that time, then, of course he would be entitled to his $3 50 per thousand. (16) [If you find, gentlemen of the jury, in this case that the contract was to ship within a week, and you further find that the defendant in this case shipped the shingles, but not within a week, but he shipped the shingles under this contract, and you further find in this case that the shingles were received by the plaintiff at Toledo as shingles talked about by them in their negotiations in reference to the shingles, he received those shingles; and you further find that, between the negotiations for the shingles and the receipt of the shingles, there had been no notice on the part of the plaintiff in this suit rescinding the contract; that he received the shingles in June, and took them into his possession without notifying the defendant in this suit that he repudiated the contract on account of time, then, under the rules of law, he would be holden for those shingles at $3.50 per thousand. And if you should find these facts, then, so far as determining the price at which you should figure the shingles in this case, you would figure the shingles at $3.50 per thousand.] The next question is a question in reference to the delay after receiving the account as figured by Mr. Peter. It appears in evidence that, on or about the twenty-seventh of June, at the time he sent this draft, he sent a statement of the account to Mr. Thickstun with the draft; and it is claimed that he made no objection to this account as rendered. And if you find that this account, as rendered, figured the shingles at $3.30, and Mr. Thickstun made no objection to the account, and you further find that a reasonable time had elapsed, or he had a reasonable time in which to look the account over and determine whether it was correct or not, and made no objection, then he would be concluded by the items of the account as rendered to him by Mr. Peter.

cipal element in that portion of the charge excepted to. *American Transportation Co. v. Moore* 5 Mich. 368.

[The judge then gave the first three charges requested by the plaintiff.]

In connection with this matter, gentlemen, of the rendering of the account, before you take the plaintiff's view of the case in reference to this particular branch of the case, you must be satisfied from the proofs in the case that there has been no objection on the part of Mr. Thickstun to the correctness of this account. And it is necessary for you to go through the proofs, scan the proofs closely in the case, and determine in your minds whether there has been on the part of Mr. Thickstun any objection raised. (17.) [And I desire to call your attention to the testimony of Mr. Thickstun in reference to sending the letter, if he sent a letter, and also to the conversation that was had between Mr. Thickstun and Mr. Peter here in town, and I think, as recollected by Mr. Peter, at the depot, and Mr. Thickstun, as I understand, don't recollect it; but that matter is for you to determine, and what was said between the parties as to the correctness of this account. If there was an objection made to the account, it was a timely objection, undoubtedly, because it is claimed by the parties in this suit that it was within three weeks of the time of the rendition of the account;] and if a party objects to an account within a reasonable time, then, of course, the account is open for contention between the parties. And it is for you to determine in this case whether there was on the part of Mr. Thickstun, after he received this account, and after he had an opportunity to object to it, he did object. (18.) [The objection to the account that it was not what was his due, or was not what the shingles cost him, that he was losing so much, would be such an objection, gentlemen of the jury, as would entitle him to contest the matter, so far as any admission is concerned of the correctness of the account,] if you find that he did object. If you find that he did not, gentlemen of the jury, then, under the rule of law, while it is perhaps a technical objection, it is such a rule of law that I think you would be bound by it, and would be bound by it in this case, if you find the facts all here.

The fourth request on the part of the plaintiff in this suit, gentlemen of the jury, is: 'If the jury find that Peter sent Thickstun, June 27, '81, a check for $407.35, on which was written, 'payment in full for shingles shipped to him in cars 1997 and D 324,' and finished unloading the cars June 27, '81, and that Thickstun negotiated said check and drew the $407.35, this would have the effect of a receipt in full given by Thickstun to Peter.' (19.) [No, gentlemen of the jury, I don't desire to lay down the rule as broad as stated in that request, but I desire to call your attention to it. Now, you may take the receipt of this check into consideration, and consider it and what is stated in the body of the receipt over the signature of William Peter; take it in connection with the testimony offered upon the part of Mr. Peter as to the reason why he sent this check, and the testimony upon the part of the defendant as to why he received the payment. Now, I understand the rule of law to be, gentlemen, in a case of this kind, if a receipt is given by a party who is acting under a stress of circumstances, and it is not of his own free will; that he is compelled to do it to save his financial standing, and does not do it of his own free will, intending thereby to be bound by it as a settlement in full of the transaction,—does not intend to be so bound,—that he need not be so bound under the law. This check is in no way signed by Mr. Thickstun, except the indorsement of the check upon its back whereby he could obtain the money. Now, gentlemen of

For the errors above mentioned the judgment must be reversed with costs and a new trial granted.

The other Justices concurred.

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the jury, if you should find that this was received by Mr. Thickstun in so far settling the negotiations, and the pay for the two car-loads of shingles shipped by him to Mr. Peter, not intending that it should be a full payment of the entire price for the shingles, and that his financial condition was such that he was under obligation to receive this money, then the receiving and using the $407.35 would not be a receipt, need not be considered, need not have the effect of a receipt in full by you in considering this transaction.] It may be taken into consideration, gentlemen of the jury, with the other facts and circumstances in the case, as showing with what intent this matter was sent, and with what intent it was received by Mr. Thickstun.

Now, gentlemen of the jury, in this case you will take all the circumstances in the case and the rules of law that I have indicated to govern you in applying these facts to the case, and arrive at such a conclusion as between these two parties you will be satisfied is right, from the evidence in the case. In the first place, gentlemen of the jury, under the rule as laid down by the court, you would figure the shingles at $3.50, if you find that they were shipped as I have indicated; then deduct the freight, $76, I think,—"

Mr. Geer. "$76.13; it would be just $30 difference."

The Court. "Just $30 difference; then deduct from that, gentlemen of the jury, the $407.35; that is the amount of the check, and that will be the balance, of course, figured at $3.50, due the defendant in this suit so far as the shingle transaction was concerned; then deduct that from the amount of the bran and middlings, and that would be the balance, if you find, gentlemen of the jury, that there has been no settlement between the parties, from the proofs, and you find that the party is not estopped by the settlement from contesting the correctness of the bill as rendered by Mr. Peter."

ASSIGNMENTS OF ERROR.

The court erred in permitting the witness William Peter to answer the following questions: (1) "How many million of dollars a year are you doing at Toledo?" (2) "Where else were you engaged in business?" (3) "How many men have you in your employ down there?" (4) "You have a large lumber interest there, and also a grist-milling business?" (5) "Where else are you doing business besides at Columbiaville and Toledo, and what kinds of business are you doing there, and how large a business, and about how many men do you employ?" (6) "What is your business at Bay City, what kind of a business, and how many men do you employ up there at Bay City?" And in admitting in evidence (7) the Toledo *Blade* of date June 27th. (8) The Toledo *Blade* of July 27th. * * * And in charging the jury: [See assignments of error numbered 15, 16, 17, 18 and 19, as shown in the charge.] (20) And in allowing he witness Thickstun to answer the following question: "What was the price you received for the shingles shipped to Toledo to Mr. Mason?"

Elizabeth Goodchild v. John N. Foster, Superintendent of State Public School.

Habeas corpus for children sent to State public school.

A circuit judge at chambers has jurisdiction to issue the writ of habeas corpus to get possession of children sent to the State Public School by order of the probate judge.

The action of a circuit judge in habeas corpus proceedings is strictly judicial where no jury is required and the judge acts personally; and it need not be taken in open court or during term.

A mother is not bound by an order made by a probate judge sending her child to the State Public School without any notice to her, if she was within the county, or to any of the child's friends or relations; and she can sue out the writ of habeas corpus to regain their custody.

Certiorari to Hooker, J. October 16.—October 24.

Habeas Corpus. Respondent appeals. Affirmed.

Charles Upson for appellant. The fact that relator in habeas corpus proceedings is the mother of minors detained from her is not conclusive as to her right to their custody; it must further appear that it is for the welfare of the children to have them placed in her charge: *Corrie v. Corrie* 42 Mich. 509; Hurd on Habeas Corpus 462–3; Schouler's Dom. Rel. § 248; a final adjudication upon the right of contending parties to the control, custody, nurture and education of a child is as much foreign to the nature of chamber powers as one where the possession and enjoyment of property are the purpose of the suit: *Rowe v. Rowe* 28 Mich. 357; *Matter of Buddington* 29 Mich. 472.

Henry Plass for appellee petitioner. Unauthorized absence of infants from legal custody is an imprisonment: Hurd on Habeas Corpus 454; the State courts, in all cases authorized by the laws of the State must issue the writ of habeas corpus, to inquire into the legality of the imprisonment of any person deprived of his liberty within the State:

Matter of Spangler 11 Mich. 310; in case of infants, the writ may issue without the privity of the child: *People v. Mercein* 3 Hill 399; and against its express wishes: *Commonwealth v. Hamilton* 6 Mass. 273; and the circuit judge has power to act in the premises at other times as well as in open court: *Matter of Buddington* 29 Mich. 475; Hurd on Habeas Corpus 456; Act 266 of 1881.

CAMPBELL, J. Mrs. Goodchild brought habeas corpus to get possession of her children in the State public school, to which they had been sent under an order of Judge Durfee, probate judge of Wayne county. Respondent brought certiorari against the decision restoring them to her possession.

The objection made on the argument to the jurisdiction of the circuit judge is not made in the affidavit for the writ of certiorari. But we do not think there is any foundation for such an objection. Proceedings must be speedy to be valuable, and the long practice that has sanctioned such action is unquestionably correct. Where no jury is required, and where the judge acts personally, we think his action under this writ is strictly judicial and need not be in open court at term.

As no authority was shown which would bind the mother, the children were properly restored. The order of the judge of probate shows she was in the county, but no notice appears to have been given either to her or to any friends or relatives. The statute clearly contemplates and distinctly provides that parents and friends may be heard on the children's behalf; and this involves an opportunity to be heard. As this was not shown, the mother was a stranger to the proceeding and it in no way bound her.

The proceedings must be affirmed with costs.

The other Justices concurred.

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TIMOTHY McKONE v. MICHIGAN CENTRAL RAILROAD Co.

Railway grounds—Injury to person waiting for a passenger.

The want of averments necessary to set forth the special grievance relied on in a declaration for damages based on personal injury will not be considered for the first time on review if the case was not disposed of on such ground and if court and counsel below had treated the declaration as proper.

A man went to the depot to meet his wife, and having occasion to seek a retired spot, no special resort being provided, he stepped off the walk, in the darkness, upon a portion of the depot grounds, and fell into a hole. *Held* that he was a customer of the railway company and not a trespasser, and that he could maintain an action against the company for the injury he sustained.

Error to Washtenaw. (Joslyn, J.) Oct. 16.—Oct. 24.

CASE. Plaintiff brings error. Reversed.

Sawyer & Knowlton for appellant. Leaving a hole unguarded is negligence: *Prideaux v. Mineral Point* 43 Wis. 513; *Patterson v. Pittsburg etc. R. R. Co.* 76 Penn. St. 389; *Barrett v. Black* 56 Me. 498; *Carleton v. Franconia etc. Co.* 99 Mass. 216; *Conroy v. Vulcan Iron Works* 62 Mo. 35; *Elliott v. Pray* 10 Allen 378; *Hargreaves v. Deacon Adm.* 25 Mich. 1; *Indermaur v. Dames* L. R. 2 C. B. 311; *Beck v. Carter* 68 N. Y. 283; a railroad company must keep in safe condition all portions of its station grounds, reasonably near to its platform where passengers would naturally go (*McDonald v. C. & N. W. Rd.* 26 Ia. 125; *Sweet v. I. & G. N. R. R. Co.* 2 Am. & Eng. R. R. Cas. 497; *Bennett v. L. & N. R.* 1 id. 71), also its approaches, platforms and landing places: *Knight v. P. S. & P. R. Co.* 56 Me. 234; also the ordinary space used by passengers in going to and from the train: *Hulbert v. N. Y. Cent. R. R.* 40 N. Y. 146; *Brassell v. N. Y. Cent. R. R.* 84 N. Y. 241; *Holmes v. N. E. Ry. Co.* L. R. 4 Exch. 259; one who enters the cars, depot and grounds of a railroad company to aid friends

to get on or off its trains are there by invitation of the company and are entitled to the same degree of care and protection as passengers: *Tobin v. R. R. Co.* 59 Me. 183; *G. R. & Ind. R. R. Co. v. Martin* 41 Mich. 667; *Doss v. R. R. Co.* 59 Mo. 27: 6 Am. & Eng. R. R. Cas. 136; *Catherham v. London Railroad Co.* 40 Eng. L. & Eq. 261; *Gillis v. Penn. R. R.* 59 Penn. St. 129; *Tol. W. & W. Ry. v. McGinnis* 71 Ill. 346; Cooley on Torts 605; 1 Thomp. Neg. 313; 1 Redf. Railways § 10; see also *Murphy v. Bost. & Alb. Rd.* 133 Mass. 121; *Sweeny v. Old Colony R. R.* 10 Allen 368; *Gaynor v. Old Colony Ry.* 100 Mass. 208; *Longmore v. Gt. West. Ry.* 19 C. B. (N. S.) 183.

Henry Russel, Chas. R. Whitman and *Wm. H. Wells* for appellee. Passengers must conform to the reasonable business arrangements of the railroad company: *Mich. Cent. R. R. v. Coleman* 28 Mich. 440; they cannot create rights of way by custom: *Bancroft v. Boston etc. R. R.* 97 Mass. 275; *Hounsell v. Smyth* 7 C. B. (N. S.) 731; one is under no obligation to keep his premises in safe condition for the visit of trespassers: Cooley on Torts, 605–6: 660 n. 2; 1 Thomp. on Neg. 298–300: 303–4; *Morgan v. Hallowell*, 57 Me. 375; *Turner v. Thomas* 71 Mo. 596; *Ill. Cent. R. R. Co. v. Carraher* 47 Ill. 333; *McGill v. Compton* 66 Ill. 327; an adult who was crossing another's land without right, except that persons, with the owner's knowledge, were in the habit of constantly crossing it, fell into a pool of water, over which a crust had so formed that it resembled dry land, and was drowned; an action was not maintainable: *Union Stock Yards etc. Co. v. Rourke* (1881) 10 Ill. App. 474; the proper test of legality is, whether the excavation be substantially adjoining the way so that one walking upon the highway might accidently fall into it: Cooley on Torts 660–1; 1 Thomp. on Neg. 361–2; *Binks v. South Yorkshire Railway Co.* 3 B. & S. 244; *Hardcastle v. South Yorkshire Railway Co.* 4 H. & N. 74; *Gramlich v. Wurst* 86 Penn. St. 74; *Howland v. Vincent* 10 Met. 373; *Vale v. Bliss* 50 Barb. 358; in *Forsyth v. Boston &*

Albany R. R. Co. 103 Mass. 510, it was held that one who voluntarily stepped off the side of the platform with the intention of going obliquely to the highway, and stepped directly into a cattle-guard and was injured, could not recover: see *Gillis v. Pa. R. R. Co.* 59 Penn. St. 129; *Duff v. Allegheny Valley R. R. Co.* 91 Penn. St. 458; *Gautret v. Egerton* L. R. 2 C. P. 371; *Lary v. Cleveland &c. R. R. Co.* 78 Ind. 323; *Severy v. Nickerson* 120 Mass. 306; *Wright v. Boston & Maine R. R.* 129 Mass. 440; *Nicholson v. Erie Ry. Co.* 41 N. Y. 525; *McAlpin v. Powell* 70 N. Y. 126; *Pierce v. Whitcomb* 48 Vt. 127; *Bennett v. R. R. Co.* 102 U. S. 577; *Sanders v. Reister* 1 Dak. Terr. 151.

Graves, C. J. On the evening of September 16th, 1879, the plaintiff's wife, accompanied by a hired girl, was returning on defendant's train from the East to her home in Chelsea, and the plaintiff went to defendant's depot to meet and escort her, as he had previously informed her he would. It was about 11 o'clock. The train was coming in as he reached the station. Being urged by a call of nature, and there being no urinal, he passed some little distance along the sidewalk, away from the place for the passengers to alight, and in order to seclude himself from observation and avoid indecent exposure, he stepped from four to eight feet on defendant's grounds, and fell into a deep hole and received injury. He subsequently sued the company in this action for the damages suffered; but the circuit judge, being of opinion that his deviation from the sidewalk placed him where the risk was all his own, and where the existence of unsafe conditions was not a fault of the company of which he could take advantage, proceeded to order a verdict for the defendant.

The ruling appears to be defended on two general grounds: *First*, that the declaration is at fault for the want of certain averments necessary to formulate a charge of the kind of grievance which the plaintiff endeavored to establish; *second*, that when the plaintiff left the sidewalk he

became a trespasser on defendant's ground, and received his injury through his own misdoing.

As to the first proposition, the accuracy of the declaration in point of strict law will not be considered. The case was not disposed of on such ground. The declaration was treated by court and counsel as a proper one for the controversy. It was fully acquiesced in, as well framed and applicable to the case, and it is too late now to raise the point in order to defeat the writ of error.

As to the second ground, there was no proof of special regulations by the company at this station in regard to the reception and exit of passengers, or the rights and privileges of their friends and attendants. The evidence tended to show that the passenger-house and privy accommodations, together with the water-tank, had been destroyed by fire, and that the existing accommodations were scant and temporary. No privy accommodations remained. That the place where the buildings had stood, and the surrounding ground, including the spot where the plaintiff received his injury, had been leveled off and graveled, and left open for use. That the company virtually offered it for the use of its patrons, and that the offer was acted on, and the ground habitually used for all the purposes which are usual at such places. That the hole or sink, in which the plaintiff fell, was so situated that those frequenting the place would be in danger of getting in it. That it was a defect not unlikely to cause injury, and was left entirely uncovered and exposed, without an obstacle to arrest approach to it or turn persons from it, and without any light to betray its existence or position.

Now, as this point was a portion of defendant's station ground, and included in the space allotted to the public, and devoted to the convenience of all persons having lawful intercourse with the station, the company was bound to keep it in a reasonably safe condition for its customers; and whether, in permitting the pitfall in question to exist, this duty of the company was not disregarded, was a question which the court was not justified in ruling against the

plaintiff. The facts were very strong that the company was at fault. If we believe the evidence, which is undisputed, the plaintiff was not a trespasser. His occasion was not only lawful, but it was obviously within the license which the company had extended to the public. It is admitted in argument that had his presence at the station been in the character of a hackman engaged in running for passengers, his stepping aside would not have been wrongful, and the duty of the company would have extended to him. We think it would be straining common sense to make such a distinction as is implied here. He was a customer within the essence of the rule just mentioned. The company was bringing his wife to him, and he went to receive and protect her. Had his errand been to receive a bale of goods, or a horse, no one would doubt that he had all the rights of a customer, and it seems little less than preposterous to contend that the right was not simply different or inferior, but absolutely wanting, because it was his wife that he went for.

We think the evidence had a tendency to establish a liability, and that the case should have been submitted to the jury.

The judgment is reversed with costs and a new trial granted.

The other Justices concurred.

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GEORGE MARX AND JAMES CAHALON, EXECUTORS FOR WILLIAM QUIN v. ANTOINE LABADIE, EXECUTOR FOR ALEXANDER H. WOODRUFF.

Replevin for impounded cattle.

Comp. L. ch. 214 permitting replevin to be brought for distrained cattle is meant to provide an action wherein the legality of a distress of stray cattle may be tested.

The sums allowed per head for cattle distrained (Comp. L. § 6768) are

penalties within the meaning of Comp. L. § 6784 which allows the owner of beasts "impounded in order to recover a penalty" to bring replevin for them.

Error to Wayne. (Jennison, J.) Oct. 17.—Oct. 24.

REPLEVIN. Defendant brings error. Reversed.

Stewart & Galloway for appellant.

Chas. R. Ford and *Sylvester Larned* for appellee.

SHERWOOD, J. This case was before this Court on error at the last April term. See 50 Mich. 361. It was then decided the case should have been dismissed in the court below. This course has not been taken. A second trial has been had with substantially the same result as in the first, and the proceedings are now before us for review.

The circuit judge has evidently misinterpreted the statute, as well as the scope of the opinion filed by Mr. Justice Cooley in this case on the former hearing. Chapter 214 of the Compiled Laws was intended to provide an action in which may be tried the legality of the distress made for either of the causes mentioned in the statute. The sums required to be paid by the owner of beasts distrained, mentioned in section 2 of said chapter, are in the nature of a penalty, and this brings the case clearly within section eighteen.*

We are unable to discover that the second trial has made any difference in the legal status of the case, and it must abide the former rulings of this Court. It is unnecessary to consider the case further.

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*(6768) SEC. 2. The person so taking up and distraining the same shall be entitled to fifty cents per head for all horses, mules, asses and neat cattle, and ten cents per head for all sheep, goats and swine so distrained by him; and the poundkeeper shall be entitled to four cents per head for all the said animals so impounded.

(6784) SEC. 18. Any person whose beasts are distrained or impounded, in order to recover any penalty or forfeiture supposed to have been incurred by their going at large, or to obtain satisfaction for any damages alleged to have been done by them, may have a writ of replevin therefor out of the proper court, and the same proceedings shall be had thereon as in other cases of replevin, except as hereinafter provided.

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

The other Justices concurred.

AUSTIN SMITH v. DELL SMITH.

Marriage annulled for duress.

A bill to annul a marriage for gross duress was sustained where the marriage had never been recognized and complainant was an unworldly youth of eighteen whom defendant had brought before a justice on a charge of bastardy and who, though protesting his innocence, had been frightened by the justice into a marriage on the spot.

Appeal from Branch. (Pealer, J.) Oct. 17.—Oct. 24.

BILL to dissolve marriage. Complainant appeals. Prayer of bill granted.

Loveridge & Barlow for complainant, as to marriage under duress, cited *Seiber v. Price* 26 Mich. 518; *Feller v. Green* 26 Mich. 70; *Frost v. Vought* 37 Mich. 65.

COOLEY, J. Bill to annul a marriage as having been brought about by fraud and duress. The marriage took place in May, 1882. Complainant was a boy eighteen years of age. He was arrested on a charge of bastardy made by the defendant, and brought before the justice who issued the warrant. The justice told him he had better marry the girl; that she had every advantage of him, and if convicted he would be sent to prison. Complainant protested that the charge against him was wholly groundless, but this seems to have made no difference with the advice of the justice, who continued to press it upon complainant until he was induced to stand up with the girl and go through

the marriage ceremony. The evidence shows that complainant had seen little of the world, and was a very likely subject for such a trap as was set for him. It was a gross case of duress, carried out when complainant was without opportunity to consult with his friends, and while he was held under an arrest the dangers of which were purposely magnified to alarm him. The marriage has never been recognized since the ceremony was performed, and complainant is entitled to have it annulled.

It is proper to remark that this suit is not brought under the statute prescribing the causes for divorce, but is brought independently of that statute for the nullity of the marriage.

The complainant should have the relief prayed.

The other Justices concurred.

William H. Sampsell v. The Chicago & Grand Trunk Railway Company.

Railroad companies—Killing cattle—Conversion of beef.

Two cows worth $40 each were killed on a railway track, and a heifer was so badly hurt that the railway company's agents killed her. The heifer was worth $25 for beef, but the company's agents refused to give up the carcass and buried it. The value was not disputed. The owner sued the company in case for negligence and added a special count for the conversion, and recovered $21.22. *Held* that the recovery must be construed as based on the special count alone and as confined to the value of the heifer as beef.

Error to Kalamazoo. (Mills, J.) Oct. 18.—Oct. 24.

Case and trover. Defendant brings error. Affirmed.

F. H. Culver and *Louis C. Stanley* for appellant.

Oscar T. Tuthill for appellee.

Graves, C. J. In September, 1880, two cows and a heif-

er, owned by the plaintiff, were run over by a train on defendant's road at Leesburg crossing in Kalamazoo county. The cows were killed and the heifer so badly injured that defendant's servants soon after killed her. The plaintiff sued the company before a justice in an action on the case and charged it with tortious negligence, and added a count in trover for an alleged unlawful conversion of the animals. The cause was appealed and the plaintiff obtained a verdict in the circuit court for $21.22. The company brought error.

The objections apply to the contention regarding the liability based on alleged negligence. There was no dispute about the value. The cows were proved to be worth $40 each and the heifer $25 for beef. The hide of one of the cows was sold by defendant's servants for $3.75, and the amount was paid to the plaintiff. The heifer was buried by defendant's agents.

The Court is entirely clear that the recovery was simply for her value as beef, and that it was founded exclusively on the count for conversion. It would be well-nigh impossible to construe the record otherwise. The showing on that theory was scarcely open to argument, and the circuit judge presented it explicitly and fairly to the jury. Such were the circumstances that, had they found a repugnant verdict, it would have suggested that they had made a misstep. There is no pretense that either by word or act the defendant's servants manifested a willingness for the plaintiff to interfere. On the contrary, the evidence is positive that they set up a claim that the defendant's rules would not permit intermeddling with animals thus killed or injured at the crossings of its road; and the record leaves no doubt that they gave out, and led the plaintiff to understand, that he would not be allowed to take the heifer away, and that the effect of their statements and conduct was to prevent him.

If the intent was different, the plaintiff ought not to lose, or the defendant gain, by means of the misleading course of its agents. The amount of the verdict is not only consist-

ent with this view, but it tends to corroborate it. The allowance seems to have been for the animal as she was after being hit, and not for the sum which would have been given for damages for her negligent destruction.

This construction of the case renders all the exceptions of any consequence perfectly harmless, and leads to an affirmance.

The judgment is therefore affirmed with costs.

The other Justices concurred.

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The People v. John Dolan.

Jurors not to be challenged after being sworn.

A peremptory challenge is not allowable in a criminal case after the jury has been sworn.

After the jury in a criminal case was sworn the prosecuting attorney was allowed a peremptory challenge, and a new juror being chosen the jury was again sworn. *Held*, that so long as the jury first sworn was not legally discharged there could not be two juries sworn to try the same case; and a conviction by the latter jury was set aside and the prisoner discharged.

Exceptions before sentence from Washtenaw. (Joslyn, J.) October 19.—October 24.

Complaint for violation of statute requiring saloons to be closed on election days. Respondent was convicted. Conviction set aside.

Cramer & Corbin for respondent appellant.

Attorney General *Jacob J. Van Riper* for the People.

Where a jury was sworn anew after a peremptory challenge had been allowed and before there had been any presentation of the case, or witnesses sworn, or evidence taken, defendant was not put in jeopardy at the time the first oath

was administered to the jury: *Stone v. State* 2 Scam. 326; *McFadden v. Com.* 23 Pa. St; *Rex v. Perkins* Holt 403; *Rex v. Kell* 1 Crawf. & Dix 151; as to the discretion of the court about discharging the jury: *People v. Olcott* 2 Johns. Cas. 301; *Case of the two Kinlochs* Foster 16; *People v. Goodwin* 18 John. 187; *Com. v. Bowden* 9 Mass. 494; *U. S. v. Haskell* 4 Wash. C. C. 409; where the jury was sworn by inadvertence before the defendant was arraigned, he was not put in jeopardy: *U. S. v. Riley* 5 Blatch. C. C. 204.

SHERWOOD, J. The respondent in this case was convicted in the Washtenaw circuit court of a violation of the statute relating to closing saloons on election days. Act 259, Pub. Acts 1881.

The consideration of the first exception taken by defendant is alone sufficient to dispose of this case, and it will be unnecessary to consider any of the other exceptions, although we think several are well taken.

After the jury was impaneled the prosecuting attorney was absent from the court-room a few moments, and during such absence the jury was duly sworn by the court to try the cause. Immediately thereafter the prosecuting attorney returned into the court-room, and insisted upon his right to still examine the jurors before they were impaneled and sworn, and the court thereupon permitted him to challenge peremptorily one of the jurors impaneled, and another was called and sworn in his place, and the jury as thus constituted was thereupon sworn to try the case. The proceedings were objected to by defendant's counsel on the ground that a jury had already been regularly impaneled and sworn in the cause, and further objected to the serving of the jury in the case as then constituted. The court overruled the objection, and defendant's counsel excepted, and the court then proceeded with the trial. This was error.

The statute clearly points out the various steps required to be taken in obtaining, impaneling and swearing a jury for the trial of a cause in a court of record. 2 Comp. L. pp. 1726-1731.

There can be no departure from these requirements without the express consent or stipulation to that effect of the parties. Only one jury can be impaneled and sworn to try a case, unless the jury first impaneled has for some reason been legally discharged.

In this case two juries were sworn to try the case, and the first had not been discharged by the court when the trial commenced before the second, which rendered the verdict complained of. We know of no practice or statute which will allow a proceeding of this kind.

The conviction should be set aside and the respondent discharged.

The other Justices concurred.

In *Reg. v. Reeve,* Lond. Leg. Obs. (Feb. 15, 1845,) p. 312, a case of felony, a juror was taken sick and had to be removed after part of the evidence for the prosecution had been received. Mr. Justice Creswell thereupon required a physician's testimony as to the juror's inability to continue on duty, and then had another man sworn in his place. The prisoners were allowed their challenge and those witnesses who had been already examined were again called and sworn and the judge read to each his own note of the witness' evidence and had him state whether it was correct. 3 West. Law Journal 95.—[Rep.

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The People v. Hugh Wolcott.

Criminal prosecution—Incompetent evidence—Want of exceptions—Extorted confessions—Excitement on the part of the accused—Arrest of witnesses in court—Collateral impeachment—Striking out testimony—Obligation to call witness named in information.

Admission of incompetent evidence is not ground for setting aside a conviction if no exception was taken.

Confessions of guilt are inadmissible when persons, apparently acting by authority, obtain them by making respondent believe that he will get off easier by making them. So *held* where the confessions were made to persons who were allowed access to the prisoner's cell after midnight.

One of several persons accused of larceny showed some excitement while

the boots of those accused were being measured, to see if they corresponded to tracks found at the scene of the crime. *Held*, that on his prosecution this fact was inadmissible as bearing upon the question of his guilt, particularly when given by persons prepossessed against him; and it was not res gestæ.

The arrest of respondent's witness, upon his leaving the stand, and in the presence of the jury, tends, in a criminal case, to pervert justice, and should not be permitted. And such an arrest may be considered in connection with other facts of similar tendency, such as the collateral impeachment of other witnesses for respondent.

Where the wife of a person accused of crime testifies in his behalf, and on cross-examination denies that she has herself been arrested for having been concerned in a crime, it is error to admit testimony to contradict her.

Striking out testimony that has been improperly allowed in a criminal case, and cautioning the jury not to be influenced by it, do not necessarily obviate its effects.

The prosecution in a criminal case cannot be required to call respondent's wife as a witness, in order that she may be cross-examined, even though her name has been indorsed on the information as one of the witnesses for the prosecution.

Exceptions before sentence from Kalamazoo. (Mills, J.) October 19.—October 24.

LARCENY. Conviction set aside.

Oscar T. Tuthill and *Howard & Roos* for respondent appellant. Confessions are not presumed to be voluntary when made by a person in jail and when his statement, after being made under pressure, was used by way of confession: *Dick v. State* 30 Miss. 593; *State v. Grant* 21 Me. 171; *Simon v. State* 5 Fla. 285; *Whaley v. State* 11 Ga. 123; *State v. Ostrander* 18 Ia. 435; *Hudson v. Commonwealth* 2 Duv. 531; *State v. Peter* 14 La. Ann. 521; *Peter v. State* 12 Miss. 31; *Commonwealth v. Curtis* 97 Mass. 574; *People v. Smith* 15 Cal. 408; *Stephen v. State* 11 Ga. 225; *Miller v. People* 39 Ill. 457; *Commonwealth v. Chabbock* 1 Mass. 144; *Wiley v. State* 3 Coldw. 362; *Newman v. State* 49 Ala. 9; 1 Greenl. Ev. §§ 219, 220.

Attorney General *Jacob J. Van Riper* for the People. Objections to the admission of evidence are not considered if no exception has been taken; *Snyder v. Willey* 33 Mich. 483; *Hill v. Robinson* 23 Mich. 26; *Manistee School Dist. v. Cook* 47 Mich. 112; voluntary confessions are admissible even though made to an officer while in custody: *People v. Rogers* 18 N. Y. 9; *Hawkins v. State* 7 Mo. 190; *Jane v. Com.* 2 Metc. (Ky.) 30; *Com. v. Mosler* 4 Penn. St. 264; *State v. Jefferson* 6 Ired. 305; *Cobb v. State* 27 Ga. 648; *State v. Kirby* 1 Strobh. 155; confessions are prima facie admissible, and it is for respondent to show that they are not so: Roscoe's Crim. Ev. 39; *Reg. v. Garner* 2 C. & K. 920.

Cooley, J. Respondent was informed against and convicted of the larceny of a quantity of wheat. The theory of the prosecution was that respondent, in concert with several other persons, stole the wheat in the night-time from a granary, took it to market and disposed of it. The evidence was in part circumstantial, and in part consisted in the respondent's confessions.

When evidence of confessions was offered, counsel for respondent insisted that it must first be shown that the confessions were not obtained by means of threats or promises of favor. The trial judge appears to have assented to the propriety of this, and considerable evidence was taken on the subject, at the conclusion of which the confessions were allowed to be proven. No exception appears to have been taken to this, and for that reason if the evidence was incompetent the respondent could not now take advantage of the error. But, as the case must go back for a new trial, it is proper to say that we think enough was shown to render the confessions altogether inadmissible. If the statement of the respondent is believed, not only were promises of favor held out to him as an inducement to confess, but he was threatened with personal violence while in confinement, and though the party accused of the threats denies them, we find sufficient in the evidence of witnesses for the people

to convince us that the respondent was treated in a manner which was altogether unwarranted. It appears without dispute that in the middle of the night, after the officer who had arrested him had retired for much-needed rest, the respondent, instead of being allowed the like privilege of rest, was visited by three persons in succession, whose mission appears to have been to obtain confessions by impressing upon the mind of the respondent that it would be better for him, or he would get off easier if he made confession. None of these persons was the officer in charge; but their admission to the cell at such an unreasonable hour carried with it an implication of the officer's consent to their mission, and respondent could scarcely fail to be impressed that their assurances were made with full authority. No reliance can be placed upon admissions of guilt so obtained; for the very obvious reason that they are not made because they are true, but because, whether true or false, the accused is led to believe it is for his interest to make them. The cases of *State v. Phelps* 11 Vt. 116: s. c. 34 Amer. Dec. 672: *State v. Walker* 34 Vt. 296; *Hector v. State* 2 Mo. 166: s. c. 22 Amer. Dec. 454; *State v. Bostick* 4 Harr. 563; *State v. Guild* 10 N. J. 163: s. c. 18 Amer. Dec. 404; *Spears v. State* 2 Ohio St. 583; *Commonwealth v. Taylor* 5 Cush. 505; *Commonwealth v. Tuckerman* 10 Gray 190; *Smith v. State* 10 Ind. 106; *Miller v. People* 39 Ill. 457; *Cain v. State* 18 Tex. 387; *Davis v. State* 2 Tex. App. 588; *Van Buren v. State* 24 Miss. 512; *Jordan v. State* 32 Miss. 382; *People v. Barric* 49 Cal. 342; *State v. York* 37 N. H. 175; *Miller v. State* 40 Ala. 54; *Porter v. State* 55 Ala. 95; *State v. Whitfield* 70 N. C. 356 and *State v. Hagan* 54 Mo. 192, may all be cited in support of the views here expressed, and the list might easily be increased very considerably. The case of *Flagg v. People* 40 Mich. 706, has sufficient resemblance to the one before us to render what is there said in point, and we refer to it for a further expression of our own views on the general subject.

The prosecution gave evidence that tracks were found and

followed from where the wheat was taken, and that the boots of the accused parties were measured to see how they corresponded to the tracks. They were allowed also, against objection, to show that while this was going on the respondent seemed to be excited. From this excitement the jury were expected to draw inferences unfavorable to the accused. No doubt a guilty party might be excited under such a charge, and so might an innocent party be; and the probability that one or the other would be most affected by the accusation would depend so much upon individual mental and physical peculiarities that the mere fact of excitement affords no basis whatever for any deduction for or against the justice of the charge. But the evidence of excitement is peculiarly objectionable because it is likely to be given —as it evidently was in this case—by persons prepossessed with a belief in the guilt of the accused, and very certain from that fact to draw unfavorable inferences, and to have what they see magnified by their imagination. The case of *Dillin v. People* 8 Mich. 357, 371, which is relied upon as sanctioning the admission of such evidence, was different. The excitement testified to in that case was not connected with any accusation, but was so nearly cotemporaneous with the crime as to be provable as part of the res gestæ.

The following transaction appears by the record to have taken place on the trial:

George Harrison, being sworn as a witness for the defense, was asked, on cross-examination, whether he had ever been arrested, and whether he did not know that there was a warrant out for him, and whether he did not know that the sheriff had such a warrant then. The record then proceeds as follows:

Counsel for Respondent. "What did you insinuate that for?"

Prosecuting Attorney. "It is true."

The witness then left the stand, and was immediately arrested by the sheriff in court, in presence of the jury, and taken to jail.

Counsel for Respondent to the Court. "I would like to know what kind of a performance this is, for the sheriff to take my witness out of the court-room."

The Court. "You excused him from the stand, and he said he had a warrant for him, and he took him on the warrant."

Counsel for Respondent. "I supposed I had a right to have him here."

The Court. "Certainly; if you want to use him you may have him; he will be produced; it is a kind of performance that should not be indulged in, and the court is not responsible for the commission of it. If you desire to use the witness he will be produced for that purpose."

And he was subsequently produced in the sheriff's custody.

It is very plain that the court perceived the wrong of this theatrical arrest, and its necessary tendency to pervert justice, and it is to be regretted that he did not promptly and decisively rebuke it. No one can feel assured that a trial in the course of which such a transaction can take place, has been fair or just; there is a suggestion about it of brow-beating and terrorism that may have affected witnesses and jurors beyond what can be shown; and it was so entirely unnecessary to any proper purpose that it cannot be overlooked. It is proper also to consider it in connection with other things occurring on the trial which had a tendency in the same direction. The wife of the respondent was a witness for him. On cross-examination an effort was made to show that on another occasion she had been concerned in the larceny of a pair of shoes. She denied the facts imputed to her, and a witness was then permitted to contradict her, and detail the particulars of the alleged offense. The bringing in of this collateral matter was plainly erroneous, as the judge soon perceived, and he did what he could to correct the mischief by striking out the testimony and giving the jury proper caution respecting it. But it is not possible wholly to obviate the effect of such damaging evidence by mere cautions: the jury, unconsciously to themselves perhaps, will be more or less affected by it. Possibly, if this were the only error in the case we

might not be disposed to grant a new trial because of it; but in view of other proceedings which have been specified, we think a new trial demanded by the plainest principles of right.

A number of assignments of error have been passed over by us as not being sufficiently plausible to require attention. One only will be mentioned. The name of respondent's wife had been endorsed on the information as a witness for the People, and counsel for respondent insisted that she should be called by the People that the defense might have opportunity for cross-examination. The court declined, correctly as we think, to order this. The relationship of the witness to the accused was sufficient reason for excusing her.

A new trial is advised.

The other Justices concurred.

JAMES VINCENT AND WIFE v. ALLENDAR S. MOORE.

Foreclosure—Lien for taxes paid.

Money paid by the holder of a mortgage to redeem the premises from a tax-sale does not constitute a lien apart from the mortgage, but is discharged when the mortgage is satisfied; and whether the amount paid is or is not included in the sum for which the mortgage is foreclosed, there can be no subsequent or separate proceeding against the mortgager to enforce its payment.

Whatever can be claimed by virtue of a mortgage must be claimed in the foreclosure proceedings; the demand cannot be split and made a basis for separate suits.

Appeal from St. Clair. (Stevens, J.) Oct. 24.—Oct. 24.

BILL to enforce lien. Complainants appeal. Affirmed.

Julian G. Dickinson for complainants. Where a mortgage needs to be kept alive to protect the mortgagee's rights, equity will keep it alive as against the mortgager: *Conn.*

Mut. L. Ins. Co. v. Bulte 45 Mich. 113 (and see brief of defendant in error in that case, and cases cited, p. 116); *Jackson v. Evans* 44 Mich. 510; *French v. DeBow* 38 Mich. 708; *Powers v. Golden Lumber Co.* 43 Mich. 468; payment of a tax to protect the mortgagee's interest in the land, is such a charge upon the land as is redemption money paid to take up a prior mortgage: 2 Dan. Ch. Pr. 1245; 2 Jones on Mortgages §§ 1137–1683.

Atkinson & Stevenson for defendant. A mortgage and all rights under it are exhausted by the foreclosure sale: *Walton v. Hollywood* 47 Mich. 385.

COOLEY, J. The bill in this case appears to be filed to enforce the payment of a sum of money which complainants paid to redeem from a tax sale certain lands belonging to defendant, and upon which complainants, at the time of redemption, held a mortgage. The redemption, it is assumed, was made for the protection of the mortgage; but complainants went on afterwards and foreclosed the mortgage under the power of sale, taking no notice of what they had paid for taxes and making no claim for the amount. The land was sold in the foreclosure proceedings, and bid in for the amount of the mortgage debt, and defendant redeemed from that sale. This suit was then instituted. We think there is no foundation for it. What complainants were compelled to pay for the protection of their mortgage did not constitute a separate and independent lien on the land; it could become a lien only in connection with and because of the mortgage, and could not exist independent of it. When therefore complainants took proceedings which resulted in a satisfaction of the mortgage, any lien which may have existed before for the taxes paid was necessarily discharged, whether the amount paid was claimed in those proceedings or not. All that complainants could claim by virtue of the mortgage they were bound to claim in those proceedings, and they could not at pleasure split up their demand and make the parts the subjects of separate suits.

The decree must be affirmed with costs.

The other Justices concurred.

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98 401

LYMAN T. KINNEY v. BOARD OF SUPERVISORS OF KENT COUNTY.

Re-arrest on application by bail—Sheriff's charges.

Comp. L. § 7877 enabling the bail in criminal cases to take out a mittimus from a justice for the re-arrest of their principal, is for private purposes, and not public, and may be served by a private person; the sheriff's charges for executing such a precept are therefore not a public charge.

A bench warrant is sufficient for the re-arrest, on public grounds, of a person on bail.

Motion for order to show cause. Submitted and denied October 30.

Godwin & Earle for the motion.

PER CURIAM. One Gale, being convicted in the Superior Court of Grand Rapids of the offense of forgery, proceeded to remove the cause to this Court by writ of error. 50 Mich. 237. He was admitted to bail to await judgment here, but after some little time the bail became anxious to surrender him, and applied to a justice of the peace under Comp. L., § 7877 for a mittimus which was granted. It was directed to the relator who is sheriff of Kent county, and he executed it by arresting Gale and committing him to jail. In the performance of this duty he incurred certain expense, and he presented a bill therefor and for mileage to the respondents who refused to allow the claim on the ground that it was not one properly chargeable against the county. The relator applies for a mandamus to require the board to audit the bill.

We are satisfied that the view taken by the supervisors is correct. The statute under which the mittimus was issued

and executed is intended merely to afford aid to sureties in making surrender of their principals. It is a regulation to subserve private purposes and protect private interests. It does not profess to be a provision to be exerted at the instance of the People, and it is not at all necessary to have the precept executed by a public officer. The service may be made by a private person. There was no occasion for the statute, for any public purpose. For that end a bench warrant would suffice.

We are satisfied that the county is not liable, and consequently deny the motion for an order.

LYMAN D. NORRIS v. THE MICHIGAN STATE INSURANCE COMPANY.

THE MICHIGAN STATE INSURANCE COMPANY v. LYMAN D. NORRIS.

Estoppel by terms of arrangement relied on.

One who claims rights in land by virtue of a confirmatory arrangement between two other persons, from one of whom his original title was derived, must recognize all the terms of that arrangement and cannot insist upon anything which his predecessor in title could not insist upon.

F. bought property upon a foreclosure which turned out to be invalid, and conveyed it with warranty. The mortgager then conveyed the equity of redemption to N. for the protection of F.'s grantees, but by an understanding between N. and F. a portion of the premises was excepted from this arrangement. *Held* that if the grantees relied on the arrangement made for their protection they must recognize its terms throughout, and could not insist on rights in the land that was thus excepted even though the original conveyance to them antedated the arrangement and exception.

Appeal from Ottawa. (Arnold, J.) June 20.—Oct. 31.

Bill and cross-bill to quiet title. The Insurance Company appeals. Affirmed.

Norris & Uhl for Norris.

Thomas J. O'Brien for the Insurance Company.

COOLEY, J. We have in these cases a suit and cross-suit to quiet the title of the parties, respectively, to land which both claim. The same title in its origin was in question in the case of *Michigan State Ins. Co. v. Soule*, decided early in the term, *ante*, p. 312, and we there held that the conveyance to Norris was for the protection of the grantees of William M. and Thomas W. Ferry, under whom the Insurance Company claimed, and that, in the case then before us, the Insurance Company was entitled to recover.

The difference between that case and this is that the land now claimed by Norris was expressly, by arrangement between him and Edward P. Ferry, representing W. M. and T. W. Ferry, exempted from the general arrangement made for the protection of the grantees of the Ferrys, and left to the disposal of Norris. As the title under which the Insurance Company claims had been acquired by grant from the Ferrys prior to this arrangement between them and Norris, it may have been inequitable to allow it to be thus cut off; but as it is not claimed by the Insurance Company that its title was perfected so as to become available otherwise than by the dealings between the Ferrys and Norris, and as it relies altogether upon equities established against Norris in favor of the Ferrys, we think it must recognize all the terms of that arrangement, and can claim nothing under it which the Ferrys could not insist upon.

It follows that the decree appealed from must be affirmed with costs.

The other Justices concurred.

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132 615

In the matter of the Estate of Solomon O. Kingsbury and Samuel P. Bennett, insolvents.
Appeal of William B. Ledyard, administrator for Moses V. Aldrich.

Trusts—Proceedings in equity on death of trustee.

Trusts belong to the jurisdiction of equity; and the remedies connected therewith are so identified with the procedure that no departure from the general practice can be had unless permitted by statute or by rule of court.

Comp. L. ch. 148 in authorizing the court of chancery to appoint some person to complete the execution of a trust when the original trustee has died, resigned or been removed, does not apply to trusts in personalty but in real estate.

A trustee can be appointed by a court of equity to take the place of one who has died without completing the execution of his trust, or has become incapable of acting. And in proper proceedings instituted in behalf of the trustee or of any one interested in the trust fund, and begun by bill of complaint, with actual or substituted notice to all parties concerned, the court will furnish such aid as from time to time may be needed in the administration of the trust. But these proceedings cannot be taken by petition.

Appeal from Kent. (Montgomery, J.) June 21.—Oct. 31.

Petition for dividends from assets in the hands of an assignee. Petitioner appeals. Dismissed.

Norris & Uhl for appellant.

Taggart & Wolcott for claimants.

Sherwood, J. This is an appeal from an order of the circuit judge of Kent county, made for final distribution of the assets of the insolvents.

In 1876 Kingsbury and Bennett were partners, doing business in the city of Grand Rapids, and the firm was insolvent. The firm had property and Kingsbury had individual property, but both the firm and the individuals composing

the same were insolvent. On the 22d of April, 1876, the firm, and Kingsbury, individually, by the same instrument, made a general common-law assignment for the benefit of all the creditors of the firm and Kingsbury, without preference, to Truman H. Lyon. Bennett had no individual property covered by the assignment. Lyon collected all the assets of the firm and nearly all belonging to Kingsbury, and died without completing the trust.

Under the order of the circuit court, Julius Houseman was, on the 6th of September, 1881, appointed in his place,* and entered upon the discharge of his trust, June 12th, 1882, and on the same day the court made an order requiring creditors of the insolvents to file proof of their respective claims with the register of said court, on or before July 17, 1882. Among the claims filed under this order was appellant's claim of $4391.94 against the firm, and also the same indebtedness to the same amount against the individual assets of Kingsbury. The indebtedness and amount thereof are not contested. The indebtedness was upon two notes made by the firm, payable to the order of S. O. Kingsbury and endorsed by him, and secured by his mortgage on real estate. The mortgage had been foreclosed and the property all sold, and the proceeds applied to the payment of the notes, and the claim now presented was for the unpaid balance.

On the 28th day of November, 1882, Houseman, as trustee, by his petition to said circuit court, showed he had executed his trust, and that he then had of assets of the firm $1120.59 and of the individual assets of Kingsbury, $1246.35 ready for distribution, and asked the order of the court approving his account, and for the direction of the court in making distribution of the assets collected.

On the hearing of this petition the appellant appeared before the court, and claimed to be entitled to a dividend from both funds on the debt he represented, which the court denied, and entered an order that appellant elect from which fund he would take his dividend; that he could not have a

*This appointment was made on the petition of Kingsbury and Bennett, reciting the facts.—REP.

dividend from both, and if he failed to make his election, the trustee, in making distribution, would take appellant's dividend from the copartnership fund. From this order appellant took his appeal to this Court, and we are asked to review the proceedings of the circuit judge in the matter and reverse the order appealed from.

On examination of the case the question of jurisdiction at once presents itself and is the first to be disposed of.

The cause was argued and submitted by counsel for the respective parties at the June term of this Court. The question, however, now suggested, was not raised on the argument or presented in the briefs of counsel on either side; and the discussion of the subject by them at the present term, on re-argument, has failed to give us any new light upon the question, or point out any provisions of law to support the proceedings had at the circuit.

The whole subject of trusts is one of equitable jurisdiction, well defined, and the general practice under the various branches has been of long standing, both in England and this country, and has become a part of the remedy itself, and no departure therefrom can be had, except authorized by statute or by the rules of court clearly making the change.

We have been referred to the provisions of chapter 148 of the Compiled Laws as furnishing sufficient authority for the proceedings taken in this case, but a careful examination of this chapter satisfies us that the provisions referred to apply to real estate, and not to personal trusts. It is conceded by counsel there is no other statute upon which the action at the circuit can be based. We are therefore left to the original jurisdiction of the court of chancery to furnish the remedy sought by the appellant in this matter.

Whenever a trust has been created, and the trustee appointed dies, or for other cause is incapable of discharging the duties of the trust, equity, when properly invoked, will appoint some suitable person to complete the execution of the trust; and upon proper proceedings taken in his behalf, or upon the part of any party interested in the trust property or fund, the court will furnish such aid as may become nec-

essary, from time to time, in the proper administration of the trust, but in any case such proceedings cannot be instituted by petition. When they are taken all parties interested must have notice of the same, either actual or substituted, and on petition the latter cannot be obtained. Proceedings of this kind can only be had by bill of complaint. All parties may then in some way be properly brought before the court, which has ample power to do whatever may be just and equitable in the premises.

The petition in this case presented for the appointment of the trustee was not the proper proceeding to be taken. It gave the court no jurisdiction to make the appointment, and all action had thereunder is without proper authority.

The appeal must be dismissed, but without costs to either party as against the other.

The other Justices concurred.

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CHRISTIAN SCHLATTERER v. HELENE NICKODEMUS, IMPLEADED WITH PETER NICKODEMUS.

Married woman—Joint note—Consideration.

A married woman is not bound by a promissory note which she signs jointly with her husband for the amount of a judgment that has been rendered against them both, if it only appears that she signed it because he asked her to, and without knowing the use to be made of it. This only makes her a surety for her husband, and does not connect her with the consideration in such a way as to reach her sole property.

In Michigan a married woman can not be held liable upon her note, without connecting her with the consideration, as she has no general power to make notes or other contracts.

Error to Saginaw. (Gage, J.) Oct. 10.—Oct. 31.

ASSUMPSIT. Plaintiff brings error. Affirmed.

Sweet & Flanders and *Wm. A. Clark* for appellant.

William S. Tennant for appellees. A married woman's note for any consideration that does not affect her separate property is void: *Ross v. Walker* 31 Mich. 120; *Johnson v. Sutherland* 39 Mich. 580; she is not liable on the covenants of her husband's deed: *Carley v. Fox* 38 Mich. 387; and see *West v. Laraway* 28 Mich. 466; *Harvey v. Galloway* 48 Mich. 533; *Benson v. Morgan* 50 Mich. 77.

COOLEY, J. The action in this case is upon a promissory note signed by Peter Nickodemus and Helene Nickodemus, who are husband and wife, payable to the order of Jacob Nickodemus, and by him endorsed to the plaintiff before maturity. No defense is made for Peter Nickodemus, but defendant Helene contends that as to her the note is void.

As a married woman in this State has no general power to make promissory notes or other contracts, the plaintiff was under the necessity of making some showing to connect the defendant Helene with the consideration. This he claims to have done by evidence that the note was given for the amount of a justice's judgment which had previously been rendered against both the makers. The evidence, however, fails to show that there was ever any agreement by anybody with defendant Helene that the note should be given in settlement of the judgment, or that she was apprised of any such purpose in making it. Her testimony is that she signed the note with her husband because he requested her to do so, but without knowing the use to be made of it; and there is no other evidence on the subject. It is plain, therefore, that it is not made to appear that the note was given by defendant Helene with any regard to her sole property, or otherwise than as surety for her husband. The necessary result is that as to her the note is not shown to be of any validity. *De Vries v. Conklin* 22 Mich. 255; *Kenton Ins. Co. v. McClellan* 43 Mich. 565.

Other questions were made in the case, but as this is conclusive we do not notice them.

The judgment must be affirmed with costs.

The other Justices concurred.

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115 149
51 628
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GEORGE MCDONALD v. CHICAGO & NORTHWESTERN RAILWAY COMPANY.

Railways—Injuries to animals on track—Sufficiency of averments in pleadings—Inadequate force of brakemen—Reckless management.

A declaration against a railway company for the killing of animals that had got upon the track through the company's neglect to keep the side fencing in repair, averred that defendant "so carelessly and negligently ran, conducted and directed the locomotive and train" that they struck and killed the animals "so being on the railroad as aforesaid by and through the neglect of the defendant to keep in repair the fences as aforesaid and through the gross neglect and reckless conduct of the servants and employees of defendant on said locomotive in running down said animals," etc. *Held* that as it was not claimed on the trial that the averment was so general that no evidence could be received in support of it, the jury was entitled to consider any evidence that was admitted without objection and tended to prove the main allegation; and if sending out a train without enough brakemen to keep it under control had any such tendency, this fact could be relied on as well as reckless conduct in the conductor or engineer at the time of the injury.

Sending out a train with so few brakemen that on some grades its speed cannot be checked, cannot be *held*, as a matter of law, to have no tendency to support an allegation of reckless management; nor can the neglect be *held* to be of one degree rather than another; if there are special circumstances tending to excuse such management, they are for a jury to weigh.

Error to Marquette. (Grant, J.) Oct. 11.—Oct. 31.

CASE. Defendant brings error. Affirmed.

A. B. Eldredge and *B. C. Cook*, for appellant, cited as similar cases, *Fisher v. Farmers' Loan & Trust Co.* 21 Wis. 73, and *Darling v. Bost. & Alb. R. R.* 121 Mass. 119.

W. P. Healy for appellee.

COOLEY J. The declaration in this case contains a single count, which is as follows:

"For that whereas, on the 1st day of June, 1882, and

from thenceforward to the commencement of this suit, the defendant was possessed and had the entire control of the Peninsula division of the Chicago & Northwestern Railway, in the city of Negaunee aforesaid, and had the right to run upon the same locomotives and trains of cars. And the plaintiff avers that during all that time it was the duty of the defendant to erect and keep in repair fences on the sides of said railroad, suitable and sufficient to prevent cattle, horses and other animals from getting on said railroad, except at crossings and other public places. Nevertheless the defendant neglected to keep said fences in repair, as by the statute in such cases made and provided it was its duty to do, nor did said defendant build or maintain ditches or other obstructions equivalent to fences for keeping off animals from said track, by means whereof two horses and one mare, the property of the plaintiff, of great value, to-wit: of the value of seven hundred dollars, on the 16th day of June, 1882, near the western limits of the city of Negaunee aforesaid, strayed and got on said railroad, but not at any crossing or other public place, and that the defendant by its servants on the day last aforesaid so carelessly and negligently ran, conducted and directed the locomotive and train of the defendant on said railroad, that the said locomotive and train struck with great force and violence and then and there killed the said two horses and mare so being on the railroad as aforesaid, by and through the neglect of the defendant to keep in repair the fences as aforesaid, and by and through the gross neglect and reckless conduct of the servants and employes of defendant on said locomotive in running down said horses and mare after they were seen by said servants and employes on said railroad track, the said horses and mare having run a distance of nearly half a mile on said track ahead of said locomotive, until stopped at a culvert or cattle-guard, and were there recklessly run down and killed, as aforesaid, to-wit: at the county aforesaid, to the damage of the plaintiff of seven hundred dollars, and therefore he brings suit," etc.

On the trial plaintiff proved that in June, 1882, he was the owner of the horses in question, and resided in Negaunee. The horses were at large, and he sent his servant, one Adams, after them. Adams found them at Ishpeming, and started with them for home. The testimony of Adams, so far as we deem it necessary to give it, is as follows:

"I was sent after these horses and found them up at Ishpeming, and was bringing them home. The horses was feel-

ing good, and I had to go the way they went after them. They went on the north side of the track, going through an open field. I should judge it was a quarter of a mile from the track, and they got wild and galloped off right towards the track, and they came down to where the fence was down and went in. I rode in and tried to head them off, but failed, and tied my horse to the first place I could tie to, and went after them on foot, and then I heard the train coming when I started on foot. The train was coming very close. There was a man going up the track, and he headed the horses off, and got the horses off all right. They went on quite a ways again and got on the track a second time, and that is the time they were killed. The fence where the horses got in was down in three places, I should judge 20 or 30 feet apart. The opening, I should judge, there was ten or twelve feet. When the man turned the horses off the track they were within the fence and it was fenced up close and the horses had no chance to get away from the track, and there was a little knoll that come right out to the edge of the track, and that is what threw them on the track the second time. The train which come along was a loaded ore train, I should judge about 30 cars. I did not see the horses struck, but I saw them go into the air. I was standing about half way between the junction of the two tracks and the culvert. This was about half past eleven in the forenoon. I was riding one horse and driving four. All the land where the three openings in the fence were was pasture. To get into the pasture I opened a gate in the corner. As soon as I opened the gate the horses galloped off. I was from fifty to seventy-five yards behind them. When they started off I went after them. I could not see the openings. It must have been nearly a quarter of a mile from the corner where I got into the pasture to the openings. I did not try to prevent their getting out of the field, because I did not know they could get out of the field. I did not know that there were any openings. They were right at the openings when I saw they could get out of the field and I was about 50 or 75 yards behind."

The defendant put in evidence tending to contradict that of Adams, and to show that he purposely drove the horses upon and along the railroad track, and that they did not escape upon it as he testified. The engineer upon the train was also sworn, and gave evidence as follows:

"When I saw the horses I called for brakes the first thing.

I was going about twelve miles an hour when I first saw them, and the train instead of letting up the speed increased a little down the hill. No matter how many brakes you would have on there, there is no two brakesmen could check a train down that hill. I had shut off steam before I saw them. The brakesman set the brakes when I whistled, and he had the brakes set before I called. I know it because we always do in order to keep the train together. I saw him set brakes after I signaled; he must have had twenty brakes set. I sounded my whistle for brakes, and blew several short blasts for alarm. I thought may be it would frighten the horses off. I did not reverse my engine, because if I did the slack would have been so quick the pins would jump out and break the train in two. The effect of that would be that there would be part of the train with no brakesmen, and they would go running into the head end. It would be dangerous, and dangerous for me to do it. I did all possible with safety. I could not have stopped the train any way between the hill and the crossing. It is the worst grade on the road. I can run from there to Goose lake, about seven miles, without steam. I had two brakemen. I think I was running about ten miles an hour when I struck the horses."

Upon this, and other evidence which tended to show that the train was going much faster than the engineer estimated, the plaintiff claimed that the jury would be warranted in finding that defendant was running its train at this point recklessly; the provision of brakemen being entirely inadequate, and insufficient for careful management, even if they exercised the utmost vigilance. The defendant on the other hand contended that the question of a sufficiency of brakemen was not in the case; there being no allegation in the declaration on the subject. Also that there was no evidence in the case tending to show recklessness on the part of the defendant or its employees contributing to the injury, and that the court should so instruct the jury.

The trial judge instructed the jury that the statute made it the duty of defendant to keep its track fenced, and if that duty was neglected and plaintiff's horses went upon the track in consequence, the defendant would be liable for the resulting injury even though Adams may have been negligent in suffering them to escape. If however Adams pur-

posely drove the horses upon the track, then the defendant is not liable, unless there was gross and reckless misconduct in the management of the train. Proof of gross and reckless mismanagement must be made by the plaintiff: it cannot be inferred. Attention was called to the speed at which the train was running, but the jury were told that the defendant had a right to run its train along this track at whatever speed it saw fit, so long as it was not dangerous. The number of brakemen upon the train might be taken into consideration, and the jury might ask themselves the question whether the evidence tended to show that two brakemen, with the assistance of the conductor—if he did assist—were sufficient.

The jury under the instructions returned a verdict for the plaintiff for the value of the horses, and the defendant has brought error.

We do not think the trial judge committed any error in submitting to the jury the evidence respecting the insufficiency of brakemen. The defendant was charged with reckless conduct in the management of its train, whereby the injury was caused; and it was not claimed on the trial that the averment was so general that no evidence could be received in support of it. If that claim had been made, possibly an amendment might have been permitted; but under the declaration as it stood, any evidence which was admitted without objection, and which tended to prove the main allegation, the jury were entitled to consider. If sending out an insufficiently manned train would have such a tendency, it was as competent to rely upon it, as upon reckless conduct in the engineer or conductor occurring at the time of the injury. The case of *Marquette etc. R. R. Co. v. Marcott* 41 Mich. 433, to which our attention is called, is quite different. There was a variance in that case between the declaration and the proofs, and the objection was distinctly taken in the trial court. In this case no variance is complained of, nor was objection made that the allegations of the declaration were wanting in particularity.

It seems to have been conceded on the part of the defense

that even though Adams drove the horses upon the track purposely, the defendant would be liable if the reckless management of the train caused the injury. Under that concession the instructions were given; and we do not see how the trial judge could have been warranted in saying to the jury that the sending out of a train with so light a force of brakemen that at one point in the line it would have been impossible for them to check in any degree the speed of the train, could have no tendency to support an allegation of reckless management. Prudent management would seem to require that careful provision be made for bringing the train under control whenever occasion should arise for it; and if injury resulted from the neglect of such provision, it cannot devolve upon the court to say, as matter of law, that the neglect was of one degree of culpability rather than of another. The attendant circumstances might have much to do with this; excuses might be made upon special facts; but these would present questions of fact, not of law. And if it was claimed that this particular grade was so exceptional that it was excusable to suffer trains to pass down it without effectual check, the jury must judge of the claim, not the court.

The errors assigned are not tenable, and the judgment must be affirmed with costs.

The other Justices concurred.

JOHN McRAE v. FRANK DAVENPORT AND CHARLES CHASE.

Chattel mortgage to be satisfied by labor.

The buyer of a portable saw-mill gave a series of notes for the unpaid portion of the purchase price and secured them by a chattel mortgage on the mill. He also made a contract with the seller whereby he was to saw for him, and the latter was to be allowed to withhold one-third of the payments due for this work until it should amount

to the unpaid balance. He did not do so however, and when so much sawing had been done that a third of the payments therefor would have completed the payment for the mill, the first note only had been actually paid. As the remaining notes were not taken up, the seller demanded the property, and as the buyer refused to give it up he took it on a writ of replevin. *Held*, that as the seller had not withheld the money to which he was entitled, and it was therefore never allowed to apply on the mortgage, it did not follow that the mortgage was extinguished from the fact, merely, that enough sawing had been done to satisfy it.

Error to Montcalm. (V. H. Smith, J.) Oct. 16.—Oct. 31.

REPLEVIN. Plaintiff brings error. Reversed.

John Atkinson, *W. S. Whittlesey* and *Isaac Marston* for appellant.

Brown & Griswold for appellees.

GRAVES, C. J. August 25, 1880, the plaintiff sold to the defendants a portable saw-mill for $2200. They paid him $1000, and for the residue gave him their eight promissory notes of $150 each, payable in one, two, three, four, five, six, seven and eight months, and a chattel mortgage on the mill to secure them. On the same day the parties made a written contract by which the defendants agreed to manufacture lumber and shingles for the plaintiff at said mill after certain named rates. By this contract the plaintiff was to keep back one-third of the sum to be allowed for sawing until the amount so retained should be $1200, and this money it was provided should be applied on the purchase price of the mill. The other two-thirds he was to pay to defendants as earned in monthly payments.

The course of affairs, as we gather from the record, was as follows: The defendants proceeded to manufacture under the contract, but finding themselves unable to continue and at the same time make the payments on the mortgage by allowing the plaintiff to withhold one-third of the earnings, they elected to call out of the fund in his hands not only

the two-thirds which it was their province to draw, but also a large part of the one-third which it was agreed should remain. The money actually earned was more than three times the amount intended for the plaintiff, so that if the one-third which was designed to be left on the mortgage had not been diverted, the mortgage would have been satisfied. But on account of the reduction of the fund which the defendants thus made, only enough was suffered to remain to discharge the first note. The others not being taken up, the plaintiff called for the mortgaged property, and the defendants refused to surrender it. The plaintiff then seized it by replevin. The defendants contended that, having manufactured three times the amount going to the plaintiff, it was a necessary consequence that the mortgage was paid and extinguished.

The circuit judge directed a verdict for the defendants, and they recovered the value of the property. We think this was error.

By the result reached the defendants get the value of the mill, and still retain the benefit of a large share of the purchase price. The bias of the evidence goes to show that the plaintiff never consented to a constructive satisfaction of his mortgage. He forebore to enforce the application authorized by the contract, and permitted the defendants to intercept it and to turn the money away from the mortgage, and put it to a foreign use of their own. By consent that part of the fund in question was actually diverted from the end originally agreed on, and was reserved and put by defendants to another purpose. It was never allowed to attach to the mortgage. Such seems to be the import of the facts.

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

The other Justices concurred.

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DAVID GAULT v. GEORGE STORMONT.

Forcible entry and detainer—Complaint—Statute of frauds—Memorandum of contract—Permission to occupy—Tenancy at will.

In forcible entry and detainer proceedings the general allegation in the complaint that defendant is in possession of the premises and unlawfully holds them against the rights of the plaintiff, is sufficient though possession was taken or held by force. Comp. L. § 6697.

A mere memorandum of a land sale in a receipt for money paid down, is not enough to establish the contract, under the statute of frauds, unless it is complete in itself and leaves nothing to rest in parol. It is not enough to state the purchase price and omit the time of payment, as there is no known usage to fix periods of payment.

A receipt for a payment on a sale of land does not of itself entitle the purchaser to take possession before he has fulfilled the terms of the sale.

Verbal permission, by the vendor of land to the purchaser, to take possession at any time, is a mere license, revocable at pleasure, so long as the terms of the sale are unfulfilled; and the vendor's return of a partial payment on failing to get his wife to unite with him in the sale revokes such a permission previously given.

Tenancy at will rests on the actual or presumed consent of the owner of the premises.

Error to Wayne. (Jennison, J.) Oct. 17.—Oct. 31.

FORCIBLE ENTRY and detainer. Complainant appeals. Reversed, and judgment entered.

Stewart & Galloway for appellant.

Geo. W. Coomer and *Atkinson & Atkinson* for appellee. Where possession has been retaken by force after being surrendered a complaint in forcible entry and detainer proceedings should allege the force: *Latimer v. Woodward* 2 Doug. (Mich.) 368; *Hoffman v. Harrington* 22 Mich. 57.

COOLEY, J. This is a proceeding for forcible entry and detainer tried before a commissioner, and appealed to and

tried in the circuit court where the defendant had judgment. From the finding by the circuit judge the following facts appear.

On April 26, 1881, the plaintiff, who resides in the county of Shiawassee, was owner of a house and two lots in Wyandotte, which were then occupied by one Sill as tenant. Sill had paid rent up to and including May 1, 1881. On the day first mentioned defendant bargained with plaintiff for the purchase of the place, and they agreed upon one thousand and fifty dollars as the price. Defendant paid seventy-five dollars down and plaintiff gave him the following receipt:

"WYANDOTTE, April 26, 1881.

Received from George Stormont the sum of seventy-five dollars as part of the principal of ten hundred and fifty dollars on sale of my house and two lots on corner of Superior and Second streets in this city.

DAVID GAULT.

Witness: C. W. THOMAS."

The understanding was that plaintiff should return home and have a deed executed by himself and wife, on receipt of which defendant would pay the balance of the purchase price. There was a further understanding that defendant might take possession of the place at any time when Sill would permit it.

When plaintiff returned home his wife refused to unite with him in the deed, and he thereupon, on the 28th or 29th of April, sent the seventy-five dollars back to Mr. Thomas to be returned to defendant. Thomas tendered it to defendant, who refused to receive it, and insisted on his right to the lots. Defendant had not at this time obtained possession, but he put a few things into the house by Sill's permission, April 30th, and obtained entire possession on May 7th. On May 9th Thomas again tendered back the seventy-five dollars, and on defendant refusing to receive it, went away leaving the money with him. At a subsequent hour of the same day Thomas tendered to defendant a deed of the lots executed by the plaintiff alone, but this defendant refused to receive. On both these occasions possession of the place was demanded and refused. On July 12th, however,

defendant allowed Thomas to take possession, but soon after retook it by force, and still retains it.

The complaint by which these proceedings were commenced alleged, in general terms, that the defendant was in possession of the premises, and that he unlawfully held the same against the rights of the plaintiff. Objection is taken to this as not applicable to a case in which possession is taken or held by force: but the statute (Comp. L. § 6697) expressly authorizes a complaint in this general form, and we think it sufficient.

On the merits the case is plainly with the plaintiff. There was no written evidence of the sale of the lots except the receipt which was given for the seventy-five dollars, and that was insufficient to answer the requirements of the statute of frauds, for though it specified the purchase price, it failed to express the time or times of payment, and there is no known and recognized custom to fix what is thus left undetermined. A memorandum, to be sufficient under the statute, must be complete in itself, and leave nothing to rest in parol. *Hall v. Soule* 11 Mich. 494; *James v. Muir* 33 Mich. 223; *McElroy v. Buck* 35 Mich. 434. Even if sufficient as a contract, the writing would not have entitled defendant to take possession before complete fulfillment on his part; *Dwight v. Cutler* 3 Mich. 566; *Hogsett v. Ellis* 17 Mich. 351; *Druse v. Wheeler* 22 Mich. 439; and any verbal permission would be a mere license, revocable at pleasure. *Druse v. Wheeler* 26 Mich. 189. And when in this case plaintiff tendered back the seventy-five dollars, after failing to obtain his wife's signature to the deed, any previous permission he may have given to take possession must be considered as recalled, and taking possession afterwards was a trespass. There is no ground for contending that defendant was a tenant at will and entitled to notice to quit before being proceeded against. A tenancy at will is only established by the actual or presumed consent of the owner; and in this case consent is conclusively disproved.

Judgment must be entered in this Court for the plaintiff on the judge's finding, with costs of all the courts.

The other Justices concurred.

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WILLIAM HARWOOD v. THALES W. HUNTOON, DRAIN COMMISSIONER OF LESLIE TOWNSHIP, AND JAMES TORREY, TOWNSHIP TREASURER.

Drain proceedings—Laches.

A bill to set aside proceedings to establish a drain, and to enjoin the collection of the drain tax, was properly dismissed where complainant had joined with others in releasing the right of way, had bid off part of the work, had neglected to inform himself as to his interests, and had delayed to file his bill until the whole tax had been collected except his share and that of one other objector.

Appeal from Ingham. (Gridley, J.) Oct. 17.—Oct. 31.

BILL to set aside drain proceedings and tax. Complainant appeals. Dismissal affirmed.

Grove H. Wolcott for complainant.

Huntington & Henderson for defendants.

GRAVES, C. J. We think no error was committed by the circuit court in dismissing the bill in this cause.

It was filed in January, 1883, to set aside proceedings establishing a drain, and to enjoin the collection of complainant's tax. The groundwork of the suit is that errors were committed in the course of the proceedings, and we think that several irregularities actually occurred; but none are pointed out or discovered which the Court can now regard as sufficient to invalidate the proceeding.

The bill rather insinuates than avers some deceptive conduct on the part of the commissioner. It does not amount to an allegation of fraud or even to a distinct charge of deception, and it would not be competent to regard it as a basis for the proof of either. But the evidence fails to fasten dishonest conduct on the commissioner.

The complainant has not been uniform in holding an adverse attitude. He joined with others in releasing the right

of way, and he subsequently bid off the work for two sections. True, he claims to have been misled or deceived, but his explanations leave an impression that if he was, it must have been because he took very little, if any, pains to get accurate information. His views towards the scheme seem to have fluctuated as his opinion varied concerning his liability to be called on, or not called on, for a share of the expense. He deferred filing the bill until the entire tax, except his own and that of another person who also filed a bill at the same time, had been collected.

The recent legislation in reference to these drain proceedings is a strong expression of policy which ought not to be wholly disregarded, and it bears on the case before us very distinctly. Pub. Act 269 of the Laws of 1881, § 40.

The decree must be affirmed with costs.

The other Justices concurred.

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ACTION OR SUIT.
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2. The Legislature has power to direct what officer shall bring any class of public actions, and what shall be done with sums collected therein. *Denver v. White River Log & Booming Co*, 472.
3. The motives of a plaintiff, in an action at law, in bringing a suit in chancery, are not pertinent to the action at law, whether the chancery suit has or has not any bearing on the rights of the parties. *Stansell v. Leavitt*, 537.
4. Objections for misjoinder of complainants are not entitled to favor in the appellate court if not called to the attention of the court below until the case was brought to hearing on the proofs. *Bell v. Todd*, 21.
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APPEAL.
1. The opinion of a trial court in chancery upon questions of fact ought not to be hastily rejected on review, if the showing itself rested upon the testimony of only one party and was not very decisive. *Griffin v. Nichols*, 575.
2. An appellate court will not feel bound to consider whether it was technically proper to implead a particular defendant, if the written stipulations of the parties and their mode of conducting the litigation have been such as to practically waive the point, and no demurrer has been interposed. *Hopkins v. Ruggles*, 475.
3. The general objection, on an appeal in proceedings to quiet title, that the sheriff's deed on foreclosure, under which complainant claims, was incompetent, irrelevant, and immaterial as evidence, will not be regarded; the specific defect must be indicated. *Mich. State Ins. Co. v. Soule*, 313.
4. The alleged fact that legislation was about to take effect permitting full examination of the parties to a divorce suit was not recognized by the Supreme Court as sufficient reason for withholding its decision until complainant in a case in which too much latitude had been taken could move for a dismissal of the bill without prejudice, so that in beginning anew advantage could be taken of the statute. *Page v. Page*, 89.
5. An allowance made by a commissioner, in proceedings for an accounting, cannot be raised by an appellate court in favor of a party not appealing. *Hopkins v. Ruggles*, 475.
6. Damages for vexatious appeals are not given unless the appeal is groundless or oppressive, or there is clear proof of intentional wrong on the part of the party taking it. *Id.*
7. Rehearing will not be granted on the mere ground that a change in the Court has taken place or is about to do so. *Peoples v. Evening News*, 11.
8. The issue made before a justice cannot be substantially changed in the circuit court on appeal. *Hatzenbuhler v. Lewis*, 585.

9. An appeal from justice's court will not be peremptorily dismissed on the ground that the affidavit for the appeal was sworn to before a notary who was an attorney in the case. The proper course would be to enter a rule nisi, instead. *Bradley v. Andrews*, 100.
10. In disposing of a bill to quiet title by setting aside an execution sale made on a transcript of a justice's judgment, the circuit court does not exercise an appellate jurisdiction as to the action in which the execution issued. *Vroman v. Thompson*, 453.
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ARREST.
1. An arrest cannot be made without a warrant on causeless suspicion, and in the absence of actual belief of guilt, based on actual facts that created probable cause. *People v. Burt*, 199.
2. The arrest of defendant in summary proceedings to recover possession is not approved where some other course is allowable and the arrest is not essential to complainant's security. *Carpenter v. Harris*, 223.
3. The arrest of respondent's witness, upon his leaving the stand, and in the presence of the jury, tends, in a criminal case, to pervert justice, and should not be permitted. And such an arrest may be considered in connection with other facts of similar tendency, such as the collateral impeachment of other witnesses for respondent. *People v. Wolcott*, 613.
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A judgment for plaintiff in an action for an assault committed by defendant while defending his possession, was reversed for an instruction permitting the jury to award to plaintiff her actual damages even though defendant did not exceed his just rights in defending; and this, too, though there were other instructions inconsistent with this. *Phillips v. Jamieson*, 153.
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ASSUMPSIT.

1. A vessel-captain can maintain assumpsit on common and special counts against his employer, the owner of the vessel, for a breach of the contract of employment by discharging him before the expiration of the period for which he was hired. *Jones v. Graham &c. Transp. Co.*, 539.
2. Assumpsit for the amount of a promised loan will not lie after the expiration of the time within which it was to have been paid back. The only right of action, if any, is for damages for not making the loan as agreed. *Stanley v. Nye*, 232.
3. Certain building contractors agreed that when they got the payment on the contract they would pay a certain sum to a specified person on an order from the painter. *Held* that an action for this money could not be brought until after the order had been presented or some demand made; and that if the agreement implied an obligation on defendants' part to take active measures to collect the money, the failure to do so must be averred. *Smith v. Ross*, 116.
4. N agreed to deliver lumber to W & D. Both parties to this agreement afterward agreed with B that payment for the lumber should be made to B. *Held*, that on N's fulfilment of the agreement for delivery, B could maintain assumpsit under the later agreement, for an unpaid balance of the payment due on delivery. *Beebe v. Warner*, 134.
5. Assumpsit as for money overcharged will not lie where the contract on which it was paid was fully performed according to its terms, but was practically broken by the arbitrary exercise of an option permitted therein, to the disadvantage of the plaintiff; the remedy should be in an action for damages. *Blitz v. Union Steamboat Co.*, 558.
6. Assumpsit to recover back the amount paid for a shipping receipt, lies against the persons who originally issued the receipt, if the merchandise therein described was not actually shipped as agreed in the receipt, and the defendants have by words or acts, authorized, consented to, connived at or sanctioned the act of the person selling the receipt in thereby obtaining from plaintiff money

which he has turned over to defendants in payment of a debt due them from himself. *Tregent v. Maybee*, 191.
7. A woman brought assumpsit on a claim assigned to her by her husband for the value of wheat sown by him, but harvested by defendant. *Held*, error to exclude any circumstances tending to show the relation sustained by the husband or the parties to the land on which the crop was grown; as, in this case, that the premises were sold under a mortgage, and the sale was confirmed and a deed given in the spring before the crop was harvested. *Colwell v. Adams*, 491.
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BAIL AND RECOGNIZANCE.
1. Comp. L. § 7877 enabling the bail in criminal cases to take out a mittimus from a justice for the re-arrest of their principal, is for private purposes, and not public, and may be served by a private person; the sheriff's charges for executing such a precept are therefore not a public charge. *Kinney v. Kent Supervisors*, 620.
2. A bench warrant is sufficient for the re-arrest, on public grounds, of a person on bail. *Id.*

BANKRUPTCY.
The moral obligation to pay a debt is a sufficient consideration for a new promise to pay it, even though any legal liability therefor has been suspended by discharge in bankruptcy. *Edwards v. Nelson*, 121.

BANKS AND BANKING.
1. Certificates of deposit are negotiable instruments; and where the owner of such a certificate has indorsed it, and, through his

want of ordinary business caution, it has passed beyond his control, *it seems* that one who within a reasonable time purchases it in good faith and for value is entitled to protection. But the question of good faith is for the jury, if there is any evidence to impeach it. *Birch v. Fisher*, 36.

2. *It seems* that the lapse of thirty-one days from the date of a certificate of deposit is not enough to raise the presumption that it is dishonored paper, even though such paper be due at its date. *Id.*

Bar—of writ of error or certiorari: ERROR, 1,—p. 171.
Bastardy—youth accused of, compelled to marry: HUSBAND, &c., 8, —p. 607.
Bench Warrant—for re-arrest of principal: BAIL, &c., 2,—p. 620.
Bids—for work in digging drain: DRAINS, &c., 2,—p. 639.
Bill—to annul marriage for duress: HUSBAND, &c., 8,—p. 657.
to cancel securities as obtained by DURESS, 1,—p. 432.
to enjoin collection of drain tax: DRAINS, &c., 2,—p. 639.
to obtain release of security: EQUITY, 11,—p. 230.
to quiet title: EQUITY, 7,—p. 240.
to quiet title; evidence objected to: APPEAL, 3,—p. 313.
to quiet title by vacating execution sale: APPEAL, 10,—p. 453.
for rescission of deed: EQUITY, 3; VENDOR, &c., 7,—p. 167.
to set aside cloud; decree declaring title: EQUITY, 10,—p. 453.
to set aside drain proceedings: DRAINS, &c., 2,—p. 639.
to set aside settlement between townships: MUN. CORP., 6; EQUITY, 2,—p. 446.
to set aside tax sale: TAXES, 10, 12,—p. 336.
in aid of execution: EQUITY, 5, 6,—p. 148; COSTS, 1,—p. 149.
for aid in execution of trusts: TRUSTS, 3,—p. 623.
in legislation; want of enacting clause: CONST. LAW, 1,—p. 129.
of particulars; what it cannot cover: PLEADING, 7,—p. 74.
of particulars; exclusion of: PLEADING, 8,—p. 8.

BILLS AND NOTES.

1. In Michigan a married woman cannot be held liable upon her note, without connecting her with the consideration, as she has no general power to make notes or other contracts. *Schlatterer v. Nickodemus*, 626.
2. A married woman is not bound by a promissory note which she signs jointly with her husband for the amount of a judgment that has been rendered against them both, if it only appears that she signed it because he asked her to, and without knowing the use to be made of it. This only makes her a surety for her husband, and does not connect her with the consideration in such a way as to reach her sole property. *Id.*
3. The mutual rights of parties to negotiable paper are determined, in common-law actions, by their respective positions on the paper at the time it is negotiated and becomes the property of a bona fide holder. *Greusel v. Hubbard*, 95.
4. The payee of a note cannot sue, as a joint maker, one who has provisionally put his name on the back of it if he himself has afterwards indorsed the note and put his own name before the other. *Id.*
5. One who has been tricked into signing a promissory note will not be liable upon it, unless his own negligence was so gross as to preclude his defending against a bona fide purchaser of the paper. *Soper v. Peck*, 563.
6. One who in good faith takes a note signed by a person of whose incompetency to do business he has no notice, and in a transaction which is not likely to call his attention to it, can recover on the note. *Shoulters v. Allen*, 529.
7. A note that is given to the payee's agent and is turned over to the

payee before it is due and applied by him on an indebtedness of the maker, will sustain a recovery by the payee if he has no knowledge of any arrangement between the maker and the agent whereby the latter was to keep the note in his own hands and use it in his own business. *McCormick Harvesting Machine Co. v. McKee*, 427.

8. A party to a contract has no right to bring suit upon a note placed by the other party in the hands of a third person as security, merely, for his fulfilment of the contract, so long as it is not agreed that the note shall be liquidated damages for non-performance, and the damages therefor have not been determined in a suit on the contract. *Rumney v. Coville*, 186.
9. An amendment to a declaration on a promissory note so as to show the full name of defendant instead of the initial by which he had signed the note, should be allowed at any time if there is no question of identity. *Webber v. Bolte*, 113.
10. In an action on a note the signature thereto proves itself if delivery only is denied by the affidavit filed with the plea. *McCormick Harvesting Machine Co. v. McKee*, 426.
11. Where the execution of a promissory note is denied on oath, the general issue in an action thereon will admit evidence tending to show that defendant made no such contract as was counted upon, and that he was fraudulently got to sign the note when he thought he was signing something else. *Soper v. Peck*, 563.
12. Where the defense to a promissory note is that it was obtained by fraud, and that the consideration was misrepresented, it is within the discretion of the trial judge to allow considerable latitude in receiving testimony. *Gutsch v. Pittsley*, 566.
13. The agent of a manufacturing corporation was one of a firm organized for selling its goods. The firm owed money and the agent furnished it from funds of the corporation, taking as security the note of one of the partners on which the maker's father was surety. The note was payable to the corporation and was afterwards taken up and another given. In a suit on the last note defendants claimed that it had never been intended that it should be delivered to the payee. *Held* proper to refuse to allow defendants to show that certain members of the firm had, with others, projected a partnership for selling the plaintiff's goods some time before the note was given; or to show what funds were in the firm's hands and that the agent had charge of and used them; or what the surety's intention was, when he signed the first note, as to its delivery; or what property belonging to the firm the corporation had taken possession of on finding that their agent was short in his accounts. *McCormick Harvesting Machine Co. v. McKee*, 426.
14. In an action on a promissory note in which the interest clause had been altered by erasing the words "after maturity" some time after it was given, the question was whether the alteration was made with the maker's consent. The payee's wife testified to being in and out of the room while the maker and the payee were talking about some notes which the former had given to the latter, and being asked what was said about their bearing interest, answered: "They were all to draw interest but the ninety-day note" [which was not the one in suit.] She was farther asked, "What was said by them about your husband's erasing the word 'maturity,' if anything?" and she answered, "Well, he said that was to be done. He says 'The notes were to draw interest, wasn't they,' and he says, 'Yes, all but the ninety-day note.' He said that was all right." On cross-examination she said she did not remember whether she saw any of the notes or saw them signed, or when they were signed or whether the conversation was before or after they were signed. *Held* that

the evidence did not warrant submitting the case to the jury on the theory that the maker told the payee to alter the note, or that he approved of his doing so, after the fact. *Nelson v. Dutton*, 416.
action by partner on note made by firm: PARTNERSHIP 2, 3,—p. 480.
defence as to necessity of transaction: VENDOR, &c. 2,—p. 529.
inference of identity does not support judgment: IDENTITY,—p. 417
sale of worthless note as genuine: EVIDENCE 2,—p. 189.
Board—of health, common council as: MUN. CORP. 2, 3,—p. 526.
of supervisors: See Supervisors.
of township officers; official action: MUN. CORP. 5, 6; EQUITY 2,—p. 446.
Bona fide—claims saved in sale on execution: EQUITY 6,—p. 148.
holders of indorsed paper: BILLS, &c. 3,—p. 95.
purchaser of note: BILLS, &c. 5,—p. 563.
Bond—of guardian: GUARDIAN, &c. 3, 4,—p. 223.
property transferred to surety on bond: GARNISHMENT 2,—p. 140.
BOUNDARY.
1. Equity cannot take cognizance of a dispute as to the true location of the boundary between the premises of parties, if the settlement of such dispute leaves no question as to the title to the property on either side; the remedy is at law. *Kilgannon v. Jenkinson*, 240.
2. The comparative means of the parties to a boundary dispute are immaterial to the question whether the case should fall within the jurisdiction of law or of equity. *Id.*
by mutual recognition: EJECTMENT 1,—p. 98.
of town lots, not to be changed by re-survey: SURVEYS, &c.,—p. 580.
judgment as to, as res judicata: JUDGMENT 4,—p. 153.
Breach—of condition in lease: LANDLORD, &c. 5,—p. 482.
of condition, in avoidance of policy: INSURANCE 9,—p. 469.
of condition, forfeiture for: INSURANCE 10,—p. 587.
of contract of employment: ASSUMPSIT 1,—p. 539.
of contract for transportation: CARRIERS 1, 2,—p. 558.
of covenant, by subsequent contract: COVENANT,—p. 92.
of warranty, by lien of judgment: JUDGMENT 5,—p. 298.
of warranty; notice to agent: PRINCIPAL AND AGENT 2,—p. 298.
Bridges—action for injuries to: WAYS 3,—p. 472.
Burden of proof—of amount due on mortgage: MORTGAGE 17,—p. 435.
of boom company's authority to operate: WATERS, &c. 2,—p. 378.
of consideration of mortgage: MORTGAGE 4,—p. 324.
of filing of sheriff's deed: MORTGAGE 19,—p. 335.
of regularity of sale on EXECUTION 10,—p. 453
Burglary—evidence of, in trial for murder: CRIM. LAW 8,—p. 200.

Cancellation—of insurance policy: INSURANCE 11,—p. 243.
of lien: EXECUTION 7,—p. 453.
of securities, as obtained by DURESS 1,—p. 432.
Capacity—of married women to contract: HUSBAND, &c. 1, 2,—p. 160.
CARRIERS.
1. Where a contract for the transportation of goods gives the carrier an option between modes of transportation, the option must be exercised with a view to the interest of the opposite party; and it is a breach of the contract to exercise it to his disadvantage unless it is done in good faith and under circumstances which seem to require it. *Blitz v. Union Steamboat Co.*, 558.
2. In an action for damages on a contract for the carriage of goods by steamer, the usual course of business in such transportation must be considered.—*Id.*
3. Railway passengers are presumed to know the every-day incidents of railway travel, and it cannot be expected that they will be treated, or

put under restraint, as if they were children. *Mitchell v. Chicago & Grand Trunk R'y Co.*, 236.
4. A train approaching a station where there was a crossing of railway tracks, stopped, as required by law, several hundred feet from the crossing before proceeding to cross the track. The name of the station had just been called, and a woman passenger hurried to the door to alight. The train was not at its proper point for landing passengers, and as she climbed down it started to go on to the depot platform, and she fell and broke her ankle. The conductor and brakemen did not know she had left her place in the car, and it did not appear that anything was done that was out of the usual course. The accident happened by daylight. *Held*, that the injury to the passenger was purely accidental, unless the passenger was herself negligent, and that the company was not liable.—*Id.*
false shipping receipt: ASSUMPSIT 6,—p. 191.
Cause—of action: for accidental injury: Personal injuries,—p. 236.
on insurance policy: INSURANCE 6,—p. 245.
not affected by cancellation: INSURANCE 11,—p. 243.
when it arises on a loan: LIMITATION OF ACTIONS 1,—p. 125.
locality determines forum: CORPORATIONS 1,—p. 5.
objections grounded on failure to state: PLEADING 3,—p. 463.
statement in action for treble damages: DAMAGES 6,—p. 263.
failure of: COSTS 2,—p. 116.
Certainty—in entries in docket of JUSTICE, &c. 1,—p. 452.
Certificate—to assessment roll: TAXES 4, 5, 8, 12,—p. 335-6.
of deposit: BANKS, &c. 1, 2,—p. 36.
of sale on execution, defects in: EXECUTION 11,—p. 453.
CERTIORARI.
1. The writ of certiorari is appropriate to accompany the writ of error in criminal cases, if issued in time. *People v. Van Wagner* 171.
2. Certiorari should not be resorted to for the review of statutory proceedings to recover possession unless there is some fair ground for it on which the whole case can be disposed of justly and finally; but if a full review is desired an appeal should be taken. *Wilkinson v. Williams*, 155.
3. Where the action of a judge in investigating the character of a plea of guilty, is reviewed, his return should fully state the details of his inquiry. *People v. Lepper*, 197.
4. Where a justice's judgment in a case tried without a jury was reversed on certiorari and there were no findings of law, the only assignments of error that were considered were general, viz.: that the court had erred in sustaining the writ of certiorari and in giving judgment against the surety for costs. *Boatz v. Berg*, 8.
Challenge—of jurors, peremptory: JURY 3,—p. 71.
not allowed after swearing jury: JURY 1; CRIM. LAW 12,—p. 610.
Change—of judges no ground for rehearing: APPEAL, &c. 7,—p. 11.
of venue by removal of goods: SALE 3,—p. 298.
Charge—to jury: See Instructions to Jury.
Chattels—mortgage of; replevin: MORTGAGE 12,—p. 633; WITNESS 1,—p. 373.
Child—custody of: HABEAS CORPUS 3,—p. 599.
Church—See Religious Societies.
Circuit Court Commissioner—circuit judge acting as commissioner in habeas corpus proceedings: COURTS 1,—p. 174.
examination of parties to divorce: WITNESS 2, 3,—p. 88.
his fees for taking testimony: OFFICE, &c. 2,—p. 125.
cannot issue writ of ne exeat: NE EXEAT 2,—p. 217.
proceedings to recover possession: Real Actions 2,—p. 155; id. 4,—p. 157.

question of title in proceedings for possession: Real Actions 5,—p. 483.
Claim—assignment of, by firm to partner: PARTNERSHIP 4,—p. 585.
for improvements: EJECTMENT 3,—p. 33.
of ownership concluded by verdict: TROVER, &c. 4,—p. 118.
of title under foreclosure sale: MORTGAGE 10,—p. 33.
Clerk—of circuit court: COUNTIES 3,—p. 503; SHERIFF 1,—p. 504.
Cloud on title—dismissal of bill to set aside: EQUITY 10,—p. 453.
Collection—of drain taxes, warrant for: DRAINS, &c. 1,—p. 557.
of drain tax, bill to enjoin: DRAINS, &c. 2,—p. 639.
of judgment by service of EXECUTION 3,—p. 353.
of judgment restrained: JUDGMENT 6,—p. 354.
of money; averment of neglect: ASSUMPSIT 3,—p. 116.
commission for, in joint business: EQUITY 4,—p. 475.
necessary to entitle sheriff to poundage: SHERIFF 3,—p. 353.
Comity—to foreign corporation: CORPORATIONS 3,—p. 145.
Commissioner—allowance by, in proceedings for accounting: APPEAL 5,—p. 475.
of highway, sues for injury to way: WAYS 3,—p. 472.
Commissions—for collections made in joint business: EQUITY 4,—p. 475.
Common—counts: declaration on, for price: PARTNERSHIP 4,—p. 585.
Compensation—to public nurses: MUNICIPAL CORPORATIONS 3,—p. 526.
for services to PROSECUTING ATTORNEY 4, 6,—p. 524.
Competency—to do business: BILLS, &c. 6; CONTRACT 2; VENDOR, &c. 2,—p. 529.
of evidence, sheriff's deed: APPEAL 3,—p. 313.
Complaint—before a justice, examination upon: CRIM. LAW 2,—p. 422.
in proceedings for FORCIBLE ENTRY AND DETAINER,—p. 636.
in summary proceedings for possession: Real Actions 6,—p. 223.
of exclusion of evidence: ERROR 8,—p. 427.
Compromise—between parties to a contract: VENDOR, &c. 6,—p. 497.
foreclosure, decree for amount offered: SETTLEMENT 8,—p. 436.
Conclusions—of jury as to reasonableness of lien: LIEN 7,—p. 378.
as to weight of testimony: ERROR 7,—p. 11.
Condition—breach of: forfeiture for: INSURANCE 10,—p. 587.
in avoidance of policy: INSURANCE 9,—p. 469.
in lease: LANDLORD, &c. 5,—p. 482.
Conduct—of accused, not res gestæ: EVIDENCE 6,—p. 613.
Confessions—when inadmissible: EVIDENCE 9,—p. 612.
Consideration—of mortgage, presumption as to: MORTGAGE 3,—p. 324.
of mortgage, proof as to: MORTGAGE 4,—p. 324.
of note, misrepresented: BILLS, &c. 12,—p. 566.
of married woman's note: BILLS, &c. 1, 2,—p. 626.
for new promise to pay debt: Bankruptcy,—p. 121.
for promise to discharge surety: ESTOPPEL 3,—p. 312.
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money paid without: DAMAGES 2,—p. 189.
money paid without consid., treated as SET-OFF,—p. 86.
payment in consid. of deed from mortgager: MORTGAGE 9,—p. 532.
sufficiency bears on grantor's intent: FRAUD &c. 4,—p. 140.
Conspiracy—to defraud: FRAUDS, STATUTE OF 3,—p. 41.
Constable—official character of: OFFICE, &c. 3,—p. 199.
acting outside of his county: CRIM. LAW 8,—p. 200.

CONSTITUTIONAL LAW.

1. A statute is not invalidated by the fact that the bill, when introduced, had no enacting clause. *Powell v. Jackson*, 129.
2. Amendments made to a bill after the expiration of the period limited by the Constitution for the introduction of new bills, are not invalid for that reason if they indicate no purpose to violate the

Constitution and do not exceed the proper limits of legislative discretion. *Id.*

3. "An act to amend the charter of the city of Jackson," changed the office of city attorney from one of appointment to one of election. *Held* that its title sufficiently complied with the constitutional requirement that the purpose of every act shall be expressed in its title. *Id.*

4. The Constitution provides that "Each apportionment and the division into representative districts by any board of supervisors shall remain unaltered until the return of another enumeration." *Held*, that the enumeration referred to is an enumeration of the population by either State or federal authority. *Bay v. Bullock*, 545.

counties, reduction of: COUNTIES 1,—p. 544.
place of holding court: COUNTIES 4,—p. 504.
removal of county seat: COUNTIES 3,—p. 503.
retrospective dispensing acts: TAXES 4, 5,—p. 336.
title of act to express its purpose: CONST. LAW 3,—p. 129.

Construction—of agreement to share expenses: CONTRACT 8,—p. 475.
of clause appointing guardians: GUARDIAN, &c. 4,—p. 223.
of contracts according to circumstances: CONTRACT 4,—p. 105.
of contracts: CONTRACT 3,—p. 558; ID. 5, 7,—p. 62.
of contract of sale: CONTRACT 9,—p. 76.
of parol contracts: CONTRACT 6,—p. 475.
of docket entry: JUSTICE, &c. 1,—p. 452.
of finding, in connection with pleadings: TRIAL 10,—p. 121.
of judge's remarks to prejudice of party: TRIAL 11, 13,—p. 178.
of offer to make a contract: CONTRACT 10,—p. 79.
of statutes: STATUTES 1,—p. 180.
of terms of payment: SETTLEMENT 4, 5,—p. 291.
of term "family" in policy of INSURANCE 1,—p. 494.
of request to resign: MASTER, &c. 2,—p. 539.

Contempt—mandamus enforceable by process for contempt: MANDAMUS 2,—p. 145.

Contingent—claims, subject to GARNISHMENT 1,—p. 113.

CONTINUANCE AND ADJOURNMENT.

Defendant's refusal to submit to cross-examination upon his affidavit for continuance in justice's court is sufficient reason for denying the continuance. *Boatz v. Berg*, 9.

on amendment of declaration: PLEADING 3,—p. 463.

Contradiction—by parol, of written agreements: EVIDENCE 4,—p. 92.

CONTRACT.

1. Adults who contract with infants do so at their own risk, as they are bound by their contracts while infants are not. *Widrig v. Taggart*, 103.

2. A showing of business incapacity which consists of evidence of inability to learn to read beyond the alphabet, or to count more than twenty, and of a preference for large coins over small ones, regardless of value, is largely counterbalanced by proof of industrious habits, moral living, exercise of the franchise, and the occasional transaction of business in buying, selling and giving security. *Shoulters v. Allen*, 529.

3. A contract must be construed as reasonably as its terms will allow; and where it permits an option, it is not to be supposed that the option can be arbitrarily exercised to the disadvantage of the other party. *Blitz v. Union Steamboat Co.*, 558.

4. Contracts must be construed in the light of their circumstances and by taking, as nearly as possible, the position occupied by the parties when they used the words, in which the contracts are expressed, to evidence their intent. *Ferris v. Wilcox*, 105.

5. A contract should be construed in the light of what it expresses in

terms, and what is necessarily implied therefrom. *Goodrich v. Hubbard*, 62.

6. Courts will incline to charitable views in construing parol contracts and ascertaining therefrom the motives and intention of the parties, where the proofs rest upon imperfect recollection, and there is opportunity for misunderstanding. *Hopkins v. Ruggles*, 475.
A logging contract, after providing that the logger should "have and deliver all of said logs this winter next ensuing, if weather will permit," stipulated that, "If weather unfavorable, and all the logs cannot be hauled the first winter, this contract shall be continued to another winter, on same terms and conditions." *Held*, where such preparations had been made as would be proper for an average winter, and the logger had made all reasonable efforts to do the hauling, but there was so little snow and frost that it could not be done on sleds, in the usual way, that the logger was entitled to postpone what remained undone to the next winter, and the other party to the contract had no right to terminate the contract by taking possession of the logs and removing them. *Goodrich v. Hubbard*, 62.

8. An agreement between the parties to a logging contract to share the expenses equally, covers not only the cost of property purchased for camp purposes, but also necessary payments of interest on such purchases. *Hopkins v. Ruggles*, 475.

9. An order upon a dealer contained a printed agreement binding the buyer to pay a certain sum in notes. After it was given, but before the merchandise was delivered, the buyer requested, and the dealer allowed, the addition of these words: "It is understood that no notes are to be given on this sale, but a simple Michigan mortgage." The former clause was left standing. *Held*, that the latter destroyed its force, and left the dealer to rely on the mortgage security alone, and that the buyer was not personally liable. *Russell & Co. v. Bondie*, 76.

10. A written instrument, dated and signed, and in these terms: "We agree to sell one million feet of Norway in town 28 N. 8 E., on our lands, * * and will make a contract with him, giving him the right to go on said lands and cut and remove said timber on payment for the same. The price of said Norway to be $1.50 per M. board measure," etc., is not a contract but merely an offer to make one on stated terms, and will not of itself support an action. *McDonald v. Bewick*, 79.

11. Where one of the parties to a contract sues the other for preventing its performance, a prior contract, made by the defendant with a third person, can have no bearing unless it appears from the contract in suit that it was made with reference to the prior contract. *Goodrich v. Hubbard*, 62.

for employment of vessel master: COURTS 3,—p. 539.
of employment, action on: ASSUMPSIT 1,—p. 539.
of extension, discharges surety: PRINCIPAL AND SURETY 2,—p. 312.
of insurance, ratification of: INSURANCE 6,—p. 245.
for interest, when to be written: INTEREST 3,—p. 416.
for sale of personalty: FRAUDS, STAT. OF 5,—p. 536.
for sale of lands: FRAUDS, STATUTE OF 1,—p. 636.
of sale, receipt without objection: VENDOR &c. 4,—p. 590.
of sale; judgment of return: REPLEVIN 3,—p. 412.
for transportation of goods: CARRIERS 1, 2,—p. 558.
for transportation, breach of: CARRIERS 1, 2,—p. 558.
to pay joint debts; damages for breach: DAMAGES 1,—p. 132.
affecting submarine rights: WATERS, &c. 5,—p. 277.
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of married woman: HUSBAND, &c. 1, 2; ESTOPPEL 4,—p. 160.
power of married woman to make: BILLS, &c. 1,—p. 626.
parties to; enforcement of LIEN 2,—p. 573.
production of papers constituting: TRIAL 4,—p. 298.
in writing not disputed by parol: EVIDENCE 4,—p. 92.
rights not affected by agent's talk: EVIDENCE 8,—p. 568.
suit on note deposited as security: BILLS, &c. 8,—p. 186.
liability for contract price: VENDOR, &c., 3,—p. 590.
liability of principal as garnishee: ESTOPPEL 4,—p. 160.
prevention of performance: DAMAGES 3,—p. 62.
moneys depending on performance: GARNISHMENT 1,—p. 113.
failure of consideration: SET-OFF—p. 86.
effect of, on prior covenant: COVENANT,—p. 92.
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tender of performance in extinguishment of lien: LIEN 8,—p. 1.
refusal to deliver possession: Real Actions 2,—p. 155.
Contributory Negligence—in railway injuries: NEGLIGENCE 5; CARRIERS 4,—p. 236.
of injured brakeman: MASTER, &c. 5,—p. 253.
Conversation—of agent as to past transactions: EVIDENCE 8,—p. 568.
between prisoners and under sheriff: CRIM. LAW 4,—p. 196.
Conversion—proof of demand before REPLEVIN 1,—p. 411.
See TROVER 2; DAMAGES 9,—p. 320.
Conviction—set aside for incompetent evidence: CRIM. LAW 15,—p. 612; or for unlawful challenge: CRIM. LAW 12,—p. 610.
CORPORATIONS.
1. Foreign corporations may sue each other in Michigan if both are doing business within the State and the cause of action accrued there. Act 256 of 1881. *Emerson &c. v. McCormick Harvesting Co.*, 5.
2. Where trover is brought against a foreign corporation and personal service of the writ is made upon the proper officer, the omission to notify the home office of the suit, as provided by law, is a mere irregularity and not a jurisdictional defect. *Id.*
3. Comity to a foreign corporation cannot extend to the point of granting it privileges which its charter does not permit it to exercise; and in applying for privileges it must show that it has power to exercise them. *Diamond Match Co. v. Powers*, 145.
notice of suit against foreign corporation: WRIT, &c.,—p. 5.
taxation of street railways. TAXES 2,—p. 180.
COSTS.
1. Where a bill in aid of execution was dismissed as to all the defendants while it should have been sustained as against some, costs were allowed against the latter on appeal; but neither complainant nor the other defendants were allowed costs of the Supreme Court as against one another. *Beam v. Bennett*, 149.
2. Costs of both courts were allowed on reversal where recovery was had on a declaration which made out no cause of action. *Smith v. Ross*, 116.
3. Costs were withheld upon the affirmance of a judgment reversing the action of a justice in proceeding ex parte in a case in which he would have had a right to proceed if he had not previously erased his entry of defendant's appearance. *King v. McKenzie*, 462.
4. Costs were withheld on affirmance of a decree of divorce in favor of the wife, where the record was much too large and had been paid for by defendant. *Page v. Page*, 89.
denied in consent decree for SPECIFIC PERFORMANCE,—p. 467.
surety for, included in judgment: JUDGMENT 2,—p. 8.
judgment for, against surety: CERTIORARI 4,—p. 8.

COUNTIES.

1. The constitutional prohibition against reducing any county to less than sixteen townships is meant to prevent its unreasonable reduction in size, and not to preclude the division of surveyed townships, if convenience requires, in organizing new counties. It was not violated where a county was left with fifteen whole and two half townships. *Bay County v. Bullock*, 544.
2. The division of the State into representative districts is not necessarily altered by an act so setting off a new county from an old one as to carve the new county out of one of the districts in the old one. *Id.*
3. The Constitution of Michigan forbids the removal of a county seat without a popular vote. *Held*, that a statute authorizing terms of the circuit court for Ingham county to be held at Lansing, the State capital, instead of at Mason, the county seat, both places being within the county, is not unconstitutional on the ground that it takes the clerk of the circuit court away from the county seat, where his office is established, since the same Constitution made the clerk of the circuit court the clerk also of the Supreme Court, which sits at the capital, and the circuit court itself has been given exceptional statutory powers as a forum for litigation to which the State is a party. *Whallon v. Ingham Circuit Judge*, 503.
4. There is nothing in the history of county institutions in England, nor in the course of Michigan legislation since the Ordinance of 1787, to establish so uniform a system with regard to the place of holding the circuit court for the county that holding it elsewhere than at the county seat should be in itself, and apart from any constitutional provision, a violation of constitutional principles. *Id.*

circuit judge acting beyond jurisdiction: COURTS 1,—p. 174.
constable acting outside of county: OFFICE &c. 3,—p. 199; CRIM. LAW 8,—p. 200.
officers of circuit courts for counties: SHERIFF 1,—p. 504
Counts—several; evidence supporting one: TRIAL 6,—p. 41.
sufficiency of, on review: ERROR 10,—p. 263.
County Seat—holding court elsewhere: COUNTIES 3, 4,—pp. 503-4.

COURTS.

1. A circuit judge is not an appellate tribunal for proceedings taken before a justice of the peace in a county not belonging to his circuit and where he is not acting; and if in such proceedings he exercises authority by writ of habeas corpus, he has only the powers of a circuit court commissioner and he cannot review the judgment. *Hamilton's Case*, 174.
2. The Legislature, in empowering circuit judges to fix the time for holding terms of court, does not divest itself of power to change the times so fixed. *Whallon v. Ingham Circ. Judge*, 503.
3. State courts have jurisdiction at common law over actions on contracts for the employment by a vessel-owner of a captain or master for his vessel. *Jones v. Graham &c. Transp. Co.*, 539.
4. The Detroit charter of 1883 repeals all conflicting acts, and gives the Recorder's Court exclusive jurisdiction of all prosecutions for offences arising under it, or under any ordinance. All cases theretofore triable in the Central Station police court arose under the charter; and all breaches of the peace had to be defined by ordinance. *Held*, that in the absence of any provision for the continuance of the Central Station court, it was abolished. *Roberts' Case*, 548.

place of holding: COUNTIES 4,—p. 504.
probate; authority to sell devised lands: EXECUTORS, &c. 5,—p. 360.
jurisdiction of probate court to appoint guardian: GUARDIAN, &c. 2,—p. 223.
sheriff as officer of circuit court: SHERIFF 1,—p. 504.

to sanction employment of counsel for PROSECUTING ATTORNEY 7,—p. 422.
not to try whether a tax is excessive: MUNICIPAL CORPORATIONS 4,—p. 120.
cannot enter on accounting with settlement in force: SETTLEMENT 7,—p. 447.
cannot disturb compromise: SETTLEMENT 6,—p. 432.
do not favor forfeiture clauses: LANDLORD, &c. 5,—p. 482
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examination of parties to divorce suit: WITNESS 2, 3: APPEAL 4,—p. 88.
use of habeas corpus by appellate court: HABEAS CORPUS 5,—p. 174.
Supreme Court cannot assess DAMAGES 11,—p. 494.
costs of Supreme Court on dismissal of bill: COSTS 1,—p. 149.
Supreme Court may strike out improper testimony: TRIAL 8,—p. 88.
weight of evidence not reviewed by Supreme Court: ERROR 7,—p. 11.
when Supreme Court will not regard amicus curiæ: ATTORNEY GENERAL,—p. 200.
refusal of Supreme Court to withhold decision; APPEAL 4,—p. 88
changes in judges not ground for rehearing: APPEAL 7,—p. 11.

COVENANT.

A covenant of seizin is not broken by the existence of a subsequent written contract from a former owner for the conveyance of the legal estate to another person than the grantee; and it cannot be shown, in support of such a contract that it was made in pursuance of a previous oral agreement with the grantor to provide in this way for such person. *Seckler v. Fox*, 92.

to keep in repair, damage from elements: LANDLORD, 2,—p. 363.
of warranty, discharge from liability on: MORTGAGE 21,—p. 312.
Credibility—of testimony, by whom determined: EVIDENCE 10,—p. 121.
Creditor's—bill: see EQUITY 5, 6,—p. 148.

CRIMINAL LAW.

1. Technical defects in a justice's warrant of commitment are not reviewable in habeas corpus proceedings; redress must be sought in some way prescribed by statute for review by an appellate court. *Hamilton's Case*, 174.
2. An information charging that the accused, at a time and place stated, "feloniously, willfully, and of her malice aforethought, did kill and murder," etc., without stating the means by which the murder was done, is sufficient, under the statutory system of procedure in Michigan, as the information is based on a full examination into the facts on a complaint before a justice, and this examination, unless waived, is returned into the circuit court, where the respondent can avail himself of it to restrict the trial to the matters on which he has been examined. *People v. Bemis*, 422.
3. A prisoner who had pleaded guilty was asked by the judge if he understood that if the plea was entered he would not be entitled to trial but would be subject to sentence. He said he so understood and wished the plea to be entered. He was sentenced the same day, the judge asking him if he had any reason to urge why judgment should not be passed against him, to which he answered that he knew of none. The judge made no other examination as to whether the prisoner's plea was voluntary, and this was in the presence of the prosecuting attorney and other officers of the court, but he made return that he was satisfied at the time from the prisoner's statements that the plea was voluntary. *Held*, sufficient. *People v. Lewis*, 172.
4. A person accused of grand larceny pleaded guilty on arraignment.

The judge told him that if his plea was entered he could have no trial and must be sentenced. The prisoner said he understood that. He was then remanded to the sheriff's custody for two days before sentence. Meanwhile the judge inquired of the under-sheriff, in whose charge the prisoner had been, as to what statement he had made to him and he also talked with the sheriff and with the prisoner's wife, and was satisfied that the plea was voluntary. When the prisoner was brought into court to be sentenced, the judge asked him if he had any reason to urge why judgment should not be passed upon him, and the prisoner said he knew of none. He was accordingly sentenced. *Held*, that the statutory requirement that the judge satisfy himself that a plea of guilty is voluntary, was substantially fulfilled. *People v. Lepper*, 196.

5. The prosecution in a criminal case are not obliged to call all the witnesses that are named on the information. *People v. Quick*, 547.
6. The prosecution in a criminal case cannot be required to call respondent's wife as a witness, in order that she may be cross-examined, even though her name has been indorsed on the information as one of the witnesses for the prosecution. *People v. Wolcott*, 613.
7. The purpose of permitting the respondent in a criminal prosecution to testify on his own behalf is to enable him to present his own defence. *People v. Quick*, 547.
8. A constable acting outside of his county and in company with a private citizen, sought to find out who had committed certain burglaries by stationing themselves at a certain point and stopping passers-by. One man as to whom there was no probable cause for suspicion, would not be stopped; and in escaping he fired on them, killing the private citizen. *Held*, that in trying him as for murder proof of the burglaries was inadmissible. And the case should have been put to the jury on the hypothesis that it was one of justifiable homicide. *People v. Burt*, 200.
9. It is not clearly error, in a murder case, to admit evidence of ill-feeling between the accused and the victim, extending back two years before his death, though such a showing would be certainly remote. *People v. Bemis*, 423.
10. A woman was prosecuted for killing her son-in-law with strychnine, and it was the theory of the prosecution that the victim's wife was accessory to the crime. *Held*, that it was not error to admit evidence that on the night after his death the two women slept together, and were heard whispering a long time after retiring. *Id.*
11. Proof beyond reasonable doubt can only be required in criminal cases; in all others, including those, even, that involve facts of a criminal nature, the question is one of preponderance. *Peoples v. Evening News*, 11.
12. After the jury in a criminal case was sworn the prosecuting attorney was allowed a peremptory challenge, and a new juror being chosen the jury was again sworn. *Held*, that so long as the jury first sworn was not legally discharged there could not be two juries sworn to try the same case; and a conviction by the latter jury was set aside and the prisoner discharged. *People v. Dolan*, 610.
13. Entry of judgment in a murder case may properly be amended a month after it was made, to show that the verdict was for murder in the first degree and to give the sentence correctly. *People v. Bemis*, 423.
14. It is presumed that a judge before sentencing a convict performs his duty as to ascertaining the latter's age, unless the contrary is implied in the record of the proceedings. *People v. Lewis*, 172.
15. Admission of incompetent evidence is not ground for setting aside a conviction if no exception was taken. *People v. Wolcott*, 613.

16. One who was guilty of manslaughter but convicted of murder should be discharged, on vacating the judgment against him, if the right to prosecute him for manslaughter was outlawed when the proceedings for murder were taken. *People v. Burt*, 200.
duty of PROSECUTING ATTORNEY 2,—p. 524.
status of the PROSECUTING ATTORNEY 1,—p. 422.
employment of counsel for PROSECUTING ATTORNEY 5,—p. 422.
keeping a pool room: GAMING 1, 2,—p. 203.
conduct of accused: EVIDENCE 6,—p. 613.
confessions made under duress: EVIDENCE 9,—p. 612.
wife as witness for husband: WITNESS 8,—p. 613.
arrest of witness in jury's presence: ARREST 3,—p. 613.
mittimus for re-arrest of principal: BAIL, &c. 1,—p. 620.
certiorari accompanying writ of error: CERTIORARI 1,—p. 171.
effect of confessing error: ATTORNEY GENERAL,—p. 203.
Crop—sale of, by tenant; protection of purchaser: LANDLORD, &c. 3, 4, —p. 482.
Cross bill—in suit to set aside cloud on title: EQUITY 10,—p. 453.
Cross-examination—on affidavit for continuance: CONTINUANCE,—p. 8.
of respondent's wife: CRIMINAL LAW 6,—p. 613.
refuting statements of witness: WITNESS 8,—p. 613.
as to details: WITNESS 5,—p. 589.
as to identity of documents: EVIDENCE 1,—p. 298.
as to items of lien for services: LIEN 7,—p. 378.
as to ownership of property: HUSBAND, &c. 5,—p. 373.
Custody—of children: HABEAS CORPUS 2, 3,—p. 599.

DAMAGES.

1. The measure of damages for the failure to perform a contract to pay joint debts owing by the parties thereto, and to obtain the discharge of a mortgage on their property, is the full amount of the debts if the original liability therefor has been enforced. Whether it would make any difference if the enforcement had been in fraud of defendant's rights—*Q. Lee v. Burrell*, 132.
2. Where a note was altered and made to correspond to a mortgage which was drawn for fraudulent purposes, and both papers were sold, and the buyer brought suit for damages against the person who caused the sale, a rule of damages was held correct which treated the money as paid without consideration. *Adams v. Bowman*, 189.
3. The measure of damages for preventing the performance of a labor contract may include the loss of profits if there is no uncertainty as to what they would have been; and if plaintiff does not elect to consider the contract broken before the time for full performance has expired, and the cost of doing the work has meanwhile fallen, he is entitled to recover what difference there is to his advantage. *Goodrich v. Hubbard*, 62.
4. Loss of profits is a proper element of the damages recoverable in an action of trespass for forcible entry and detainer. *Hitchcock v. Pratt*, 263.
5. Damages for a forcible entry cannot be based on any specific effect of the act that is not near enough to the injury done to make it just and reasonable that defendants answer for it to the plaintiffs; nor on any particular effect, however natural, if it is not a necessary result, unless it is specially charged as a ground of recovery. *Id.*
6. Treble damages are recoverable in a statutory action therefor if the declaration sufficiently states the cause of action and specifically refers for authority, to the statute allowing the court to treble the damages. *Id.*

7. Comp. L. § 6717, in allowing the recovery of treble damages by one who has recovered judgment of restitution in forcible entry proceedings, contemplates that single and treble damages may be recovered under the same count. *Id.*
8. Whether the damages allowed by Comp L. § 6717 in addition to the treble damages for forcible entry and detainer, are not such as may have accrued before the act complained of—*Q.* *Id.*
9. Where the measure of damages for the conversion of timber by cutting it down, is restricted to the actual value of the timber, the party guilty of the conversion cannot complain. *Wood v. Elliott*, 320.
10. Damages for personal injury include everything of which the person recovering them has been deprived as a direct and natural consequence of the injury. *Huizega v. Cutler & Savidge Co.*, 272.
11. Damages cannot be assessed by the Supreme Court in a case at law, but must be found by the court below; and if not so found, or if the finding settles no basis of fact which will fix the amount, the Supreme Court has no means for entering judgment. *Carmichael v. N. W. Mut. Ben. Ass'n*, 494.
12. Recoupment is, in effect, a cross-action; and it cannot be enforced against one who, like an infant, could not be compelled by an independent action to respond for damages. *Widrig v. Taggart*, 103.
for non-performance of contract: BILLS, &c. 8,—p. 186.
on contract of carriage of goods: CARRIERS 2,—p. 558.
for injurious exercise of option: ASSUMPSIT 5,—p. 558.
for not making promised loan: ASSUMPSIT 2,—p. 232.
for assault in protecting possession: ASSAULT,—p. 153.
for expulsion from church: RELIGIOUS SOCIETIES 2,—p. 137.
for personal injury; necessary averments: ERROR 11,—p. 601.
from personal injury: MASTER, &c. 6-8,—p. 272.
for selling worthless note and mortgage: EVIDENCE 2,—p. 189.
for vexatious appeals: APPEAL 6,—p. 475.
excess remitted after review: JUDGMENT 8,—p. 427.
Death—of trustee; successor: TRUSTS 2, 3,—p. 623.
not defeating appointment of guardian: GUARDIAN, &c. 1,—p. 223.
Debtor and Creditor—assignment void as against creditors: EQUITY 11, —p. 230.
neglect to enforce demand: PRINCIPAL AND SURETY 1,—p. 312.
estoppel from calling on surety: ESTOPPEL 3,—p. 312.
promise not to collect debt: PRINCIPAL AND SURETY 2,—p. 312.
sale of devised lands to pay debts: EXECUTORS, &c. 5,—p. 360.
security by means of assignment of MORTGAGE 7,—p. 229.
settlement of account: SETTLEMENT 4, 5,—p. 291.
transfer of exempt property not to be attacked: ACTION, &c. 1,—p. 492.
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sufficiency of counts: ERROR 10,—p. 263.
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for damages, averments wanting: ERROR 11,—p. 601.
for injury; with special count for conversion: TROVER 5,—p. 608.
for malicious prosecution: MALICIOUS PROSECUTION,—p. 463.
for price of goods sold by firm: PARTNERSHIP 4,—p. 585.
for railway injury: PLEADING 4,—p. 628.

Decree—not set aside for superfluities: EQUITY 11,—p. 230.
Dedication—of plat; non-acceptance: WAYS 1,—p. 21.
Deed—construed as mortgage: MORTGAGE 1, 2,—p. 105.
by mortgager to person making payment; MORTGAGE 9,—532.
wife's refusal to unite in: LICENSE,—p. 636.
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decree for rescission of: VENDOR, &c. 7,—p. 167.
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See COVENANT.
Defamation—See LIBEL AND SLANDER.
Defeasance—separate from conveyance: MORTGAGE 1, 2,—p. 105.
Defects—in pleadings: MALICIOUS PROSECUTION; PLEADING 3,—p. 463.
in sheriff's certificate of sale on EXECUTION 11,—p. 453.
Defence—against replevin, assumption of: VENDOR, &c. 9,—p. 298.
Defendant—impleading improper defendant: APPEAL 2,—474.
Degrees—of murder, as shown by verdict: CRIM. LAW 13,—p. 423.
of negligence; for jury to consider: NEGLIGENCE 1,—p. 628.
Delegation—of powers by PROSECUTING ATTORNEY 3, 4,—524.
Delivery—proved by signature: BILLS, &c. 10,—p. 426.
surety's intention as to: BILLS, &c. 13,—p. 426.
under contract, without protest: VENDOR &c. 5,—p. 497.
objections to tardiness: VENDOR, &c. 4,—p. 590.
DEMAND.
1. Demand need not precede an action of replevin for goods, the taking of which by defendant constituted a trespass, unless the trespass has been satisfied or the plaintiff is estopped from asserting it; but where the wrongful taking arises out of contract relations, and defendant holds in good faith, demand is necessary. *Adams v. Wood*, 411.
2. Demand and refusal, before bringing replevin, will not make defendant's lawful possession unlawful. *Id.*
as preliminary to action: ASSUMPSIT 3,—p. 116.
when necessary to show: REPLEVIN 1,—p. 411.
of goods sold: SALE 2,—p. 411.
for which lien is held: LIEN 10, 11,—p. 378.
of property on which lien is asserted: LIEN 9,—p. 378.
interest running from time thereof: INTEREST 2,—p. 184.
Demurrer—in equity: See EQUITY 9,—p. 446.
for impleading improper party: APPEAL 2,—p. 474.
to petition to enforce mechanics' lien: LIEN 3,—p. 573.
Denial—of delivery only, by affidavit: BILLS, &c. 10,—p. 426.
of excution of note: BILLS, &c. 11,—p. 563.
of sheriff's indorsement on EXECUTION 6,—p. 453.
by witness; of arrest for crime: WITNESS 8,—p. 613.
Deposit—certificates of: BANKS &c. 1, 2,—p. 36.
DEPOSITION.
Where notice is duly given of the filing of a deposition and no motion is made to suppress it nor any objection to it filed or served on the opposite attorneys, it is too late to question its regularity at the hearing. *Palms v. Richardson*, 84.
fee for taking deposition: OFFICE, &c. 2,—p. 125.
DESCENT AND DISTRIBUTION.
Under the Statute of Distributions the husband of a woman who dies intestate is entitled to one-third of her personalty, or to one-half if she leave but one child or a father, mother, brothers, sisters, or their issue. No individual, under any circumstances, takes any larger

interest than the husband. Comp. L., § 4377, subd. 7. *Breen v. Pangborn*, 29.
Detroit—abolition of central station court: COURTS 4,—p. 548.
Disability—of married woman to contract: HUSBAND, &c. 1, 2,—p. 160.
Discharge—of lien for redemption from tax sale: LIEN 1,—p. 618.
of mortgage by assignee: MORTGAGE 8,—p. 532.
of surety, promise of: ESTOPPEL 3,—p. 312.
of surety, by extension of time: PRINCIPAL AND SURETY 2,—p. 312.
from liability on covenant of warranty: MORTGAGE 21,—p. 312.
of employee: ASSUMPSIT 1; MASTER, &c. 1-4,—p. 539.
jury must be legally discharged: CRIM. LAW 12,—p. 610.
of person convicted of murder: CRIM. LAW 16,—p. 200.
of prisoner for wrongful challenge: CRIM. LAW 12,—p. 610.
Discretion—abuse of, in excluding particulars: PLEADING 8,—p. 8.
as to allowing parties to be examined: WITNESS 2,—p. 88.
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of legislature as to introducing bills: CONST. LAW 2,—p. 129.
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Dismissal—of appeal from justice's court: APPEAL 9,—p. 100.
of divorce bill pending decision: APPEAL 4,—p. 88.
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of bill to enjoin collection of drain tax: DRAINS, &c. 2,—p. 639.
of bill to set aside cloud on title: EQUITY 10,—p. 453.
of common-law action is ground for error: ERROR 2,—p. 5.
of employee: ASSUMPSIT 1; MASTER, &c. 1-4,—p. 539.
of garnishment proceedings for laches: GARNISHMENT 4,—p. 113.
of writ of error in certiorari proceedings: ERROR 1,—p. 171.
of writ of error on judgment of restitution: TRESPASS 3,—p. 263.
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Dissolution of firm; notice to purchaser: PARTNERSHIP 4,—p. 585.
of firm; remedies of partners: PARTNERSHIP 2, 3,—p. 480.
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Distribution—of highway labor: WAYS 4,—p. 347.
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Division—of townships: COUNTIES 1; MUN. CORP. 1,—p. 544.
Divorce—proceedings; effect on HOMESTEAD 3,—p. 576.
examination of parties to suit: WITNESS 2, 3,—p. 88.
taking testimony in divorce suits: WITNESS 2, 3, 6; TRIAL 8,—p. 88.
See HUSBAND AND WIFE.
Docket—erasure of entry of appearance: COSTS 3,—p. 462; JUSTICE, &c. 2,—p. 461.
must show jurisdiction: JUSTICE, &c. 1,—p. 452.
Documents—proof of: EVIDENCE 1,—p. 298.
production of: TRIAL 3, 4,—p. 298.
to impeach witness: WITNESS 1,—p. 373.
refusal to produce: TRIAL 5,—p. 324.
Domicil—removal of goods to purchaser's domicil: SALE 3,—p. 298.

DOWER.

A married woman's release, to her husband, of her dower right, if made for a good consideration and without fraud or improper dealing, is binding, in view of the married woman's act permitting wives to dispose of their interests as if single. *Rhoades v. Davis*, 306.

DRAINS AND SEWERS.

1. A warrant for the collection of drain taxes is bad if the taxes are not so spread upon the assessment roll as to identify the drain for which

each is levied, in order that each fund may be kept separate, and specific drain orders be paid from the proper fund. *Dunning v. Calkins*, 557.

2. A bill to set aside proceedings to establish a drain, and to enjoin the collection of the drain tax, was properly dismissed where complainant had joined with others in releasing the right of way, had bid off part of the work, had neglected to inform himself as to his interests, and had delayed to file his bill until the whole tax had been collected except his share and that of one other objector. *Harwood v. Drain Com'r*, 639.
3. In an action against a highway officer for injury caused by a ditch which he has dug, defendant cannot complain of an instruction that he would not be liable unless the ditch brought upon the plaintiff's land the drainage of a greater area than was drained upon it before. *Cubit v. O'Dett*, 348.

right to cut: WATERS, &c. 3,—p. 347.

DURESS.

1. A person arrested on capias could not get bail, and, on giving the plaintiff secured notes, the latter consented to his discharge. The arrest was caused in good faith for an injury which plaintiff supposed had been done by defendant, and the notes were taken in satisfaction of the injury, though they did not fully compensate it. *Held*, that a bill would not lie for the cancellation of the securities on the ground that they had been obtained by duress. *Prichard v. Sharp*, 432.
2. The purchaser of goods sent a draft for less than the price demanded, and the vendor accepted it, but afterwards claimed that it was not in full payment. *Held*, error to permit the jury to consider whether the acceptance was not made under financial duress, there being no evidence as to the vendor's financial condition. *Peter v. Thickstun*, 590.

as ground for annulling marriage: HUSBAND, c. 8,—p. 607.
confessions made under duress: EVIDENCE 9, p. 613.

Easement—appurtenant to homestead. SPECIFIC PERF.,—p. 467.
East Saginaw—assessment of city taxes; MUN. CORP. 4,—p. 120.

EJECTMENT.

1. Ejectment will not lie for land adjoining plaintiff's premises but on the other side of a fence which for twenty years the adjoining owners and occupants have treated as the boundary between their lots. Comp. L. § 7137. *Call v. O'Harrow*, 98.
2. The statute forbidding ejectment to be brought for mortgaged premises before foreclosure does not apply to mortgages given before its enactment, and under which the purchase made at the foreclosure sale passed the title to the purchaser, even though the foreclosure were ineffectual. *Baldwin v. Cullen*, 33.
3. Defendant in ejectment filed a claim for improvements at the proper time but it was informal and insufficient. Two years after the suit was put at issue, but three years before it was brought to trial, he filed a claim that was in due form, and no motion was made to strike it from the files, nor did plaintiff object that it was not served on him or brought to his notice. *Held*, that as a motion to amend the first claim should have been allowed, if made, the second claim should have been treated as an amendment, and evidence should have been received under it. Van Den Brooks v. Correon 48 Mich. 285, distinguished. *Id.*

adverse homestead rights: HOMESTEAD 4,—p. 158.
a possessory remedy: Real Actions 1,—p. 155.

Election—notice of, dispensed with: OFFICE, &c. 1,—p. 129.

to treat lease as void: LANDLORD, &c. 5,—p. 482.
Enforcement of—lien, reasons against: EXECUTION 7,—p. 453.
Entry—in docket of JUSTICE, &c. 1,—p. 452.
of appearance, erasure of: COSTS 3,—p. 462; JUSTICE, &c. 2,—p. 461.
of judgment for damages in Supreme Court: DAMAGES 11,—p. 494
of judgment, amendment of: CRIM. LAW 7,—p. 423.

EQUITY.

1. The misrepresentation to a public board of facts which they can ascertain and are bound to know as pertaining to their own duties, but as to which they neglect to inform themselves, does not furnish any substantial ground for remedial equity. *Churchill v. Cummings*, 446.
2. Where unsettled accounts between two townships are adjusted by their boards at a joint meeting, one of the townships cannot afterward maintain a bill against the other to set aside the settlement on the ground that its own board was inferior to the other in ability, experience or knowledge, or that it was misled by the other as to the true financial condition of its own township. And the complaining township cannot distinguish between itself and its board for the purpose of escaping the consequence of the latter's negligence. *Id.*
3. An octogenarian, who had been living with one of his sons, went to live with another to whom he gave a general power of attorney to dispose of his real estate, worth about $5000. He was feeble and in such condition as to be easily wrought on, and he was induced to convey his land to this son, for an expressed consideration of $4000, most of which was illusory. He did not understand, however, that he was absolutely depriving himself of his property. Such securities as he received in return, from his son, he gave up or destroyed. *Held*, on his bill for rescission of the conveyance, that the son's dealings, especially as they were carried on while acting in a fiduciary capacity as his father's agent and factotum, were intrinsically wrong, and that rescission should be granted; also that the son had no equity to recover his outlays on his father, as he had been in possession of the property, and had taken advantage of his father's residence with him to further his designs. *Thorn v. Thorn*, 167.
4. In an accounting between the parties to a joint enterprise, a claim by one against the other for commissions for making collections in the joint business is properly disallowed, if there was no express agreement therefor. *Hopkins v. Ruggles*, 475.
5. A bill in equity will lie for the double purpose of aiding an execution and of reaching property that is not open thereto. *Beam v. Bennett*, 148.
6. A man fraudulently transferred his property to his son to anticipate the judgment in a suit pending against him. The son agreed, in the instrument of transfer, to pay his father's debts to certain bona fide creditors, and while the action was still pending, executed mortgages to them therefor. After the verdict but before judgment he executed other mortgages to brothers of defendant. *Held* on a bill filed by the judgment creditor in aid of execution, that the property, relieved of the later mortgages, should be sold on execution, and that if the proceeds were not sufficient to pay the judgment and the bona fide claims, they should be applied ratably thereon. *Id.*
7. One who is not in possession cannot maintain a bill to quiet title, and an averment in the bill that defendant has entered upon the premises, and by personal force and violence has prevented complainant from occupying or using them, has the effect of negativing a fact that is necessary to the theory of the bill. *Kilgannon v. Jenkinson*, 240.

8. Defendants to a bill in equity cannot object to the omission to implead parties whose names they themselves will not disclose. *Hutton v. Cuthbert*, 230.
9. Demurrer to a bill in equity does not admit the truth of matters that are not relevant or well pleaded, nor the correctness of legal inferences, nor unreasonable deductions of facts, nor unreasonable or inequitable meanings or implications. *Churchill v. Cummings*, 446.
10. A decree which, on bill, answer and evidence and in the absence of any cross-bill, not only dismisses a bill to set aside a cloud on title, but affirmatively declares defendant's title, should be so modified, on affirmance, as to confine it to a mere dismissal. *Vroman v. Thompson*, 453.
11. A decree in equity will not be set aside for containing superfluous reasons for the conclusion reached, if the result is correct, and the decree does not prejudice defendants. So *held* where a bill to obtain the release of a security was sustained not only on the ground that the alleged assignment of the security was never operative, but that it was void as against creditors. But in affirming the decree on the first ground it might properly be amended by striking out what related to insolvency. *Hutton v. Cuthbert*, 230.

accounting precluded by existing SETTLEMENT 7,—p. 447.
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ERROR.

1. Writs of error and of certiorari are barred after five years from judgment, and if sued out will be dismissed. *People v. Van Wagner*, 171.
2. Error lies upon an order finally dismissing a common-law action of trover where the grounds of the motion to dismiss are made part of the record. *Emerson v. McCormick Harvesting Machine Co.*, 5.
3. Error may be assigned upon the record where the only question is whether the facts found support the judgment, the finding being treated in such cases as a special verdict. *Peck v. City Nat. Bank*, 354.
4. Where exceptions are taken to a referee's report and are overruled and error is assigned on the confirmation of his finding of law, the only questions raised are upon the exceptions to his conclusions of law. *Goodrich v. Hubbard*, 62.
5. Errors assigned upon the proceedings in summoning and striking the jury in justice's court are immaterial if no jury was had on the trial. *Boaiz v. Berg*, 9.
6. The assignment of error that there is no evidence to support the finding covers the whole group of facts found and is too broad where the finding contains some unquestioned facts. *Behler v. Drury*, 111.
7. The Supreme Court will not review the conclusions of a jury upon the weight of testimony, in a case at law, if there was any evidence to be submitted to the jury, even if it were only circumstantial. *Peoples v. Evening News*, 11.
8. Complaint cannot be made of the exclusion of evidence if it is afterwards admitted. *McCormick Harv'g Co. v. McKee*, 427.

9. The exclusion of a question is not prejudicial error, if its substance is afterwards allowed to be fully inquired into. *Stansell v. Leavitt*, 537.
10. The sufficiency of the counts of a declaration cannot be considered on review if there is no assignment of error thereon. *Hitchcock v. Pratt*, 263.
11. The want of averments necessary to set forth the special grievance relied on in a declaration for damages based on personal injury will not be considered for the first time on review if the case was not disposed of on such ground and if court and counsel below had treated the declaration as proper. *McKone v. Mich. Central R. R. Co.*, 601.
12. A judgment cannot be reversed upon an instruction to the jury which in itself was correct, whether the reason for it did or did not involve an opinion on facts. *Hatzenbuhler v. Lewis*, 585.
13. Dismissal of a writ of error leaves the judgment on which it was sued out operative and conclusive. *Hitchcock v. Pratt*, 263.

writ of, accompanied by certiorari: CERTIORARI 1,—p. 171.
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Estates—homestead right not strictly an estate: HOMESTEAD 5,—p. 157.
of decedents: See DESCENT, &c.; EXECUTORS, &c.
satisfaction of debts of, by sale of lands: EXECUTORS, &c. 5,—p. 360.

ESTOPPEL.

1. Estoppels arise upon equities and are enforced for their protection. *Bell v. Todd*, 21.
2. Estoppel does not generally arise from one's silence or inaction, unless he knows that there is occasion to speak or act. *Griffin v. Nichols*, 575.
3. A creditor's mere statement to his debtor's surety that the debtor's responsibility was sufficient security for the debt and that the surety would not be called upon, did not estop the creditor from resorting to the security if the claim was not renounced and the surety was not misled by the assurance to his disadvantage. Whether even a promise to discharge the surety would estop him where no consideration is shown for such a promise—*Q. Mich. State Ins. Co. v. Soule*, 312.
4. A was the successful bidder for certain carpenter work, and B & Co., for certain masonry. It was arranged, for the convenience of the party for whom the work was to be done, that A should take a contract for the whole, though B should do the masonry, whereby A stood in the place of surety for B. A was afterwards garnished by judgment creditors of B, but B refused to allow the amount of the judgments to be applied on what was due him from A, claiming that the judgments had been recovered against him individually while his contract was in the name of a firm, his wife being his partner. A refused to pay B unless he allowed the judgments, and B sued him. *Held*, that an instruction that if A had had an opportunity to know that B's bid was in the name of a firm, he was estopped from denying that he knew it, was error. *Edwards v. McEnhill*, 160.

5. One who claims rights in land by virtue of a confirmatory arrangement between two other persons, from one of whom his original title was derived, must recognize all the terms of that arrangement and cannot insist upon anything which his predecessor in title could not insist upon. *Norris v. Mich. State Ins. Co.*, 621.
6. F. bought property upon a foreclosure which turned out to be invalid, and conveyed it with warranty. The mortgager then conveyed the equity of redemption to N. for the protection of F.'s grantees, but by an understanding between N. and F. a portion of the premises was excepted from this arrangement. *Held* that if the grantees relied on the arrangement made for their protection they must recognize its terms throughout, and could not insist on rights in the land that was thus excepted even though the original conveyance to them antedated the arrangement and exception. *Id.*

against enforcement of lien of EXECUTION 7,—p. 453.
from alleging want of authority: PLEADING 6,—p. 472.
from asserting trespass: DEMAND 1,—p. 411.
from complaining of obstructing street: WAYS 2,—p. 21.
from objecting to custody of logs: WATERS, &c. 1,—p. 377.
Estrays—distress of: ANIMALS; REPLEVIN 2,—p. 605.

EVIDENCE.

1. Documents cannot be treated as proven by the testimony of a witness to their identity unless the adverse party has had an opportunity to inspect them and cross-examine the witness. *De Witt v. Prescott*, 298.
2. In an action for damages for selling to plaintiff, through a third person, a worthless note and mortgage, it is proper to lay before the jury the documents themselves if their suspicious character and the tokens of their fabrication are primary facts in the controversy. *Adams v. Bowman*, 189.
3. Local newspaper quotations as to the price of merchandise at the point of consignment are admissible where its value is a material fact in the case; as where a claim for the price charged was met by the defence that the value had declined. But evidence of the rate at which the claimant sold other such merchandise at the time when that in suit arrived at its destination, is not admissible. *Peter v. Thickstun*, 589.
4. Written agreements, however explainable, cannot be absolutely contradicted by parol. *Seckler v. Fox*, 92.
5. In an action for a personal injury from mill machinery, the question whether a witness had ever heard of such injuries to other persons is improper as calling for hearsay testimony. *Huizega v. Cutler & Savidge Lumber Co.*, 272.
6. One of several persons accused of larceny showed some excitement while the boots of those accused were being measured to see if they corresponded to tracks found at the scene of the crime. *Held*, that on his prosecution this fact was inadmissible as bearing upon the question of his guilt, particularly when given by persons prepossessed against him; and it was not res gestæ. *People v. Wolcott*, 612.
7. Proof of an admission cannot be excluded merely on the ground that it does not cover a whole series of transactions. *Stansell v. Leavitt*, 536.
8. An agent's talk with strangers concerning past transactions of his employer is not res gestæ either in point of time or in relation to parties, and, being of no account as proof, cannot affect his principal's rights under a contract on which the transactions were based. *Benner v. Feige*, 568.
9. Confessions of guilt are inadmissible when persons, apparently acting

by authority, obtain them by making respondent believe that he will get off easier by making them. So *held* where the confessions were made to persons who were allowed access to the prisoner's cell after midnight. *People v. Wolcott*, 612.

10. The credibility of testimony and its sufficiency to support a finding are to be determined by the trial judge when he sits without a jury. *Edwards v. Nelson*, 121.
11. Where dealings between partners who are connected by family ties have been carried on for a long series of years without keeping any strict account of them, but in the confidence which springs from such relations, and litigation thereon arise between them and their successors, a court will be disposed to be governed by such indications as appear in the written evidence of their transactions rather than by the recollections of the parties. *Wiswall v. Ayres*, 324.

admissibility of judgments: JUDGMENT 3, 4,—p. 153.
admissions as to wife's transactions: HUSBAND, &c. 4,—p. 536.
admission of incompetent evidence: CRIM. LAW 15,—p. 612.
as to authority to bind another by warranty: PRINCIPAL AND AGENT 3,—p. 298.
as to complicity in case of poisoning: CRIM. LAW 10,—p. 423.
as to character of machinery: MASTER, &c. 8,—p. 272.
as to damages from personal injury: MASTER, &c. 6–8,—p. 272.
as to honesty of grantor's intent: FRAUD, &c. 4,—p. 140.
as to items of lien for services: LIEN 7,—p. 378.
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as to ownership of property levied on: HUSBAND, &c. 5, 6; WITNESS, &c. 1,—p. 373.
as to prior contract with stranger: CONTRACT 11,—p. 62.
as to rescission of bargain: VENDOR, &c. 1,—p. 536.
as to value, exclusion of: VENDOR, &c. 1,—p. 536.
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of motives, relevancy of: ACTION, &c. 3,—p. 537.
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of husband's admissions as to wife's business: HUSBAND &c, 4,—p. 536.
of newspaper article in libel suit: LIBEL 2,—p. 11.
of proof of admissions: EVIDENCE 7,—p. 536.
of question afterward allowed: ERROR 9,—p. 537.
of testimony: TRIAL 6,—p. 41.

EXECUTION.

1. Executions ought not to be removed at pleasure from the files by the plaintiffs therein or their counsel, or by a sheriff who has gone out of office. Such a removal, however, is only an irregularity and does not of itself invalidate a sale on the execution. *Vroman v. Thompson*, 453.
2. It is not customary in Michigan to resort to the writ of venditioni exponas; it is usual to proceed on the old execution or take out another. *Id.*
3. Service of execution covers every act and proceeding that may be required for collecting the amount of the judgment, including the sale of the property, when that shall be necessary. *Peck v. City Nat. Bank*, 353.
4. The fact of levy should be indorsed on the execution; but its absence does not invalidate the execution if notice of the levy is duly recorded according to statute (Comp. L. § 4685; Act 5 of 1875), and its subsequent indorsement is unimportant. *Vroman v. Thompson*, 452.
5. Abandonment of a levy is not necessarily implied by the sheriff's indorsing on the writ of execution the fact of his levy and the words: "I hereby return the within execution to the clerk of the court for the county of Kalamazoo, as I am commanded by Seth D. Thompson, plaintiff." *Id.*
6. *It seems* proper to allow the plaintiff in an execution to dispute the sheriff's indorsement thereon that the plaintiff had directed him to return the execution to the clerk. *Id.*

7. A levy may be left to sleep till it becomes stale and an estoppel or some equity arises against the enforcement of the lien or the right to keep it uncancelled. *Id.*
8. A sheriff who has made a levy in the life time of the writ of execution and during his own official term, can sell the property on the execution after his term expires; and the old writ is his sufficient authority. *Id.*
9. Publication of notice of execution sale is provable by the publisher's affidavit. Comp. L. § 5925. Whether it is provable by the affidavits of those who posted the notices—*Q.* *Id.*
10. An execution sale is presumed regular and made on proper notice if the party attacking it does not make out a prima facie case to the contrary; he cannot, by merely alleging its validity, place upon the execution purchaser the burden of establishing it. *Id.*
11. Where complainant in a bill to set aside an execution sale assumes, for the purposes of the case, that the sale itself is valid, such defects in the sheriff's certificate of sale as wrong dates for the issue of execution and of levy are immaterial as between complainant and the execution purchaser. *Id.*

against husband levied on wife's goods: HUSBAND, &c. 5; WITNESS 1,—p. 373.
assignment of property exempt from: ACTION 1; GARNISHMENT 3,—p. 492.
bill in aid of, and to reach other property: COSTS 1,—p. 149; EQUITY 5, 6,—p. 148.
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wrong date as to issue and levy: EXECUTION 11,—p. 453.
appointment to complete execution of TRUSTS 2, 3,—p. 623.

EXECUTORS AND ADMINISTRATORS.

1. Persons interested in the property left by an intestate can always raise the objection of any want of jurisdiction in the court which issues letters of administration; but no one can be allowed to intervene in the affairs of an estate unless he is authorized by law to do so, or is personally interested. *Breen v. Pangborn*, 29.
2. A husband has a right to be heard in regard to the appointment of an administrator for his wife's estate if she leaves any personalty, as he has an interest in the property. *Id.*
3. A woman died intestate leaving a husband and four minor children. The husband was a creditor to her estate, and applied for letters of administration, but the probate court issued them to a person who was neither a creditor nor a distributee, and did so on a petition filed by the intestate's brother and setting forth on its face that there were lawful distributees residing in the county, and that the petitioner was not interested. *Held*, that the petition negatived the jurisdiction, and that in the absence of reasons for disregarding the petition of the husband, the appointment was void as against him. *Id.*
4. Administration, when letters are issued on petition to the court, can only be granted to, or on application by, one or more of the persons specified in Comp. L., § 4379, viz., creditors and distribu-

tees; and as between these, only in this order, and under the contingency specified, of their being competent or willing to take the trust. *Id.*

5. An executor cannot be empowered by the probate court to sell devised land of which the devisee has taken possession, for the purpose of satisfying debts of the estate. Comp. L. §§ 4353-7. *Atwood v. Frost*, 360.

6. An administrator's forcible ouster of a guardian from the possession of the real estate of heirs who are his wards cannot be legalized by facts occurring after the proceedings were begun. *Carpenter v. Harris*, 223.

7. In proving a claim against an estate for services as a practical mechanic and miller in superintending the construction of a mill and in running it, witnesses may properly be asked what claimant's services therein were worth, or what they were worth per month. *Hamper's Appeal*, 71.

appointment of executors: GUARDIAN, &c. 4,—p. 223.

Exemption—of homestead; abandonment by wife: HOMESTEAD 3,—p. 576.

from execution: HOMESTEAD 1,—p. 541.

assignment of exempt property: ACTION 1; GARNISHMENT 3,—p. 492.

Extension—of time, discharge of surety by: PRINCIPAL AND SURETY 2,—p. 312.

Extinguishment—of lien, by tender of performance: LIEN 8,—p. 1.

effect on notice: PRINCIPAL AND AGENT 2,—p. 298.

of mortgage by application of payments: MORTGAGE 12,—p. 633.

Fees—of sheriff, action for: SHERIFF 2,—p. 353.

of sheriff, for re-arrest of principal: BAIL 1,—p. 620.

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FENCES.

recognized mutually as boundary: EJECTMENT 1,—p. 98.

Filing—of sheriff's deed on foreclosure: MORTGAGE 19,—p. 335.

Finality—of order of dismissal: ERROR 2,—p. 5.

Finding—construed in connection with pleadings: TRIAL 10,—p. 121

of damages as basis for judgment: DAMAGES 11,—p. 494.

of fact, conclusive if supported by any evidence: TRIAL 9,—p. 185.

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unsupported by evidence: ERROR 6,—p. 111.

when treated as special verdict: ERROR 3,—p. 354.

Flowage—of lands by drains: WATERS, &c. 3,—p. 347.

FORCIBLE ENTRY AND DETAINER.

In forcible entry and detainer proceedings the general allegation in the complaint that defendant is in possession of the premises and unlawfully holds them against the rights of the plaintiff, is sufficient though possession was taken or held by force. Comp. L. § 6697. *Gault v. Stormont*, 636.

damages therefor: DAMAGES 4-8,—p. 263.

one who recovers may bring trespass: TRESPASS 2, 3,—p. 263.

Foreclosure—by advertisement: APPEAL 3,—p. 313; MORTGAGE 16, 21, —p. 312.

Foreign—corporations, suits between: CORPORATIONS 1,—p. 5.

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Forfeiture—based on verdict and judgment: JUDGMENT 1,—p. 482.

clauses for, in a lease: LANDLORD, &c. 5,—p. 482.

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of insurance: INSURANCE 3,—p. 587.
of insurance policy: INSURANCE 2,—p. 243.
of lease as affecting sale of crop: LANDLORD, &c. 3, 4,—p. 482.
of right of possession under MORTGAGE 5,—p. 105.

FRAUD AND FRAUDULENT CONVEYANCES.

1. One who seeks to set aside a transaction for fraud must move promptly; and delay is gross that extends beyond the time necessary to bar an action. *Krueger v. Grand Rapids & Indiana R. R. Co.*, 142.
2. In an action for fraud in selling plaintiff a second for a first mortgage, it is admissible to show that at the time of making the mortgage defendant said he did not want it to contain an exception in the covenant against encumbrances, as it might prejudice its sale. *Cronkhite v. Dickerson*, 177.
3. Fraud in making a conveyance must be found as a fact before the conveyance can be avoided as fraudulent. *Spear v. Rood*, 140.
4. The sufficiency of the consideration for a conveyance may bear on the honesty of the grantor's intent; but excess in value over the amount of consideration is not conclusive evidence of fraud. *Id.*
5. Agreements between joint riparian owners, after making conveyance, cannot affect the grantee's rights; and deeds made in pursuance of such agreements would be in fraud of those rights if not made to the grantee, or to those claiming under him. *Fletcher v. Thunder Bay River Boom Co.*, 277.

against seller of goods: SALE 3,—p. 298.
fraudulent alteration and sale of paper: DAMAGES 2; EVIDENCE 2; TRIAL 14,—p. 189.
in compromise, ground for interference: SETTLEMENT 6,—p. 432.
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laches in showing fraud: LIMITATION OF ACTIONS 2,—p. 142.
practiced upon signer of note: BILLS, &c. 5, 11,—p. 563.
transfer to avoid execution: EQUITY 6,—p. 148.

FRAUDS, STATUTE OF.

1. A mere memorandum of a land sale in a receipt for money paid down, is not enough to establish the contract, under the Statute of Frauds, unless it is complete in itself and leaves nothing to rest in parol. It is not enough to state the purchase price and omit the time of payment, as there is no known usage to fix periods of payment. *Gault v. Stormont*, 636.
2. Representations concerning the credit of a corporation are within the Statute of Frauds. Comp. L. § 4701. *Bush v. Sprague*, 41.
3. The Statute of Frauds in forbidding any action to be based on unwritten assertions of the business credit of a third person (Comp. L. § 4701) does not apply to a case in which defendants are charged with conspiring to form a corporation for the purpose of defrauding plaintiff and with carrying out their fraudulent purposes by a course of dealing tending to make him believe the alleged corporation to be of good credit. *Id.*
4. The refusal of a motion to strike out testimony of oral representations as to the credit of a third person, and of a request to charge that no recovery can be had on such representations, is sufficient to raise the question, on error, whether, under the Statute of Frauds, such representations will sustain a recovery. *Id.*
5. Where a written contract for the sale of personalty includes real estate also, the contract for personalty is not necessarily vitiated by non-compliance with the Statute of Frauds in that portion which relates to realty. *Stansell v. Leavitt*, 536.

GAMING.
1. Gaming exists wherever a stake is laid on the chances of a game; and base-ball and horse-racing are games and so is any pooling scheme in betting thereon. *People v. Weithoff*, 203.
2. Keeping a pool-room for selling pools on horse-races and base-ball games is within the statute punishing the keeping or maintaining of a gaming-room or gaming-table or of any game of skill or chance. Comp. L. § 1998, amended by Act 171 of 1877. *Id.*

GARNISHMENT.
1. Garnishment process cannot reach sums that will not come due until the performance of a contract at some future time; and claims for the payment of such moneys are not "contingent" within the reason of Act 256 of 1879, which permits contingent claims to be garnished. *Webber v. Bolte*, 113.
2. Garnishment process will not reach property transferred absolutely and in good faith by a public officer to a surety on his official bond to enable the latter to secure his own and his principal's liability. *Spear v. Rood*, 140.
3. Garnishment process will not reach personal property assigned by the principal debtor, if in his hands it would have been exempt from execution. *Anderson v. Odell*, 492.
4. Pendency of a cause for fifteen months will not, of itself, warrant the dismissal of garnishment proceedings if the defence have raised no question of laches. *Webber v. Bolte*, 113.

of principal contractor: ESTOPPEL 4,—p. 160.
General—averments in declaration for injury: PLEADING 4,—p. 628.
issue, in action on note: BILLS, &c. 11,—p. 563:
where proper: PLEADING 6,—p. 472.
Good faith—of person taking a note: BILLS, &c. 6,—p. 529.
does not excuse a trespass: TRESPASS 1,—p. 348.
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of defendant in TROVER 3,—p. 569.
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property transferred in, to surety: GARNISHMENT 2,—p. 140.
purchasers of certificates of deposit: BANKS, &c. 1,—p. 36.
See Bona Fide.
Governor—his duty to issue patents: PUBLIC LANDS,—p. 195.

GUARDIAN AND WARD.
1. Act 7 of 1877 provides that where a wife survives her husband, his appointment, by will, of a guardian for minor children shall not be operative until approved by the judge of probate after giving opportunity to the mother to show cause in opposition to it. *Held*, that this provision is not meant to allow an appointment to be defeated by the death of the mother before probate unless some good reason exists. The objection to the appointment is to be made in the probate court when the will comes up for probate; and if the wife has not otherwise objected and if no affirmative objection is made, the appointment must stand with the rest of the will. *Carpenter v. Harris*, 223.
2. Proceedings to recover possession of land, when taken by a person claiming to be guardian by appointment of the probate court, are of no importance if the showing of authority as guardian gives no proof of the jurisdiction of the court to grant it. *Id.*
3. The failure to give bonds, by a person appointed guardian of minors, does not of itself vacate his appointment. *Id.*
4. Where a testator made his wife and another person executors and declared that the wife, and on her death, the other executor, should be sole guardian, and farther provided that the executors "and the

guardian" should not be required to give bond, it was *held* that this covered the guardianship of the other executor. *Id.*
guardian's proceedings to recover possession: Real Actions 6,—p. 223.
ouster of guardian by administrator: EXECUTORS, &c., 6,—p. 223.
Guilty—voluntary plea of: CERTIORARI 3; CRIM. LAW 3, 4,—pp. 172, 196.

HABEAS CORPUS.

1. Habeas corpus is the proper remedy for a conviction without jurisdiction. *Hamilton's Case*, 174.
2. A mother is not bound by an order made by a probate judge sending her child to the State Public School without any notice to her, if she was within the county, or to any of the child's friends or relations; as she can sue out the writ of habeas corpus to regain their custody. *Goodchild v. Foster*, 599.
3. A circuit judge at chambers has jurisdiction to issue the writ of habeas corpus to get possession of children sent to the State Public School by order of the probate judge. *Id.*
4. The action of a circuit judge in habeas corpus proceedings is strictly judicial where no jury is required and the judge acts personally; and it need not be taken in open court or during term. *Id.*
5. An appellate court can use the writ of habeas corpus as one means of exercising his supervisory power; but tribunals which have no appellate power cannot use it as a writ of error. *Hamilton's Case*, 174.

review of defects in criminal warrant: CRIM. LAW 1,—p. 174.
used as a mode of review: COURTS 1,—p. 174.
Health—measures to preserve public health: MUN. CORP. 2, 3,—p. 526.
Hearsay—as to cause of personal injury: EVIDENCE 5,—p. 272.
as to legal effect of process: ATTORNEY, &c.—p. 452.
in proceedings to establish will: TRIAL 2,—p. 227.
Heirs—ouster of guardian from real estate of: EXECUTORS, &c. 6,—p. 223.
Highway—action for injuries to: WAYS 3,—p. 472.
labor, distribution of. WAYS 4,—p. 347.
officer, action against for injury caused by: DRAINS, &c. 3,—p. 348.
officers; their power as to drains: WATERS, &c. 3,—p. 347.

HOMESTEAD.

1. A city lot, purchased by a single man in contemplation of his marriage, and with the intention of making it a homestead, will be exempt as such from the levy of execution, even before any dwelling is erected on it, if the man and his wife have enclosed, improved and used it with the constant purpose of making it their home as soon as their means would permit. *Reske v. Reske*, 541.
2. The homestead right of an execution defendant is not forfeited by his omission to select his homestead, if, being within reach, he is not actually notified of the levy or of the proceedings thereunder, and therefore does not know that any occasion has arisen to make a selection. *Griffin v. Nichols*, 575.
3. A man's homestead exemption is not necessarily destroyed by the act of his wife in abandoning him, or in beginning proceedings against him for a divorce, if he continues to treat the place as his home, working upon it from time to time, and sometimes eating or sleeping there, even though he parts with his furniture, and admits other occupants. *Id.*
4. Adverse and paramount homestead rights, claimed by an execution defendant, may be brought under consideration in ejectment brought by an execution purchaser; or the defendant can move to set aside the execution sale, or file a bill in equity. *Riggs v. Sterling*, 157.

5. Questions of title are not triable in mere summary proceedings before a circuit court commissioner to recover possession of real estate; and a homestead right, though not strictly an estate, sufficiently involves the question of title to fall within this rule. *Id.*
exception of easement appurtenant to: SPECIFIC PERF.,—p. 467.

HOMICIDE.

1. Voluntary homicide is no more than manslaughter if provoked by unlawful violence and by a display of deadly weapons, designed to compel submission to an unlawful arrest. *People v. Burt,* 200.
2. One who kills an actual felon in trying to arrest him, without knowing or believing him to be guilty, commits murder, especially if he is not an officer. *Id.*

HUSBAND AND WIFE.

1. In Michigan, married women have no general capacity to make contracts, their common law disabilities being only partially removed by the Married Woman's Act. *Edwards v. McEnhill,* 160.
2. One who relies upon a contract made by a married woman must show the facts in order that it may appear whether she had capacity to make it. So *held* where the contract relied on was one of partnership between herself and her husband. *Id.*
3. Where a man and wife unite in conveying property and the grantee gives back to each an individual mortgage thereon, the wife becomes absolute owner of her mortgage in her own right, and can dispose of it as she pleases and as if she were single. *Goodale v. Patterson,* 532.
4. In an action involving a sale to a woman through her husband, the latter's admissions after his wife's title has vested, and when he is not acting in her business, are properly excluded; and his admissions as to past transactions cannot bind her if they are not part of the res gestæ. *Stansell v. Leavitt,* 536.
5. A wife replevied, as her own, property that had been seized on execution against her husband and on the trial called her husband to show that it belonged to her. *Held* proper to cross-examine him as to his own use of the property, and of its proceeds, and also as to his business, what he did with his earnings, and where his wife got her money to pay for the property in suit. *Gavigan v. Scott,* 373.
6. The mere fact that a husband has given a chattel mortgage on his wife's property does not tend to show that he owned it, if there is no evidence of his wife's consent or knowledge therein, or that it was given for her. *Id.*
7. Where a wife, seeking divorce, is justified, by her husband's conduct, in living apart from him, he is bound to provide support for her elsewhere. *Page v. Page,* 89.
8. A bill to annul a marriage for gross duress was sustained where the marriage had never been recognized and complainant was an unworldly youth of eighteen whom defendant had brought before a justice on a charge of bastardy and who, though protesting his innocence, had been frightened by the justice into a marriage on the spot. *Smith v. Smith,* 607.

appointment of wife's administrator: EXECUTORS, &c. 2,—p. 29.
assumpsit on claims assigned by husband and wife: ASSUMPSIT 7,—p. 491.
calling respondent's wife as witness: CRIM. LAW 6,—p. 613.
costs on affirmance of divorce on prolix record: COSTS 4,—p. 88.
how separation affects HOMESTEAD 3,—p. 576.
husband's succession to wife's personalty: DESCENTS, &c.—p. 29.
release of dower to husband: DOWER,—p. 306.
wife's liability on note: BILLS, &c. 1, 2,—p. 626.
wife's refusal to unite in deeds: LICENSE,—p. 636.

wife's testimony for husband: WITNESS 8,—p. 613.

IDENTITY.
A mere inference that a note sued on is identical with a note referred to by a witness, cannot support a judgment. *Nelson v. Dutton*, 417.
evidence bearing on: LIBEL, &c. 1,—p. 11.
of defendant; amendment as to name: BILLS, &c. 9,—p. 113.
of documents; EVIDENCE 1,—p. 298.
of premises, to be shown in litigation between LANDLORD AND TENANT, 4,—p. 482.
Impeachment—of witness as to veracity: WITNESS 7, 9,—p. 215.
by production of papers: WITNESS 1,—p. 373.
collaterally; ARREST 3; WITNESS 8,—p. 613.
Implied—warranty; authority to bind another: PRINCIPAL AND AGENT 3,—p. 298.
Improvements—claim for, in ejectment: EJECTMENT 3,—p. 33.
See HOMESTEAD 1,—p. 541.
Indorsement—by payee, after provisional indorsement: BILLS, &c. 4.—p. 95.
of certificate of deposit: BANKS, &c. 1,—p. 36.
of levy, on EXECUTION 4-6,—p. 452.
of name of respondent's wife as witness: CRIM. LAW 6,—p. 613.
of note containing invalid interest clause: PLEADING 5,—p. 416.
want of, on firm note given to partner: PARTNERSHIP 2,—p. 480.
Infants—recoupment not enforceable against: DAMAGES 12,—p. 103.
not bound by their contracts: CONTRACT 1,—p. 103.
Information—sufficiency of, in case of murder: CRIM. LAW 2,—p. 422.
Injunction—against collection of drain tax: DRAINS, &c. 2,—p. 639.
master; power to issue writ of ne exeat: NE EXEAT 2,—p. 217.
Injuries—to highways and bridges; action for: WAYS 3,—p. 472.
caused by drains; action for: DRAINS, &c. 3,—p. 348.
In pari materia—trespass on restitution and trespass for mesne profits: TRESPASS 2,—p. 263.
INSOLVENCY.
striking out matters relating to: EQUITY 11,—p. 230.
Instructions involving opinion on facts: ERROR 12,—p. 585.
Instructions to Jury—reversal for inconsistency: ASSAULT,—p. 153.
INSURANCE.
1. Comp. L. ch. 94, provides for the organization of mutual benefit associations, to secure "to the families or heirs of any member, upon his death, a certain sum of money." *Held*, that the term "family" will cover a case where the insured and the beneficiary were an old man and a young woman who were not related, but had lived for many years in the same household, and had treated each other as father and daughter. *Carmichael v. N. W. Mut. Ben. Ass'n*, 494.
2. The charter and by-laws of a mutual fire insurance company provided that when the board of directors ordered an assessment the secretary should prepare it and it should be signed by him and by a majority of the board. *Held*, that an unsigned and uncertified paper containing no headings to explain the figures set down in it, could not be treated as an official assessment for the purpose of forfeiting the policy of one who had not paid the amount of his assessment until after the expiration of the period fixed by notice to him. *Baker v. Citizens' Mutual Fire Ins. Co.*, 243.
3. The articles and by-laws of a mutual benefit association required that assessments be made by the secretary, and the certificates of membership provided that assessments be payable within thirty days after notice from the secretary. *Held*, that the notice contemplated

was notice of the assessment; and that insurance was not forfeited by neglect to pay assessments that were not imposed by the secretary or by the trustees, but only, if at all, by persons claiming to be managers, and where the only notice from the secretary was a notice of forfeiture. *Bates v. Detroit Mut. Ben. Ass'n*, 587.

4. The charter of a mutual fire insurance company made it the absolute right of farm owners in the county to become members on subscribing the articles and applying for insurance on prescribed terms. *Held*, that the secretary could not cut off this right by refusing an actual tender of the proper amount from one who was already a member and had duly applied for insurance. *Gay v. Farmers' Mutual Ins. Co.*, 246.
5. The liability of persons insured in mutual insurance companies organized under Acts 82 of 1873 and 66 and 142 of 1877, to pay their proportion of such assessments as shall be sufficient to meet all of the company's losses and liabilities, cannot be avoided by any arrangements entered into with the company whereby the insured seeks to limit such liability; nor can it be lessened by any provisions in the articles of association. *Russell v. Berry*, 287.
6. A declaration in a suit against a mutual fire insurance company set forth that plaintiff, being a member of the company and having bought insured property from another member, applied to the secretary for insurance on it in his own name, tendering the proper amount; that the secretary had authority and actually contracted, but informed him that the property would be regarded as insured and asked him to keep the money until a formal policy could be prepared; and that before he could get him to make out the policy the property was burned. The declaration gave the charter and by-laws of the company in full, and set out an absolute contract in positive terms. *Held*, that under Circuit Court Rule 104, which dispenses with prolix declarations on policies of insurance, the declaration made out a good cause of action, and that unless the charter and by-laws made such contracts as it alleged, illegal, plaintiff should have been allowed to show that they had been recognized by the company as within the secretary's power. *Gay v. Farmers' Mutual Ins. Co.*, 245.
7. An insurance company will be considered satisfied with the answer to a question as to previous insurance, if the answer is substantially true and they issue the policy and enter into contract for insurance. *Emery v. Mut. City & Village Fire Ins. Co.*, 469.
8. A man insured property in a company whose policy provided that further insurance, without the company's consent would avoid it. He took a policy in another company, whose agent knew of the first, and in answer to a question as to what insurance there was already, he answered that there would be none after a particular date, being the time at which he supposed the first policy would run out, though it was, in fact, to be good for a year longer. *Held*, in an action on the latter policy, and in view of the clause of avoidance in the former one, that the former became void on getting the policy in suit, and the latter was therefore not void as for an untruthful answer. *Id.*
9. A policy that is to be void on a certain contingency cannot be regarded, where that occurs, as existing for any purpose; and whether ended by agreement or lapse of time or breach of condition is to be considered as no policy. *Id.*
10. Forfeitures for breach of condition cannot be established except for the violation of the precise condition made. *Bates v. Detroit Mut. Ben. Ass'n*, 587.
11. The cancellation of an insurance policy has no effect, in itself

upon a right of action which has previously accrued under the policy. *Baker v. Citizens' Mutual Fire Ins. Co.*, 243.
Intent—consideration as bearing on intent: FRAUD &c. 4,—p. 140.
evidence, as to, in action on note: BILLS &c. 13,—p. 426.
intent inferred from performance of SETTLEMENT 2,—p. 135.
of legislation: STATUTES 1,—p. 180.
of parties, as bearing on alleged SETTLEMENT 4,—p. 292.
of parties to contract: CONTRACT 4,—p. 105.
of parties to parol contract: CONTRACT 6,—p. 475.
to assign mortgage; proof of: MORTGAGE 7,—p. 229.
INTEREST.
1. Agreements to pay ten per cent. interest are invalid in Michigan, unless in writing. *Hopkins v. Ruggles*, 475.
2. Interest from the time of demand may be allowed in granting mandamus for the payment of a school order when it is such a settled demand as would sustain a recovery of interest at law. *Martin v. Tripp*, 184.
3. Agreements for ten per cent. interest must be written. Comp. L., § 1632. Whether any liability arises from a parol ratification of an oral agreement that the interest clause in a note may be so changed as to lengthen the period for which ten per cent. interest shall be paid—*Q. Nelson v. Dutton*, 416.
agency of one acting in his own interest: PRINCIPAL AND AGENT 1,—p. 142.
clause in note, alteration of: BILLS, &c. 14; INTEREST 3,—p. 416.
in administration of wife's property: EXECUTORS, &c. 2-3,—p. 29.
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of opposite party to be regarded: CARRIERS 1; ASSUMPSIT 5,—p. 558.
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Introduction—of bills: CONSTITUTIONAL LAW 1, 2,—p. 129.
Irregularities—omission of notice to officer of corporation: WRIT, &c.; CORPORATIONS 2,—p. 5.
in removing executions from files: EXECUTION 1,—p. 453.
in tax proceedings: TAXES 4, 5, 12,—p. 336.
waived by pleading: PLEADING 1,—p. 176.
Issue—before a justice, not changed on APPEAL 8,—p. 585.

Joinder—of actions for injuries to ways: WAYS 3,—p. 472.
Joint—conveyance, by HUSBAND AND WIFE 3,—p. 532.
defendants; authority to bind each other: PRINCIPAL AND AGENT 2, 3,—p. 298.
enterprise, accounting between parties thereto: EQUITY 4,—p. 475.
interest and duty: PRINCIPAL AND AGENT 2,—p. 298.
maker; provisional indorser treated as: BILLS, &c. 4,—p. 95.
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riparian owners; agreements of: WATERS, &c. 5,—p. 277; FRAUD, &c. 5,—p. 277.
Judicial—notice: as to appearance of object: NEGLIGENCE 2,—p. 488.
Judge—indiscreet remark by, before jury: TRIAL 11-13,—p. 178.
must supervise examination of parties: WITNESS 2, 3,—p. 88.
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must check counsel: TRIAL 12,—p. 227.
power over sheriff and clerk: SHERIFF 1,—p. 504.
presumed to do his duty as to questioning convict: CRIM. LAW 3,—p. 172.
See COURTS.

JUDGMENT.

1. A verdict and judgment enforcing a forfeiture cannot be supported by presuming anything that does not appear on the record. *Miller v. Havens,* 482.
2. A surety for costs in justice's court may be included in the judgment rendered on appeal against his principal. Comp. L. § 6133. *Boatz v. Berg,* 9.
3. Judgments are admissible in evidence when the same subject matter again comes in controversy between the same parties. *Phillips v. Jamieson,* 153.
4. J's agent moved a division fence that stood between J's premises and P's. P moved it back again in the night. J tried to tear it down, and as P's wife resisted, he assaulted her. In an action therefor by Mrs. P she could not show, as res judicata, that in a former suit between the agent and a third person concerning other premises, but in which the principal matter in issue was the true location of a section line that P claimed as the boundary to the premises in suit the result was adverse to the agent. *Id.*
5. A judgment lien does not operate as a breach of warranty of title unless the judgment was had in a proceeding which the guarantors undertook to be concerned in or had proper notice to defend. *De Witt v. Prescott,* 298.
6. Judgments are under the control of the parties recovering them, or of their attorneys, and they may restrain the sheriff from proceeding to collect them. *Peck v. City Nat. Bank,* 354.
7. A judgment cannot be reversed, if right, whether the reasons on which it is placed are satisfactory or not; and counsel can rely on all the objections raised below. *Dunning v. Calkins,* 556.
8. The amount of a judgment in excess of the ad damnum clause can be remitted even after review. *McCormick Co. v. McKee,* 427.

admissible in evidence: REPLEVIN 4,—p. 373.
against individual partner: ESTOPPEL 4,—p. 160.
against surety for costs: CERTIORARI 4,—p. 8.
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Jurisdiction—constable acting outside of: CRIM. LAW 8,—p. 200.
conviction without jurisdiction: HABEAS CORPUS 1,—p. 174.
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to appoint guardian: GUARDIAN, &c. 2,—p. 223.
to assess personal taxes: TAXES 11,—p. 120.
to issue writ of HABEAS CORPUS 3,—p. 599.

JURY.

1. A peremptory challenge is not allowable in a criminal case after the jury has been sworn. *People v. Dolan*, 610.
2. Defendant's absence from further proceedings in justice's court after demanding a jury and paying the jury fee does not amount to a waiver of the jury, and the justice cannot proceed to try the case alone. *Boatz v. Berg*, 9.
3. The statutory right of challenging peremptorily may be exercised so long as the jury is not sworn, and notwithstanding the previous declaration of the party exercising it that he is satisfied with the jury. *Hamper's Appeal*, 71.

arrest of witness in presence of: ARREST 3,—p. 613.
cannot convict on unreliable testimony: WITNESS 7, 9,—p. 215.
comments to, on omission to produce witness: TRIAL 1,—p. 373.
conclusions as to weight of testimony, final: ERROR 7,—p. 11.
conclusions of, as to reasonableness of lien: LIEN 7,—p. 378.
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must decide as to good faith of purchaser: BANKS, &c. 1,—p. 36.
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reasonable time a question for: TIME—p. 590.
to determine degree of NEGLIGENCE 1,—p. 628.
warned not to be influenced by testimony: TRIAL 7,—p. 613.
See Questions (of fact).

JUSTICES OF THE PEACE.

1. A justice's docket record must disclose jurisdiction and show everything which the statute requires to be entered upon it; but it must also be construed fairly and reasonably, and in view of the fact that the justice is not presumed to be a legal expert. Reasonable certainty, or perhaps "certainty to a common intent" is all that is necessary. *Vroman v. Thompson*, 452.
2. If a justice, whether properly or not, has erased his docket entry of the appearance of a defendant, he ought not to proceed in the case without giving notice of his purpose to the defendant, or the attorney who had assumed to appear for him. *King v. McKenzie*, 461.

defects in warrant of commitment: CRIM. LAW 1,—p. 174.
dismissal of appeal from: APPEAL 9,—p. 100.
examination before, preliminary to information: CRIM. LAW 2,—p. 422.
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Justification—evidence in libel case: LIBEL, &c. 1,—p. 11.
in trover for seizing tenant's crop: LANDLORD, &c. 4,—p. 482.
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Laches—as ground for dismissing proceedings in GARNISHMENT 4,—p. 113.
by township in adjusting accounts: EQUITY 1, 2; MUN. CORP. 6,—p. 446.
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in showing fraud: LIMITATION OF ACTIONS 2; FRAUD 1,—p. 142.
of person seeking to vacate drain proceedings: DRAINS, &c. 2,—p. 639.

LANDLORD AND TENANT.

1. A man and his wife filed a bill against the wife's father for the specific performance of an alleged oral agreement by him to convey them the premises on which they lived when the dwelling house thereon should be ready for occupancy. The father claimed that complainants held as tenants merely. *Held*, that the fact that taxes were assessed against the father was not conclusive evidence against complainants, and that the payment of such taxes by the son-in-law was a significant fact in their favor. *Fairfield v. Barbour*, 57.
2. "Damages by the elements," which are ordinarily excepted from a lessee's covenant to keep in repair, cover destruction by fire occurring without fault or negligence in the lessee. *Van Wormer v. Crane*, 363.
3. The rights of one who has bought a crop from a tenant will be protected as against a subsequent forfeiture of the lease and the landlord's re-entry. *Miller v. Havens*, 482.
4. In trover against a landlord, for seizing a crop which the tenant had previously sold in good faith to the plaintiff, the landlord cannot justify himself by producing the record of certain summary proceedings taken by himself to recover possession of the premises from the tenant, if there is nothing in them to show that the landlord had ever claimed a forfeiture of the lease, or that the premises recovered were the same as those leased, or that the lease was in force at the time the proceedings were taken, or that the tenant had failed in any of his obligations, or that the plaintiff was in any way concerned in or had any notice of the proceedings. *Id.*
5. Forfeiture clauses in a lease are not favored by the courts, and their effect will be restricted as far as possible; but when the lease explicitly provides that the landlord may treat it as void upon breach of condition by the tenant, his election to do so dissolves the relation between him and his tenant. *Id.*
6. Tenancy at will rests on the actual or presumed consent of the owner of the premises. *Gault v. Stormont*, 636.

Lapse—of time, as bearing on presumption of payment: MORTGAGE 10,—p. 33.
of time, bars writ of error or certiorari: ERROR 1,—p. 171.
of time before enforcing payment: MANDAMUS 3,—p. 249.
of time from date of certificate of deposit: BANKS, &c. 1, 2,—p. 36.
of time, in avoidance of policy: INSURANCE 9,—p. 469.
of time, presumes assent to possession: MORTGAGE 20,—p. 335.
Lease—forfeiture of, as affecting sale of crop: LANDLORD, &c. 3, 4,—p. 482.
forfeiture clauses in: LANDLORD, &c. 5,—p. 482.
Legislative—power to change terms of court: COURTS 2,—p. 503.
Levy—abandonment of: EXECUTION 5,—p. 452.
allowed to become stale: EXECUTION 7,—p. 453.
of execution, omission to notify: HOMESTEAD 2,—p. 575.
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indorsement of, on EXECUTION 4–6,—p. 452.
sale on, after sheriff's term expires: EXECUTION 8,—p. 453.

unsatisfied, whether a lien: ATTORNEY, &c.,—p. 452.
wrong date as to: EXECUTION 11,—p. 453.

LIBEL AND SLANDER.

1. A libel suit was based on an article charging the plaintiffs with arson to defraud insurers and with murder. *Held*, proper to permit the defendant, in justifying, and as bearing upon the malice of the libel, to show that plaintiff's claim for insurance on the house that was burned was contested. *Peoples v. Evening News*, 11.
2. A newspaper article complained of as libelous did not name the plaintiff, but it was practically conceded that he was the person referred to. *Held*, that the exclusion of a subsequent article, naming him, when offered merely for the purpose of establishing identity and objected to as incompetent for that purpose, was not material error. *Id.*

LICENSE.

Verbal permission, by the vendor of land to the purchaser, to take possession at any time, is a mere license, revocable at pleasure, so long as the terms of the sale are unfulfilled; and the vendor's return of a partial payment on failing to get his wife to unite with him in the sale revokes such a permission previously given. *Gault v. Stormont*, 636.

to lay track in street: LIMITATION OF ACTIONS 2,—p. 142.

LIEN.

1. Money paid by the holder of a mortgage to redeem the premises from a tax-sale does not constitute a lien apart from the mortgage, but is discharged when the mortgage is satisfied; and whether the amount paid is or is not included in the sum for which the mortgage is foreclosed, there can be no subsequent or separate proceeding against the mortgager to enforce its payment. *Vincent v. Moore*, 618.
2. In proceedings by sub-contractors to enforce a mechanic's lien, the original contractors must be brought in as parties, since the contract relation and state of accounts between the defendant and the original contractors, and between the original and sub-contractors, must be adjudicated before the lien can be established, and the rights and liabilities of the parties be ascertained. *Kerns v. Flynn*, 573.
3. The objection that a petition for the enforcement of a mechanic's lien does not implead necessary parties, may be taken in the answer thereto, or at the hearing; and it is not lost by putting in an answer after demurring. *Id.*
4. Boom companies have a lien for their services in breaking jams and driving logs whose owners have not put on a sufficient force to do it, not only under the Boom statute itself (Comp. L. § 2793) but under the General Act relating to log-driving. Act 83 of 1879. *Hall v. Tittabawassee Boom Co.*, 377.
5. A boom company's statutory lien for running logs is acquired if the work is done by one who has contracted with the company to do it as the company's agent, and who is to be paid a gross sum for the job. *Id.*
6. Where the logs of an individual owner have become intermingled with those in the charge of a boom company without his consent, but without the fault of the company, the latter acquires a lien for its services in driving them which it does not waive by refusing to deliver them to the owner on demand, unless he tenders not only a reasonable compensation for the services, but enough to cover the cost of separating his logs from the rest. *Id.*
7. In an action involving the existence of a lien for services, a full showing should be had as to the items that go to make up the claim, and full cross-examination should be permitted. The reasonableness

of the claim is for the jury, and they cannot be instructed as to their conclusions thereon. *Id.*

8. Tender of performance of an agreement will not operate to extinguish the lien by which the agreement is secured if it is not unequivocal and reasonably capable of being understood by the other party as a bona fide tender of the requisite thing, act or service; and the offer itself should be accompanied by circumstances fairly implying control of the necessary means, and possession of the necessary ability to fulfill it. *Selby v. Hurd*, 1.
9. Where a log-owner demands all his logs from a boom-company which claims a lien for its services in driving them, the latter does not lose its lien by detaining more of the logs than is necessary to preserve it, though such a detention may possibly give ground for an action. *Hall v. Tittabawassee Boom Co.*, 377.
10. One who seeks to break a lien on the ground that the demand is excessive should tender what he himself considers reasonable. *Id.*
11. A lien-holder cannot be said to refuse to state the amount he claims when he merely refuses to vary from schedule rates of which both parties have knowledge. *Id.*
12. One who holds property under claim of a lien is under no obligation to take it to a certain point, at the owner's request, merely to enable the owner to replevy it. *Id.*
13. In replevin for logs on which defendant claims a lien for driving them and for storage, the jury cannot be instructed that the charge for storage should be proportioned to the length of time they were held, as this involves considerations of fact, and it might be unjust that an owner who should be favored with an early delivery of his property should also be favored with the smaller charges. *Id.*

by levy returned unsatisfied: ATTORNEY, &c.,—p. 452.
effect of extinguishment, on notice: PRINCIPAL AND AGENT 2,—p. 298.
enforcement of: EXECUTION 7,—p. 453.
of judgment as breach of warranty: JUDGMENT 5,—p. 298.
on logs for services: WATERS, &c. 2,—p. 378.

LIMITATION OF ACTIONS.

1. If B borrows from A to lend to C, the running of the statute of limitations on C's debt to B is not postponed to the date of the enforcement of B's liability to A. *Howard v. Presbyterian Church of Pontiac*, 125.
2. An action by a private person as for continuing injury in keeping a railway track in the street near his premises, is subject to the six-year limitation, if defendant relies on permission given longer ago and plaintiff seeks to show by such evidence as remains, that his permission was obtained by fraud. *Krueger v. Grand Rapids & Indiana R. R. Co.*, 142.

error and certiorari barred: ERROR 1,—p. 171.
for adjoining lands: EJECTMENT 1,—p. 98.
in case of manslaughter: CRIM. LAW 16,—p. 200.

Limitations—of liability for assessments in INSURANCE 5,—p. 287.
Loan—assumpsit for amount of promised loan: ASSUMPSIT 2,—p. 232.
in settling option deals, sustained: SETTLEMENT 1,—p. 232.
not to be confused with wages due: PLEADING 7,—p. 74.
Local—actions, between foreign corporations: CORPORATIONS 1,—p. 5.
Logs and logging—agreement to share expenses equally: CONTRACT 8,—p. 475.
construction of logging contract: CONTRACT 7,—p. 62.
lien for running logs: LIEN 4, 5, 9, 13; WATERS, &c. 1, 2,—p. 377.
Loss—of lien, by detaining too much: LIEN 9,—p. 378.
of profits, as an element of DAMAGES 4,—p. 263.
as measure of DAMAGES 3,—p. 62.
of time, in consequence of injury: MASTER, &c. 6,—p. 272.

Malice—in libel; evidence bearing on: LIBEL, &c. 1,—p. 11.
MALICIOUS PROSECUTION.
A declaration for malicious prosecution is defective if it does not aver the termination of the suit in the last court to which it was carried. But the defect is formal, and would be cured by a verdict for plaintiff on the merits. *Sutton v. Van Akin*, 463.
MANDAMUS.
1. The remedy by mandamus contemplates the necessity of indicating the precise thing to be done; it is not adapted to cases calling for continuous action, varying according to circumstances. *Diamond Match Co. v. Powers*, 145.
2. Obedience to the writ of mandamus is enforcible by process for contempt. *Id.*
3. Mandamus was not allowed to enforce the payment of a claim for salary where the relator first elected to sue in assumpsit but left the action undetermined and, after ten years had passed from the date of his claim, sought his remedy by mandamus from the appellate court. *Wolcott v. Jackson*, 249.
to compel issue of patents: PUBLIC LANDS,—p. 195.
to compel payment of school orders: INTEREST 2; SCHOOLS, &c. 2,—p. 184.
Manslaughter—See CRIM. LAW 16; HOMICIDE 1,—p. 200.
Marriage—bill to annul for duress: HUSBAND, &c. 8,—p. 607.
Married woman—her right to contract: HUSBAND, &c. 1, 2,—p. 160.
her liability on promissory note: BILLS, &c. 1, 2,—p. 626.
her refusal to unite in deeds: LICENSE,—p. 636.
MASTER AND SERVANT.
1. Employers cannot assume to be final judges in their own behalf of the propriety of dismissing their employees during their term of employment, unless they also take the responsibility which attaches to dismissals without actual cause. *Jones v. Graham &c. Transp. Co.*, 539.
2. The words "I am very sorry to have to ask you to resign your position," in a letter from an employer to his employee are properly construed as a peremptory discharge. *Id.*
3. A vessel captain who has been peremptorily discharged by the owner of the vessel for unfitness, is not bound to offer to resume command before leaving and beginning suit against the owner on the contract of employment between them. He owes defendant no further duty than to use reasonable diligence to obtain other employment. *Id.*
4. Proof of the actual fitness of an employee who has been discharged is proper in an action by him on the contract of employment. *Id.*
5. The omission of a railroad company to warn an inexperienced brakemen of the specific danger of coupling cars that are furnished with double dead-woods does not make the company liable for an injury received by him in so doing, if the risk is such as to be manifest to any person, and if, on being employed, he was warned in general terms of the perils of coupling cars of different construction, and was told not to take any chances. *Hathaway v. Mich. Cent. R. R. Co.*, 253.
6. In an action by a laborer for personal injuries from machinery, testimony as to his consequent inability to work, the amount of time he lost through sickness, what that time was worth to him, and his reasonable expenses for medical attendance, is admissible as bearing on the amount of damages to which he may be entitled. *Huizega v. Cutler & Savidge Lumber Co.*, 272.
7. A youth employed in a saw-mill was injured by the machinery before he had been there long. He had once before been employed in the same mill. *Held*, that in an action for the injury he could show

the changes made in the arrangements of the mill in the interval between his terms of employment as bearing upon his want of familiarity with them when hurt. *Id.*

8. Evidence from competent persons as to the dangerous character of machinery, and the consequences of coming in contact with it, is admissible in an action for injuries caused thereby. *Id.*

action on contract of employment. ASSUMPSIT 1,—p. 539.
contract for employment of vessel master: COURTS 3,—p. 539.
evidence as to injury to servant: EVIDENCE 5,—p. 272; NEGLIGENCE 3,—p. 273.

Material—evidence, by sheriff's deed: APPEAL 3,—p. 313.
objections to materiality of evidence: TRIAL 6,—p. 41.
Measure of damages—conversion of timber. DAMAGES 9,—p. 320.
for preventing performance: DAMAGES 3,—p. 62.
See DAMAGES,
Memorandum—of land sale in receipt: FRAUDS, STATUTE OF 1,—p. 636.
Mesne profits—trespass for: TRESPASS 2,—p. 398.
MINES AND MINING CLAIMS.
reservation of mining rights: SPECIFIC PERFORMANCE,—p. 467.
Misjoinder—of complainants: ACTION 4,—p. 21.
Misrepresentation—of consideration of note: BILLS, &c. 12,—p. 566.
to public boards: MUNICIPAL CORPORATIONS 5,—p. 446.
Mistake—as to statutory requisites in SETTLEMENT 2,—p. 135.
in compromise, ground for interference: SETTLEMENT 6,—p. 432.
Mittimus—for re-arrest of principal: BAIL, &c. 1,—p. 620.

MORTGAGE.

1. The mortgager of land that was worth considerably more than the mortgage debt, deeded it to the mortgagee and took back a contract of sale, which provided that in case of default in payment, the party of the first part should be entitled to immediate possession, and should also have a lien on the crops. *Held*, that the deed and contract together should be construed as a mortgage, amounting, only, to a change in the form of a security for a continuing liability, and that it was unimportant that the conveyance and defeasance were, as indeed, was formerly customary, separate instruments. *Ferris v. Wilcox*, 105.

2. A deed absolute given by way of security conveys no right of possession, if the papers show that the relation between the parties thereto is that of mortgager and mortgagee, and that the mortgager is left in possession under an arrangement which amounts to a defeasance of the deed. *Id.*

3. It is the presumption of fact that the sum mentioned in a mortgage as the consideration therefor, is correctly stated; and very convincing proof is required to rebut this presumption. *Wiswall v. Ayres*, 324.

4. The defendant in a suit to foreclose a mortgage has the burden of proving that the consideration therefor, was less than appears therein if complainant claims that amount, and it is against him if his own theory of computation is as favorable to complainant as to himself. *Id.*

5. A mortgager of land is entitled to possession until foreclosure and does not forfeit this right by failure to make payments as stipulated. *Ferris v. Wilcox*, 105.

6. If a purchaser of a parcel of mortgaged land assumes the whole mortgage debt, his land becomes the first fund to be resorted to for its satisfaction, and the land retained by the mortgager becomes the secondary or security fund. *Mich. State Ins. Co. v. Soule*, 312.

7. A man executed an assignment of a mortgage security held by him in order that he might use it, if necessary, to secure himself

and personal creditors, in case of the failure of a manufacturing concern in which he was interested; but he never did use it and he continued to collect money on it as his own and used the money for his own purposes. *Held*, that this did not show that any effective assignment was intended or made out. *Hutton v. Cuthbert*, 229.

8. Where it is understood between a mortgager and mortgagees that the mortgager shall convey to such person as one of the mortgagees shall designate, an assignment by the other mortgagee will not affect a purchaser who, in good faith, takes conveyance from the mortgager, without notice or knowledge of such assignment; the assignee is subject to the same equities as the assignor, and if the assignor afterwards gives a discharge of the mortgage to the purchaser the latter is entitled to regard it as a regular and valid release thereof. *Goodale v. Patterson*, 532.
9. Comp. L. § 4235, providing that recording the assignment of a mortgage shall not be such notice of the assignment as to invalidate payments made by the mortgager to the mortgagee, applies where the payment, though not actually made by the mortgager, is so made as to release him from liability, as by an arrangement between all parties that he should deed the land to the person making the payment. *Id.*
10. A mortgage is not necessarily presumed paid, from lapse of time, if the mortgagee asserted his right to foreclose in due season, and there does not appear to be any adverse holding, under the mortgager; the purchaser must be understood as claiming under the sale ever since it was made. *Baldwin v. Cullen*, 33.
11. A foreclosure suit depending upon the question whether or not the mortgage debt had been settled, was determined in complainant's favor upon evidence that complainant had always claimed it as an existing obligation, and that defendant fully understood that this claim was made; that neither note nor mortgage had been surrendered, and no steps had ever been taken to procure their cancellation or release; that the mortgager had assured complainant that he had fully informed a second mortgagee of the existence of the prior mortgage, and of the reasons why complainant insisted on his right to hold it; and that defendant had made an agreement with complainant in which he set out the existence of a debt, including the mortgage as securing part of it and as belonging to complainant. *Lyon v. McDonald*, 435.
12. The buyer of a portable saw mill gave a series of notes for the unpaid portion of the purchase price and secured them by a chattel mortgage on the mill. He also made a contract with the seller whereby he was to saw for him, and the latter was to be allowed to withold one-third of the payments due for this work until it should amount to the unpaid balance. He did not do so however, and when so much sawing had been done that a third of the payments therefor would have completed the payment for the mill, the first note only had been actually paid. As the remaining notes were not taken up, the seller demanded the property, and as the buyer refused to give it up he took it on a writ of replevin. *Held*, that as the seller had not withheld the money to which he was entitled, and it was therefore never allowed to apply on the mortgage, it did not follow that the mortgage was extinguished from the fact, merely, that enough sawing had been done to satisfy it. *McRae v. Davenport*, 633.
13. A foreclosure bill will not lie until the debt secured by the mortgage under foreclosure falls due. *Kelly v. Bogardus*, 522.
14. Whatever can be claimed by virtue of a mortgage must be claimed

in the foreclosure proceedings; the demand cannot be split and made a basis for separate suits. *Vincent v. Moore*, 618.
15. Notice of a foreclosure sale is indispensable to its validity, and as it is the act of the party, and not of the officer making the sale, the presumption of the performance of official duty does not apply for the purpose of making out a valid foreclosure without actual proof of notice. *Sinclair v. Learned*, 335.
16. A notice of foreclosure by advertisement, purporting to be signed by the party foreclosing, is not fatally defective for being signed in the wrong name if the true name is specified in the body of the notice; the party is not required to sign it. Comp. L. § 6915. *Mich. State Ins. Co. v. Soule*, 312.
17. The burden of showing that the amount due on a mortgage under foreclosure is less than complainant claims is on the defendant, *Lyon v. McDonald*, 436.
18. Non-payment by the sheriff to the mortgager, of a surplus received on foreclosure sale, does not defeat the sale, for the sheriff must account for the money to the mortgager even though he fails to obtain it, and if the mortgager redeems without getting it, he still has an unquestionable right to have it taken into account. *Sinclair v. Learned*, 335.
19. The presumption of law that a public officer performs his duty applies where the question is whether a sheriff's deed on foreclosure was immediately filed by him as required by Comp. L. § 6920; and unless the circumstances of the case overturn it, prevails so far as to throw the burden of proof upon the party who questions the fact. *Id.*
20. The mortgager's assent to the possession of the foreclosure purchaser should be presumed if much time has passed without any question as to the validity of the foreclosure; and such assent would entitle the purchaser to hold as mortgagee, if not as owner, except as against proceedings to redeem. *Id.*
21. If a purchaser at a sale under an invalid foreclosure afterwards acquires the equity of redemption, it operates to perfect his own previous conveyance of the land and to discharge him from liability on his covenants of warranty, if that be the purpose of the parties. *Mich. State Ins. Co. v. Soule*, 312.

y husband on wife's property: HUSBAND, &c. 6; WITNESS 1,—p. 373.
confirmation of foreclosure title: ESTOPPEL 6,—p. 621.
contract to obtain discharge of: DAMAGES 1,—p. 132.
decree for amount offered in compromise: SETTLEMENT 8,—p. 436.
ejectment for mortgaged premises; EJECTMENT 2,—p. 33.
evidence as to sale thereunder: ASSUMPSIT 7,—p. 491.
of property to evade execution: EQUITY 6,—p. 148.
payment by mortgagee to redeem from tax sale: LIEN 1,—p. 618.
refusal of tender made by stranger: MORTGAGE 15,—p. 335.
sale of forged mortgage: EVIDENCE 2,—p. 189
sale of second mortgage as first; FRAUD, &c. 2,—p. 177; TRIAL 13,—p. 178.
securing contract of sale: CONTRACT 9,—p. 76.
to each grantor where deed is from HUSBAND, &c. 3,—p. 532,
wife as sole owner of mortgage: HUSBAND, &c. 8,—p. 532.
Motion—for dismissal of divorce bill: APPEAL 4,—p. 88.
to dismiss as ground of error: ERROR 2,—p. 5.
to set aside execution sale: HOMESTEAD 4,—p. 158.
to strike amendment from files: EJECTMENT 3,—p. 33.
to strike out testimony: FRAUDS, STATUTE OF 4,—p. 41.
to suppress deposition: DEPOSITION,—p. 84.

MUNICIPAL CORPORATIONS.

1. Where the Legislature, in setting off a new county from an old one,

divided a township, but passed an act impliedly recognizing its continued existence in one of the counties and attaching the rest to a township in the other county, it was *held* that the township organization was not destroyed. *Bay County v. Bullock,* 544,

2. The obligation and the power of a city council to act as a board of health and prevent the spread of contagion is not lessened by their omission to create a separate board of health, and their power is a police power, and is commensurate with their duty. *Rae v. Flint,* 526.
3. The charter of Flint requires the common council to take measures for the preservation of the public health. Act 145 of 1879 makes the council the board of health where no other board is appointed. *Held,* that a nurse employed by the council to care for small-pox patients was entitled to compensation from the city, even where the patient was of sufficient ability to pay for the service himself; and Comp. L. § 1706, making the cost of services rendered to such persons an individual liability, does not exempt the city from the immediate liability, if, indeed, it applies at all in cases of public emergency. *Id.*
4. The charter of Saginaw provides for a board of review with jurisdiction of appeals from the assessment of city taxes, and makes its decision, on such appeals, final. Act 300 of 1875, p. 295. *Held,* that the question whether an assessment is excessive is not for the courts to try. *Williams v. Saginaw,* 120.
5. Every township board is presumed competent to attend to the business it has to do, and in that respect to be equal in ability to any other board with which it deals. *Churchill v. Cummings,* 446.
6. Where accounts between two townships are adjusted by their respective boards, one of the townships, in filing a bill to set aside the settlement, cannot distinguish itself from its board for the purpose of excusing laches, nor can it claim relief on the ground that its own board was inferior in ability or in knowledge of facts material to the settlement. *Id.*

abolition of Detroit Central Station Court: COURTS 4,—p. 548.
Murder—See CRIM. LAW 16; HOMICIDE, 2,—p. 200.
Mutual—insurance companies, assessments: INSURANCE 3,—p. 587.
See INSURANCE 5,—p. 287.

NAME.
of defendant, amendment as to: BILLS, &c. 9,—p. 113.
of parties omitted in bill: EQUITY 8,—p. 230.
of respondents' wife indorsed as witness: CRIMINAL LAW 6,—p. 613.
signed to notice of foreclosure: MORTGAGE 16,—p. 312.
used by agent in making contract: PRINCIPAL AND AGENT 4,—p. 536.
Necessaries—purchase of: VENDOR, &c. 2,—p. 529.
NE EXEAT.

1. History of the practice in England and the United States as to the writ of ne exeat. *Bailey v. Cadwell,* 217.
2. The writ of ne exeat is not issuable in Michigan by a circuit court commissioner or injunction master, nor in divorce cases in advance of the decree. *Id.*

NEGLIGENCE.

1. Sending out a train with so few brakemen that on some grades its speed cannot be checked, cannot be *held,* as a matter of law to have no tendency to support an allegation of reckless management; nor can the neglect be *held* to be of one degree rather than another; if there are special circumstances tending to excuse such management, they are for a jury to weigh. *McDonald v. Chicago & N. W. Ry. Co.,* 628.
2. Judicial notice will be taken that a box freight car standing still at a highway crossing is not of itself a frightful object to horses of ordinary gentleness; the question is not for the jury. *Gilbert v. Flint*

& Pere Marquette Ry. Co., 488.
3. The age and intelligence of a laborer injured by machinery, and his experience in the use of such machinery, may be considered by the jury in an action by him for the injury. *Huizega v. Cutler & Savidge Lumber Co.*, 273.
4. Negligence cannot be presumed against the defendant in an action for personal injury if it did nothing outside of the usual course of its business, unless that course of business was itself improper, or special circumstances required particular caution. *Mitchell v. Chicago & Grand Trunk Ry. Co.*, 236.
5. The negligence of a railway company will not be presumed in an action against it for personal injury, but must be shown; and there can be no recovery unless it appears to be the efficient cause of the injury without any contributory fault in the plaintiff. *Id.*
declaration for injury by: PLEADING 4,—p. 628.
in coupling cars: MASTER, &c., 5,—p. 253.
in indorsing of certificate of deposit: BANKS, &c., 1,—p. 36.
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when fire is considered "damage by the elements": LANDLORD, &c. 2,—p. 363.
New Promise—to pay debts discharged by BANKRUPTCY,—p. 121.
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of surplus received on foreclosure: MORTGAGE 18,—p. 335.
performance of contract; damages: BILLS, &c. 8,—p. 186.
Notary Public—attorney acting as: APPEAL 9,—p. 100.
Notice—of agreements affecting submarine rights: WATERS, &c. 5,—p. 277.
of amendment to claim for improvements: EJECTMENT 3,—p. 33.
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of assignments to purchaser of mortgage: MORTGAGE 8,—p. 532.
of business incompetency: BILLS, &c. 6; CONTRACT 2,—p. 529.
of election, dispensed with: OFFICE, &c. 1,—p. 129.
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of filing deposition: DEPOSITION,—p. 84.
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of matters affecting recovery on note: BILLS, &c. 7,—p. 427.
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payment of assessment after time fixed by: INSURANCE 2,—p. 243.
that goods are held subject to order: SET-OFF,—p. 86.
to defend action: VENDOR, &c. 9, PRINCIPAL AND AGENT 2,—p. 298.
to defendant, of levy of execution: HOMESTEAD 2,—p. 575.
to foreign corporation, of action in Michigan: WRIT, &c.; CORPORATIONS 2,—p. 5.
to parent, of order committing child: HABEAS CORPUS 2,—p. 599.
to parties concerned in trust-estate: TRUSTS 3,—p. 623.
to produce documents: TRIAL 3, 4,—p. 298.
to purchaser, of dissolution of firm: PARTNERSHIP 4,—p. 585.
to remove timber: TROVER 2; VENDOR, &c. 8,—p. 320.
to warrantor, to defend proceeding: JUDGMENT 5,—p. 298.

Objections—to goods delivered under contract: VENDOR, &c. 4,—p. 590.
to sheriff's foreclosure deed: APPEAL 3,—p. 313.
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to appointment of guardian: GUARDIAN, &c. 1,—p. 223.
to evidence after pleading general issue: PLEADING 3,—p. 463.
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to receiving goods of different quality: VENDOR, &c. 6,—p. 497.
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Obstructions—of platted streets: WAYS 2,—p. 21.
Occupation—of timbered land, right to: TROVER, &c. 2,—p. 320.
Offer—of compromise, as fixing foreclosure decree: SETTLEMENT 8—p. 436.
to resume work before suing: MASTER, &c. 3,—p. 539.
OFFICE AND OFFICER.
1. Statutory notice of an election was held to be dispensed with, in the particular instance, where the statute was so amended as to require the election of an officer not previously provided for but the amendment went into effect too late to give the statutory notice before the election. *Powell v. Jackson*, 129.
2. Act 214 of 1879 fixing the fees of a circuit court commissioner in criminal examinations applies where he takes the evidence in person. Where it is done by a stenographer the board of supervisors are the final judges of proper compensation. *Pistorius v. Supervisors*, 125.
3. A constable is not vested with official character when acting in a county to which he does not belong. *People v. Burt*, 199.
action against highway officer: DRAINS 3,—p. 348.
arrest by person not an officer: HOMICIDE 2; CRIM. LAW 8,—p. 200.
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representations: FRAUDS, STATUTE OF 4,—p. 41.
Orders—on drain tax: DRAINS 1,—p. 557.
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of highways, sues for injury to way: WAYS 3,—p. 472.
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of goods taken on execution: HUSBAND, &c. 5, 6,—p. 373.
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PARENT AND CHILD.
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to divorce suit; examination of: WITNESS 2, 3, 6; APPEAL 4,—p. 88.
to negotiable paper; mutual rights of: BILLS, &c., 3,—p. 95.
to option deals, may settle as they please: SETTLEMENT 1,—p. 232.
to proceeding to enforce mechanics' lien: LIEN 2, 3,—p. 573.

PARTNERSHIP.

1. An arrangement by which one person is to share the profits of a business with another does not make him a general partner in any such sense as to deprive him of his right to certain additional specific compensation which has been agreed upon. *Hamper's Appeal,* 71.
2. One cannot sue himself, and neither a partner nor his assignee can maintain an action at law against the firm, even after its dissolution, for the amount of a note made by the firm to the partner and afterwards accidentally destroyed without ever having been indorsed. *Davis v Merrill,* 480.
3. The remedy of a partner, or of his assignee, against the firm upon a note given by it to the partner, must be in equity, if anywhere, after the dissolution of the partnership without an accounting or settlement. *Id.*
4. A declaration on the common counts alone is insufficient in an action by an individual for the price of goods purporting to be sold by a firm in which he was a partner, if there is no showing of any assignment of the claim by the firm to the plaintiff, or of any notice to defendant of the firm's dissolution. *Hatzenbuhler v. Lewis,* 585.

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PAYMENT.

An objection to payment tendered as not as much as was due, or not what the goods cost, is enough to entitle the vendor to contest the correctness of the account. *Peter v. Thickstun,* 590.

acceptance of cheque: RECEIPTS,—p. 590.
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PLEADING.
1. Pleading to a complaint presented in justice's court waives the irregularity of omitting to issue a subpœna before serving the warrant. *People v. Allen*, 176.
2. Objections to the sufficiency of a declaration should be raised early in the proceedings, so that parties may be saved the expense and delay of preparation for trial. *Gay v. Farmers' Mutual Ins. Co.*, 246.
3. Formal defects in pleadings, even if not amendable, should be brought to the court's attention at the earliest reasonable opportunity, if the opposite party means to rely on them; he cannot plead the general issue and then object to evidence on the ground that no cause of action is stated. And if the defect is one that would be cured by verdict, the trial judge should either disregard it or direct amendment to be made and the trial to proceed, and if this takes defendant by surprise he can continue the case on a proper showing. *Sutton v. Van Akin*, 463.
4. A declaration against a railway company for the killing of animals that had got upon the track through the company's neglect to keep the side fencing in repair, averred that defendant "so carelessly and negligently ran, conducted and directed the locomotive and train" that they struck and killed the animals "so being on the railroad as aforesaid by and through the neglect of the defendant to keep in repair the fences as aforesaid and through the gross neglect and reckless conduct of the servants and employees of defendant on said locomotive in running down said animals," etc. *Held*, that as it was not claimed on the trial that the averment was so general that no evidence could be received in support of it, the jury was entitled to consider any evidence that was admitted without objection and tended to prove the main allegation; and if sending out a train without enough brakemen to keep it under control had any such tendency, this fact could be relied on as well as reckless conduct in the conductor or

engineer at the time of the injury. *McDonald v. Chicago & N. W. Ry. Co.*, 628.
5. One cannot recover under a declaration in which he claims as indorsee of a note bearing ten per cent. interest, if the interest clause in the note sued on is invalid. *Nelson v. Dutton*, 416.
6. Plea of the general issue is proper where the claim made is not well founded in fact; and after a verdict of no cause of action, for want of authority in the plaintiff to bring the suit, the defendant is not estopped from insisting upon such want of authority as a defense. *Denver v. White River Log and Booming Co.*, 472.
7. A bill of particulars, in an action for wages on a labor contract, cannot cover money returned by plaintiff to defendant, as a loan, after receiving it as payment. *Judd v. Burton*, 74.
8. It is an abuse of discretion for a justice, acting solely on his own motion, to exclude a defendant's bill of particulars of his claim of set-off merely because it was not filed within the time allowed for that purpose after being demanded by plaintiff, if it was in fact filed before trial, and if there was nothing to show that its reception would prejudice plaintiff. *Boatz v. Berg*, 8.
9. An amendment is not objectionable for changing the date of a transaction so as to make it cover a longer time than was at first averred in the declaration, if it does not in any way change the obligation sued on. *Niemarck v. Schwartz*, 466.

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PRINCIPAL AND AGENT.
1. Whether persons, while acting in their own interest and making a request exclusively for their own advantage, can be deemed as agents of a third person who would participate in the benefits that would arise from its being granted—*Q. Krueger v. Grand Rapids & Indiana R. R. Co.*, 142.
2. Where one of several joint-vendors is manager of the business and makes all the bargains, he must be presumed to act for all where there is a joint interest and joint duty; and notice to him in proceedings arising out of a breach of warranty caused by the existence of a lien upon the property sold, is notice to the rest unless in cases where the original lien has been extinguished and the existing lien springs from a contract with the buyer. *De Witt v. Prescott*, 298.
3. In an action against joint defendants upon an implied warranty it is admissible to allow one of the defendants to testify as to his authority to bind the other, though he must state facts and not conclusions. *Id.*
4. It makes no difference whether an agent, in contracting for the sale of personalty, used his own name or that of his principal, so long as the bargain was carried out with the latter's consent and approval. *Stansell v. Leavitt*, 536.
agent's talk as to past transactions: EVIDENCE 8,—p. 568.

recovery on note given to payee's agent: BILLS, &c. 7,—p. 427.
PRINCIPAL AND SURETY.
1. A creditor's neglect to enforce his demand against his debtor at the request of the latter's surety, does not, in Michigan, release the surety. *Mich. State Ins. Co v. Soule,* 312.
2. The discharge of a surety by an extension of time on his principal's debt results from the contract for extension and not merely from forbearance to collect the debt or from a promise to forbear collection. *Id.*
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of intent of parties to parol CONTRACT 6,—p. 475.
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See Burden of Proof.
PROSECUTING ATTORNEY.
1. The prosecuting attorney is a quasi judical officer, and he and any one associated with him represent public justice exclusively, and stand indifferent as between the accused and any private interest. *People v. Bemis,* 422.
2. A prosecuting attorney is vested with a personal discretion as a

minister of justice and not as a mere legal attorney, and he must act impartially, as well in refraining from prosecuting as in prosecuting. He must guard the real interests of public justice in behalf of all concerned, and he must not become entangled with private interests or grievances in any way connected with charges of crime. *Engle v. Chipman*, 524.

3. A prosecuting attorney may, perhaps, employ assistants in ways not involving his official discretion or responsibility, but this discretion can only be delegated on special grounds, where an assistant has been provided for by law. *Id.*
4. A general delegation of his powers by a prosecuting attorney is against public policy, and is illegal; and it can furnish no basis which a court will recognize for any action by the person to whom the powers were delegated for personal compensation for his services *Id.*
5. Counsel to assist the prosecuting attorney in a particular prosecution may properly be employed by the board of supervisors, with the sanction of the circuit court and the approval of the prosecuting attorney. *People v. Bemis*, 422.
6. In an action against a prosecuting attorney for legal services rendered by plaintiff as his assistant, proof that defendant promised to tell the supervisors that the bill was right, and ought to be paid, is no evidence of a recognition of personal liability, or of the actual rendering of the services. *Engle v. Chipman*, 514.

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PUBLIC LANDS.

1. Mandamus to the Secretary of State will not lie to compel him to issue patents to State lands; that is the duty of the Governor. Comp, L. § 3824. *Crane v. Secretary of State*, 195.

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Ratification—of contract of insurance: INSURANCE 6,—p. 245.
of sale of false shipping receipt: ASSUMPSIT 6,—191.
REAL ACTIONS.
1. Ejectment and the statutory proceeding to recover possession are the only possessory remedies known to the law, in Michigan. *Wilkinson v. Williams*, 155.
2. Summary proceedings before a circuit court commissioner to recover possession under Comp. L. §§ 6706-7 are maintainable against a builder who refuses to turn over a building at the time fixed by his contract. *Id.*
3. Complainant in summary proceedings to recover possession of land can resort to a summons instead of a warrant, and his course in doing so, where safe and practicable, is approved. *Carpenter v. Harris*, 223.
4. A justice of the peace has the same jurisdiction as a circuit judge in summary proceedings to recover possession; and the judge can decide no question therein that could not have been decided by the justice. *Riggs v. Sterling*, 158.
5. Title to land cannot be put in issue or considered in summary proceedings before a circuit court commissioner to recover possession thereof. *Miller v. Havens*, 482.
6. In summary proceedings by a guardian to recover possession of the lands of his wards, a complaint was *held* sufficient which stated that complainant was sole testamentary guardian of certain minors, who were named, being duly nominated as such in their father's last will which had been duly probated; that at a certain date he was in quiet and peaceful possession of certain described lands; that on that date defendant entered said premises and unlawfully holds them and holds complainant out of possession by force, contrary to statute; and that at the time of said entry complainant was and ever since has been and still is well entitled to the same, and that he prays to be restored to possession. *Carpenter v. Harris*, 223.—p. 195.
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RELIGIOUS SOCIETIES.
1. A religious society incorporated by voluntary association under Comp. L. ch. 108 is a temporal body and distinct from the church organized from it, with which it has nothing to do except as it provides for its wants. *Hardin v. Baptist Church*, 137.
2. An action in damages for expulsion from the church will not lie against the religious society connected therewith, even though the church be an integral part of the society. *Id.*
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Renunciation—of claim by creditor: ESTOPPEL 3,—p. 312.
Repair—covenant to keep in; damages from elements: LANDLORD 2,—p. 263.
REPLEVIN.
1. Replevin for goods, on the ground that they were wrongfully detained, will not lie where defendant came lawfully into possession of them, unless the wrongful detention is proved; and, if there has been no wrongful conversion by defendant, it must also be shown that plaintiff demanded the goods before beginning suit. *Adams v. Wood*, 411.
2. Comp. L. ch. 214 permitting replevin to be brought for distrained cattle is meant to provide an action wherein the legality of a distress of stray cattle may be tested. *Marx v. Labadie*, 605.
3. Judgment for the return of goods replevied from a buyer by the seller restores to the buyer the possession of the goods without impairing the seller's rights under their contract of sale. *Adams v. Wood*, 412.
4. Where defendant in replevin justifies under a writ of execution, the record of the judgment and proceedings on which it is issued are receivable in evidence. *Gavigan v. Scott*, 373.
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SALE.
1. Where one makes several distinct purchases from another by different instruments but at the same time, they will be treated, for purposes of recoupment, as items of one transaction. *Benjamin v. Richards*, 110.

2. Retention of title by the seller until full payment is made is not necessarily inconsistent with the buyer's right to the possession of the goods, and, if no time is fixed for completing payment, the buyer is entitled to reasonable time before the seller can demand the return of the goods and replevy them. *Adams v. Wood*, 411.
3. One who sells goods with warranty of title to a purchaser in another jurisdiction cannot claim that his liability thereon is released by any reasonable arrangements which the buyer finds himself compelled to make with the holder of an existing lien to enable him to remove the goods to his own domicil; and the fact that such a removal changes the venue of any consequent action does not necessarily support an inference of fraudulent combination by the buyer and the lien-holder against the seller. *De Witt v. Prescott*, 298.
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SCHOOLS AND SCHOOL DISTRICTS.

1. Act 358 of 1877 "to incorporate the public schools of the township of Long Rapids" provides that the territory within the township of Long Rapids, in Alpena county, be *set off* from Union school district No. 1, of the township of Alpena. The adjacent county of Montmorency had previously been attached to the township of Long Rapids for judicial, and therefore, for all legal, purposes Comp. L. §§ 120, 449. Act 358 made the town clerk of Long Rapids, who might, under this arrangement, be a resident of Montmorency

county, the clerk of the board of education, and provided that the trustees should meet and the records be kept at his office, which also might be in that county; it also made the township and school elections take place at the same time and on the same tickets; and it apportioned the debt of the old Union school district Number 1 of Alpena township between that district and the new one, according to proportions fixed by the assessment rolls of the two townships on the basis of the aggregate valuation of Long Rapids, which for that purpose, covered the unorganized county. *Held*, that the new school district of Long Rapids would include the territory of Montmorency county; and that school taxes for that district were properly levied on property in that county. *Johnston v. Cathro*, 80.

2. Mandamus to compel a school district assessor to pay a school order was allowed where the court was satisfied there was no valid defense. *Martin v. Tripp*, 184.

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SET-OFF AND COUNTER-CLAIM.

Money paid in advance for goods which not only do not correspond to the contract but are worthless may be recovered back by the buyer as paid without consideration, and he can therefore treat it as set-off; and he may do so with no other notice to the dealer that the goods are held subject to the latter's order than is implied in notice of the facts, of the worthlessness of the goods, and of his refusal to take them. *Petersen v. Door, Sash & Lumber Co.*, 86.

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SETTLEMENT.

1. The parties to an arrangement for speculating in options have the right as between themselves to settle their mutual dealings as they please; and a loan from one to the other, agreed upon by them in making such settlement, would not be affected by the nature of their previous operations. *Stanley v. Nye*, 232.

2. Parties to an amicable settlement may be presumed to intend what they carry out; and if it is lawful and practicable a mere mistake

as to statutory requisities should not prevent its enforcement in some suitable proceeding. *Galloway v. Gibson*, 135.

3. One who obtains a payment from his employer on the representation that it is a settlement in full, is presumptively bound by the representation, though not conclusively. *Judd v. Burton*, 74.
4. It is the intention of the parties to an account that has not been paid in full which determines whether an alleged settlement was meant to dispose of the entire account. *Widner v. W. U. Telegraph Co.*, 292.
5. A debtor enclosed a check in a letter of transmittal which was merely a printed form with the blanks filled out in writing and containing the printed words "in settlement of account." The letter also enclosed a receipt in similar form and with the same printed words. The creditor refused to sign this receipt but gave an ordinary receipt in place of it without objection from the debtor. Farther payments were made before the completion of the contract and the creditor frequently demanded full payment after the check was received and at such times the debtor made no claim of a settlement. *Held* that the words "in settlement of account" meant no more than "applied on the account." *Id.*
6. Courts cannot disturb a compromise between parties, unless on satisfactory evidence of mistake, fraud or unconscionable advantage. *Prichard v. Sharp*, 432.
7. A court cannot enter upon an original accounting on a bill which is so deficient in equities as to leave an existing settlement in force. *Churchill v. Cummings*, 447.
8. A foreclosure decree was given for the amount of a proposed compromise which had never amounted to more than an offer on either side, where the court considered the amount a sufficient approximation to the debt to fairly represent it at the time the compromise was proposed. *Lyon v. McDonald*, 436.

between townships, bill to set aside: MUN. CORP. 6; EQUITY 2,—p. 446.
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SHERIFF.

1. Under the Michigan system, the sheriff and the county clerk are officers of the circuit court for the county while it is in session, and during that period are subject to the direction of the circuit judge in all matters pertaining to the administration of justice. *Whallon v. Ingham Circuit Judge*, 504.
2. An action for sheriff's fees will not lie upon the quantum meruit, as at common law he was not entitled to them. *Peck v. City Nat. Bank*, 353.
3. A sheriff who has levied only on real estate is not entitled to poundage until the property taken is sold or money collected on the judgment; and this is especially so where statutory provision is made for the payment of his fees. *Id.*

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SPECIFIC PERFORMANCE.
Suit for specific performance was brought against one who had agreed to convey, but refused to execute a deed on the ground that his title was subject to a reservation of mineral rights of which complainant knew, but he himself did not, at the time of making the agreement, and that complanant had told him that it was not necessary to expressly except a certain easement that was appurtenant to his homestead. It was not shown that complainant had acted fraudulently. Complainant consented to accept performance in precise accordance with defendant's maximum claims, and to take a deed reserving the easement and excepting the right to minerals, and a decree was made accordingly, without costs to either party. *Held*, that defendant could not complain. *Anderson v. Kennedy*, 467.
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1. The effect of legislation, where the Legislature has full power, bears on the question of intent and construction. *Detroit Street Rys. v. Guthard*, 180.
2. An empowering statute does not necessarily imply that the power given did not exist before. *Rhoades v. Davis*, 306.
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SURVEYS AND SURVEYORS.

Re-surveys cannot be allowed to unsettle the lines of town lots after the lot-owners have established such lines in accordance with the stakes which they have found planted or recognized by authority, and in reliance on which they have purchased. *Flynn v. Glenny*, 580.
division of surveyed townships: COUNTIES 1,—p. 544.

TAXES.

1. Personal property belonging to a partnership is assessable in the locality where it is, if the firm has its place of business there. *Williams v. Saginaw*, 120.
2. The Tram Railway Act prescribes the rate and manner of taxing such railway companies, but elsewhere provides that the act may be at any time amended or repealed, though this shall not alter the *corporate rights* of companies formed under it. The subsequent tax law

changed the mode of taxation, but the other clause was not disturbed. *Held,* that the companies came within the tax law; and that the term *corporate rights,* used alone, meant only such essential and fundamental rights as attach to corporations, and did not include incidental privileges and immunities, such as a special standard of taxation. *Detroit Street Rys. v. Guthard* 180.

3. A tax is void if the supervisor, in apportioning an increase in the valuation of the lands on the assessment roll, distributes it upon the real estate only, and not on the personalty also. Comp. L. §§ 993–5, 999. *Sinclair v. Learned,* 335.
4. Certificates to an assessment roll are necessary only because they are required by statute; and it is within legislative power to provide in express terms that a tax-sale shall not be void even though the certificate was defective in substance or was altogether omitted. *Id.*
5. Whatever the Legislature can dispense with in advance it can dispense with retrospectively by enacting that its omission shall not prejudice. So *held* of certificates to an assessment roll. *Id.*
6. The payment as taxes of arbitrary demands unwarranted by law cannot be coerced by indirect means if it is not compellable by tax-warrant; and validating acts or legislation withholding rights until payment is made will impose no obligation to pay them. *Id.*
7. Every tax-sale in Michigan is a sale of the complete title, and if legal cuts off all prior titles. *Id.*
8. A tax-sale is void if the supervisor's certificate to the assessment on which it is based states only that he has assessed the property "at its true cash value" without adding the words "and not at the price it would sell for at forced or auction sale." Comp. L. § 991. *Id.*
9. Comp. L. § 1141 provides that the holder of a tax-title shall not be entitled to possession as against the holder of a subsequent tax-deed until he shall have paid or tendered to the latter the amount of the tax for which such subsequent tax-deed was given. *Held,* that the subsequent title which will thus preclude possession is not necessarily a legal tax-title, though the tax on which it was based must have been one that was not merely arbitrary but had some warrant in law. *Id.*
10. One who seeks to vacate a tax-sale on the ground that the tax was excessive must first pay or offer to pay what is equitable. *Id.*
11. One is not bound to notice or to appeal from an assessment of personal taxes against him if jurisdiction to assess them did not exist. *Williams v. Saginaw,* 120.
12. A bill will not lie to set aside taxes or a tax-sale on the ground that the supervisor's certificate to the assessment roll did not comply with the statute, because such an irregularity would not injure complainant and his case would therefore be without equity. *Sinclair v. Learned,* 336.

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TENDER.

A mortgagee has a right to refuse any tender of the amount due on the mortgage, if made by one who, as between the mortgager and mortgagee, is a stranger to their dealings and therefore has no right of redemption; so *held* where tender was made by one who was nei-

ther mortgager nor mortgager's grantee and who did not act in the interest or at the request of the mortgager and had himself no interest in the equity of redemption but only held some tax-titles which were not subject to the mortgage. *Sinclair v. Learned*, 335.
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"Reasonable time" within which to object to an account rendered is a question for a jury and to be considered in connection with the circumstances of the case. *Peter v. Thickstun*, 590.
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TRESPASS.
1. Trespasses are not excused by good faith, though they may be aggravated by bad faith: *Cubit v. O'Dett*, 348.

2. The statutory action of trespass which one who has obtained restitution in forcible entry proceedings is entitled to bring against the defendant therein, and in which he is allowed to recover treble damages, is not the same as the common-law action of trespass for mesne profits, though in pari materia. *Hitchcock v. Pratt,* 263.
3. Comp. L. § 6717 allows one who has obtained restitution in forcible entry proceedings to sue the defendant in trespass and recover treble damages. *Held* that he is not deprived of this remedy by defendant's voluntary surrender of the premises and dismissal of a writ of error sued out by him on the judgment of restitution. *Id.*

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TRIAL.

1. Defendant's counsel has a right to comment to the jury upon the plaintiff's omission to produce important witnesses who are within reach. *Gavigan v. Scott,* 373.
2. A. devised part of his farm to B., an adopted daughter, and died leaving a widow who became administratrix, the will not being produced. The widow married again, and died without being discharged as administratrix. She left all her property to her husband. B. married, had a son, lost her husband, and married again. *Held* that in proceedings by her to establish the missing will, contestant's counsel had no right, in opening to the jury, to relate dealings between the second husband of A.'s widow and the proponent's son, on one side, and the contestant on the other, in regard to the possession of the testator's farm, nor to narrate legal proceedings for its possession brought by proponent and the second husband, against contestant; these matters were foreign to the issue. And it was improper to suggest that B.'s son was born too soon after her marriage, and hearsay for a witness to state what he had heard Mrs. A. say on the subject. It was also improper to show by a physician how soon the birth happened, as this had no legal connection with the issue. *Rickabus v. Gott,* 227.
3. Notice to produce papers is insufficient if it barely allows time to procure them by telegraphic communication with clients, unless longer notice is impracticable. *De Witt v. Prescott,* 298.
4. Defendants to an action on a contract are entitled, without notice, to the production of all papers which formed any part of the contract. *Id.*
5. The refusal of a defendant in foreclosure to produce business books which are in his possession and which may reasonably be expected to shed light upon the transactions in dispute, is suspicious. *Wiswall v. Ayres,* 324.
6. Testimony that supports any valid count of a declaration cannot be ruled out on a mere objection to its general materiality; and in the absence of any other objection to such testimony than that *it* will not support the action at all, a general verdict based on it will be good if there is any count to which the testimony applies, and if no request was made to limit its application to the proper count. *Bush v. Sprague,* 41.
7. Striking out testimony that has been improperly allowed in a criminal case, and cautioning the jury not to be influenced by it, do not necessarily obviate its effects. *People v. Wolcott,* 613.
8. Where the record in a divorce suit contained evidence that was grossly improper and ought, in the discretion of the trial judge, to have been rejected, it was stricken out by the Supreme Court and the case was heard on what remained. *Page v. Page,* 89.
9. A finding of fact in a case at law tried without a jury, is conclusive where there is any evidence to found it upon, even though the

evidence is conflicting. *Kundinger v. Det., G. H. & Mil. R. R. Co.*, 185.
10. A finding may be construed in connection with the pleadings, if these contain sufficient data to support it. *Edwards v. Nelson*, 121.
11. Judges must take great care to say nothing in the hearing of jurors while a case is progressing, which can possibly be construed to the prejudice of either party. *Cronkhite v. Dickerson*, 178.
12. A trial judge must repress needless scandal and gratuitous attacks on the character of parties. *Rickabus v. Gott*, 227.
13. In an action for fraud in selling a second mortgage for a first, it was objected that testimony was too remote which showed that defendant, in giving the mortgage, had said he wanted it to trade, and could not do so if there was anything to show a prior mortgage. Defendant's counsel said the testimony was that the buyer of the mortgage had sought defendant, and not defendant him. *Held*, prejudicial to defendant for the court to add in the hearing of the jury: "Yes, but he might have been lying in wait. If it had contained a covenant against incumbrances, and was a true statement of the situation of the property, it would itself have given the lie to the statement he is claimed to have made." *Cronkhite v. Dickerson*, 178.
14. An action for causing worthless paper to be sold to plaintiff should not be taken from the jury if there is evidence that defendant suggested and was concerned in getting up the paper; that he purposed using it to get money; that he let the person who made the sale have it, without consideration, in order to trade it off, and that he expected part of the proceeds. *Adams v. Bowman*, 189.

admission of incompetent evidence: CRIM. LAW 15,—p. 612.
admission of testimony of fraud: BILLS, &c. 12,—p. 566.
by court; judge determines sufficiency of testimony: EVIDENCE 10,—p. 121.
inconsistent instructions to jury: ASSAULT,—p. 153.
motion to suppress deposition: DEPOSITION,—p. 84.
obligation to call witnesses: CRIM. LAW 5,—p. 547; ID. 6,—p. 613.
proceedings on plea of guilty: CRIM. LAW 3,—p. 172.
raising questions, on defects in pleading: PLEADING 3,—p. 463.

TROVER AND CONVERSION.

1. Judgment in trover for conversion is sustained by a finding that defendant, in making levy as sheriff, upon wheat belonging to plaintiff's father-in-law, had taken away part of a common mass and put the rest in another bin after being warned by plaintiff that he had wheat there which must not be taken. *Behler v. Drury*, 111.
2. Where the grantee of land knows that the timber on it has been previously sold to another with the right to take his own time to remove it, he cannot terminate the other's right to occupy the land with his timber without giving him notice to remove it within a reasonable time; and if, without giving such notice, he cuts the timber down, he is guilty of its conversion. *Wood v. Elliott*, 320.
3. Plaintiff in trover must affirmatively show his ownership and right of immediate possession; and the defendant, especially if his claim is made peaceably and in good faith, is entitled to show, as a complete defense, that the title and right of possession was vested in a third person before suit was brought. *Ribble v. Lawrence*, 569.
4. In trover by the claimant of goods seized on an execution against another, a verdict against the plaintiff is conclusive against his claim of ownership. And the actual owner can have no redress in this suit. *Sutton v. Greene*, 118.
5. Two cows worth $40 each were killed on a railway track, and a heifer was so badly hurt that the railway company's agents killed her. The heifer was worth $25 for beef, but the company's agents refused to give up the carcass and buried it. The value was not dis-

puted. The owner sued the company in case for negligence and added a special count for the conversion, and recovered $21.21. *Held* that the recovery must be construed as based on the special count alone and as confined to the value of the heifer as beef. *Sampsell v. Chic. & G. T. Ry. Co.*, 608.
against foreign corporation; notice: CORPORATIONS 2,—p. 5.
by wife for property sold by husband: VENDOR, &c. 1,—p. 536.
dismissal of action: ERROR 2,—p. 5.
for crop seized by landlord: LANDLORD, &c. 4,—p. 482.

TRUSTS.
1. Trusts belong to the jurisdiction of equity; and the remedies connected therewith are so identified with the procedure that no departure from the general practice can be had unless permitted by statute or by rule of court. *Ledyard's Appeal*, 623.
2. Comp. L. ch. 148 in authorizing the court of chancery to appoint some person to complete the execution of a trust when the original trustee has died, resigned or been removed, does not apply to trusts in personalty but in real estate. *Id.*
3. A trustee can be appointed by a court of equity to take the place of one who has died without completing the execution of his trust, or has become incapable of acting. And in proper proceedings instituted in behalf of the trustee or of any one interested in the trust fund, and begun by bill of complaint, with actual or substituted notice to all parties concerned, the court will furnish such aid as from time to time may be needed in the administration of the trust. But these proceedings cannot be taken by petition. *Id.*
as between father and son: EQUITY 3,—p. 167.

Usage—as to transportation of goods: CARRIERS 2,—p. 558.
does not fix periods of payment: FRAUDS, STATUTE OF 1,—p. 636.
as to writ of venditioni exponas: EXECUTION 2,—p. 453.

Vacating—appointment of guardian: GUARDIAN, &c. 3,—p. 223.
tax-sale: TAXES 10, 12,—p. 336.
Vacation—of sale made on transcript of judgment: APPEAL 10,—p. 453.
Valuation—apportionment of, on tax roll: TAXES 3, —p. 335.

VALUE
In an action to recover for goods sold, their value must govern, in the absence of any agreement as to price. *Comstock v. Sanger*, 497.
as governing recovery: VENDOR, &c. 6,—p. 497.
assessment at true cash value: TAXES 8,—p. 335.
excess over consideration as evidence of FRAUD 4,—p. 140.
extension of evidence as to: VENDOR, &c. 1,—p. 536.
fixing liability: VENDOR, &c. 3,—p. 590.
of merchandise: EVIDENCE 3,—p. 589.
of services of claimant against estate: EXECUTORS, &c. 7,—p. 171.
of timber as fixing damages for conversion: DAMAGES 9,—p. 320.
of time lost in consequence of personal injury: MASTER, &c. 6,—p. 272.

Venditioni exponas—not much used in Michigan: EXECUTION 2,—p. 453.

VENDOR AND PURCHASER.
1. A man agreed, for his wife, to sell property, and she afterwards brought trover for it, the question in issue not being the rescission of the bargain, but its existence. *Held* proper to exclude a question to the plaintiff as to whether she knew the relative value of the property traded when the trade was made: and, if important, this question requires the value of each piece of property to be ascertained and made a basis of the inquiry. *Stansell v. Leavitt*, 536.

2. Where a man, who agreed to furnish a team for farm use, signed a note given for a horse, and afterwards, in a suit thereon, defended on the ground that he was incompetent to make the note, it was *held* that the question whether the purchase was necessary for his use did not arise where the horse was bought for farm use, and was actually taken on the farm and used. *Shoulters v. Allen*, 529.
3. Where one who contracts to furnish goods within a week does not do so for more than a month, and the goods, when finally furnished, are neither delivered nor accepted under the contract, the purchaser cannot be held for the contract price but only for the market value at the time of delivery. *Peter v. Thickstun*, 590.
4. If one who contracts for goods to be delivered at a given time receives them as the goods bargained for, without objection, though not delivered until long afterwards, he is liable for the contract price. *Id.*
5. The act of a contract purchaser in receiving without protest what is delivered under the contract to the amount bargained for, amounts to a waiver of any difference in quality between what he had a right to demand and what he has actually received. *Comstock v. Sanger*, 497.
6. A contract was made for about 800,000 feet of lumber, including stated quantities of special sizes. The number of feet bargained for was delivered, but there was a great deficiency in the special sizes, and the purchaser's agent continued to receive lumber from the other parties, in the hope that the deficiency might be made up, until the amount received exceeded the amount bargained for by about 135,000 feet, and the deficiency, even then, was as much more. The agent made no objection to receiving the surplus quantity, but did object to paying for it at the rates agreed on, and the vendors offered to abate the price 50 cents a thousand, to which he made no answer. *Held*, that there was conclusive evidence of a compromise, and of a waiver of the right to the remainder of the special sizes; that, as to the contract quantity, the vendors were entitled to the contract price, and as to the excess, to what they had offered to take, if that was its value. *Id.*
7. A decree for the rescission of a deed and for reconveyance may stand in lieu of the conveyance until made. *Thorn v. Thorn*, 167.
8. Notice by the grantee of land to his grantor to remove timber which the grantee knows has been previously sold to another, is not binding on the purchaser of the timber. *Wood v. Elliott*, 320.
9. Where replevin is brought against a purchaser, and the seller assumes the defence, the purchaser cannot be required to watch and defend the action without at least adequate notice and adequate reason. *DeWitt v. Prescott*, 298.
10. A receipt for a payment on a sale of land does not of itself entitle the purchaser to take possession before he has fulfilled the terms of the sale. *Gault v. Stormont*, 636.

acceptance of draft under DURESS 2,—p. 590.
evidence of personal liability: CONTRACT 9,—p. 76.
permission to take possession: LICENSE,—p. 636.
right to dispute account: PAYMENT,—p. 590.
value governs when price not fixed: VALUE,—p. 497.
Venue—change of, by removal of goods: SALE 3,—p. 298.
Verdict—curing defects in declarations: MALICIOUS PROSECUTION; PLEADING 3,—p. 463.
effect on claim of ownership: TROVER, &c. 4,—p. 118.
enforcing forfeiture: JUDGMENT 1,—p. 482.
estoppel from afterwards asserting want of authority: PLEADING 6, —p. 472.

good, if any count is supported: TRIAL 6,—p. 41.
shown by amended entry of judgment: CRIM. LAW 13,—p. 423.
when finding is treated as special verdict: ERROR 3,—p. 354.
Voluntary—homicide, provoked by violence: HOMICIDE 1,—p. 200.
plea of guilty: CRIM. LAW 3,—p. 172.
surrender of premises as affecting TRESPASS 3,—p. 263.

Wages—enforcement of payment by MANDAMUS 3,—p. 249.
bill of particulars in action for: PLEADING 7,—p. 74.
Waiver—by party to sale of lumber: VENDOR, &c. 6,—p. 497.
of difference in quality: VENDOR, &c. 5, 6,—p. 497.
of examination in criminal cases: CRIM. LAW 2,—p. 422.
of impropriety in impleading party: APPEAL 2,—p. 474.
of irregularity by pleading: PLEADING 1,—p. 176.
of jury, by absence: JURY 2,—p. 8.
of lien by detaining too much: LIEN 9,—p. 378.
of lien for driving logs: LIEN 6,—p. 377.
of objections as to care of logs: WATERS, &c. 1,—p. 377.
Ward—ouster of guardian from ward's realty: EXECUTOR, &c. 6, —p. 223.
Warrant—arrest made without a warrant: ARREST 1,—p. 199.
for collection of drain taxes: DRAINS, &c. 1,—p. 557.
for re-arrest of principal at instance of BAIL 1, 2,—p. 620.
in proceedings to recov. poss'n of land: Real Actions 3,—p. 223.
issued without subpœna: PLEADING 1,—p. 176.
of commitment, defects: CRIM. LAW 1,—p. 174.
Warranty—authority of joint grantors to bind each other: PRINCIPAL AND AGENT 2, 3,—p. 298.
breach of, by judgment lien: JUDGMENT 5,—p. 298.
discharge from liability on covenant: MORTGAGE 21,—p. 312.
of title, to foreign purchaser: SALE 3,—p. 298.

WATERS AND WATERCOURSES.

1. Individuals driving their own logs have the same rights as log driving companies in streams that are navigable for that purpose; but if an individual practically concedes the right of a company to regulate the time of letting his logs into the stream, he waives any objection to its customary action in that respect, and if he is not prepared, when his logs enter the stream, to take care of them, he cannot complain if they become intermingled with the logs of the company and subject to its control, which it must exercise, however, in its own interest and in that of the owners of logs in its keeping. *Hall v. Tittabawassee Boom Co.*, 377.
2. In replevin for logs on which a boom-company claims a lien for labor in running them down a particular stream, it is for the plaintiff to show that the company's articles of association did not authorize it to operate in that stream if it did in fact operate there. *Id.*
3. Highway officers have no more right than private persons to cut drains which will flood the lands of private owners. *Cubit v. O'Dett*, 347.
4. Riparian rights, unless expressly limited, extend to the middle of the navigable channel, and cover any shallows or middle ground not shown in the government surveys, but lying between such channel and the shore; and it makes no difference that the deed conveying the premises to which the rights attach describes them according to a city plat instead of the government survey. *Fletcher v. Thunder Bay River Boom Co.*, 277.
5. Private agreements between joint riparian owners, whereby they apportion among themselves the submarine rights in front of their

premises, cannot diminish the riparian rights of their grantees, if the latter have no notice of these agreements. *Id.*

WAYS.

1. The rule that those who purchase by reference to a plat are entitled to the use of the streets on which the purchased premises appear to abut, and of all connecting streets, was *held* not to apply in a case where the plat was never acknowledged, nor the dedication thereby accepted, nor the streets laid out on it used, or capable of use; and where the streets were neither ways of necessity nor of convenience, and no equities were shown against closing them for the benefit of individual interests. *Bell v. Todd*, 21.
2. One who has purchased according to a plat and has, so far as his own premises are concerned, closed up a street which is represented on the plat as passing through them, cannot be heard to complain that a subsequent purchaser of neighboring land has closed the same street where it crosses such land. *Id.*
3. Actions for injuries to highways and bridges cannot be brought by the township in which they are situated, but must be brought by the overseer of highways, or, if he is disqualified from suing, by the commissioner of highways. Acts 242 and 243 of 1881. And injuries to highways in different districts cannot be joined in one action. *Denver v. White River Boom Co.*, 472.
4. The discretion of the overseer of highways, in deciding how and where he will distribute highway labor, is limited by the rights of individuals, and he and his assistants are jointly liable for the invasion of those rights. *Cubit v. O'Dett*, 347.

injury from presence of railway track: LIMITATION OF ACTIONS 2,—p. 142.

powers of highway officers as to drains: WATERS, &c. 3,—p. 347.

release of the right of way: DRAINS, &c. 2,—p. 639.

Weight—of evidence in chancery cause: ESTOPPEL 2,—p. 576.

of testimony, necessary to prove: CRIM. LAW 11,—p. 11.

Wife—her refusal to unite in deed: LICENSE,—p. 636.

WILL.

construction as to guardianship: GUARDIAN, &c. 4,—p. 223.

objections on probate: GUARDIAN, &c. 1,—p. 223.

proceedings to establish: TRIAL 2,—p. 227.

WITNESS.

1. In replevin by a wife for property claimed by her, but seized on execution against her husband, there was evidence that the husband had given a chattel mortgage on it; but, being called as a witness for his wife, he testified that he did not remember doing so. *Held* proper to put the mortgage in evidence. *Gavigan v. Scott*, 373.
2. A circuit court commissioner's examination of the parties to a divorce suit should be in the presence or under the immediate supervision of the judge, so that it may be kept within proper limits, and as it is discretionary with the judge to allow such an examination he can prevent anything unfair or unseemly in conducting it. *Page v. Page*, 88.
3. A circuit court commissioner, in taking the testimony of the parties to a divorce suit, can refuse to take anything which is grossly improper if he is left to act in the absence of the judge. *Id.*
4. One cannot be examined on the assumption that he is an unfriendly witness before there is any showing to that effect or any evidence from him to warrant it. *People v. Lyons*, 215.
5. Where the plaintiff in an action for the price of merchandise has been examined as to the details of the transactions between the parties to the suit, it is not error to allow him to be cross-examined as to the extent, kind and localities of his business if it tends to show

his opportunity to know the facts he has testified to, and the probability as to the correctness of his statements. *Peter v. Thickstun*, 589.
6. Physicians cannot testify in a divorce suit to what they have found out by compulsory examination of a party thereto; and such examinations are illegal and improper and a party should refuse to submit to them. *Page v. Page*, 89.
7. A jury in a criminal case is not at liberty to convict on the testimony of one who has been conclusively shown, by impeaching evidence, to be unworthy of belief. *People v. Lyons*, 215.
8. Where the wife of a person accused of crime testifies in his behalf, and on cross-examination denies that she has herself been arrested for having been concerned in a crime, it is error to admit testimony to contradict her. *People v. Wolcott*, 613.
9. In seeking to impeach a witness whose reputation is well known all over the city where he lives, it is unnecessary to restrict the inquiry as to reputation to the immediate neighborhood of his dwelling-place. *People v. Lyons*, 215.

arrest of in jury's presence: ARREST 3,—p. 613.
calling respondent's wife as witness: CRIM. LAW 6,—p. 613.
husband as witness for wife: HUSBAND, &c. 5,—p. 373.
obligation to call: CRIM. LAW 5,—p. 547.
omission to produce: TRIAL 1,—p. 373.
testimony of respondent: CRIM. LAW 7,—p. 547.

WORDS AND PHRASES—
"contingent" claims: GARNISHMENT 1,—p. 113.
"corporate rights": TAXES 2,—p. 180.
"damages by the elements": LANDLORD, &c. 2,—p. 363.
"family": INSURANCE 1,—p. 494.
"gaming": GAMING 1,—p. 203.
"in settlement of accounts": SETTLEMENT 5,—p. 291.
"penalty": ANIMALS,—p. 605.

WRIT AND PROCESS.
The requirement that notice must be sent to the home office of a foreign corporation against which suit is brought in Michigan is not jurisdictional, and in a proceeding in personam is extra-territorial, if not nugatory. *Talcott v. McCormick Harvesting Co.*, 5.
defects in warrant of commitment: CRIM. LAW 1,—p. 174
for re-arrest of principal at instance of BAIL 1, 2,—p. 620.
in proceedings to recov. poss'n of land: Real Actions 3,—p. 223.
issue of writ of HABEAS CORPUS 3,—p. 599.
ne exeat: NE EXEAT 2,—p. 217.
omission of subpœna before warrant: PLEADING 1,—p. 167.
venditioni exponas: EXECUTION 2,—p. 453.

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